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NOTES

ON THE

AMERICAN DECISIONS

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NOTES

ON THE

AMERICAN DECISIONS.

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15 AM. DEC. 33, TUTT v. BROWN, 5 LITT. (KY.) 1.

Agent contracting without disclosing principal.

Cited in *McConnell v. East Point Land Co.* 100 Ga. 129, 28 S. E. 80, holding agent's rent contract, principal not disclosed, enforceable by principal subject to defenses against agent.

Cited in reference notes in 29 A. D. 567; 36 A. D. 728,—on suit by principal on contract made by agent; 93 A. D. 57, on rights and liabilities of undisclosed principal; 45 A. D. 730, as to whether contract entered into by agent may be sued on by principal.

Cited in notes in 27 A. D. 137, on rights of undisclosed principal; 55 A. S. R. 917, on suits by undisclosed principals on contracts made with agents; 55 A. S. R. 921, on defenses in actions by undisclosed principals on contracts made with agents; 2 E. R. C. 409 on binding effect of acts of factor acting for principal but concealing latter's right.

15 AM. DEC. 35, YANCEY v. DOWNER, 5 LITT. (KY.) 8.

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Cited in *Daniel v. Daniel*, 2 J. J. Marsh. 52, holding new trial unobtainable on discovery of witnesses to fact determined in former trial; *Finley v. Tyler*, 3 T. B. Mon. 400, holding that equity will refuse new trial where witness claimed to be discovered, and disputed facts were known; *Kansas & A. Valley R. Co. v. Fitzhugh*, 61 Ark. 341, 54 A. S. R. 211, 33 S. W. 960, holding that equity will relieve judgment debtor not at fault, losing appeal by judge's death; *Lawson v. Bettison*, 12 Ark. 401, holding that party seeking equitable relief against judgment by surprise must show himself free from negligence; *Pelham v. Moreland*, 11 Ark. 442, holding that equity acts upon person and cannot set aside law judgment, and grant new trial; *Stein v. Burden*, 30 Ala. 270, holding that equity will not relieve against judgment without notice, rendered by consent after another decision; *Longdale Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. Am. Dec. Vol. III.—1.

487, holding valid legal defense besides other ground of relief essential to obtain new trial.

Cited in reference notes in 17 A. D. 136; 37 A. D. 607,—on equitable relief against judgment; 19 A. D. 119; 21 A. D. 631; 22 A. D. 444,—on power of equity over judgments at law; 43 A. D. 288, as to when equity will decree new trial at law; 21 A. D. 530, as to when equity will not relieve against judgment at law; 29 A. D. 106, on relief in equity against judgments caused by mistake or negligence; 35 A. D. 421, on relief in equity against judgment where defense was prevented by fraud or unavoidable accident.

Cited in notes in 19 A. D. 609, as to how and when new trial at law is obtainable in equity; 54 A. S. R. 260, on mode of obtaining and granting equitable relief against judgment, decree, or other judicial determination; 54 A. D. 467, on equitable relief against judgment at law where no defense was interposed; 55 A. S. R. 506, on ignorance or mistake of facts as to overruled decisions as ground for relief.

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Cited in *Shields v. Burns*, 31 Ala. 535, holding that judgment debtor, absent by consent, cannot obtain rehearing because attorney did not hear case called; *White v. Ryan*, 31 Ala. 400, holding that judgment debtor, at fault, cannot obtain rehearing on ground of surprise, mistake, or fraud.

—Injunction.

Cited in *Bracken v. Preston*, 1 Pinney (Wis.) 584, 44 A. D. 412, holding that injunction will be granted to restrain trespass in order to quiet possession; *Cairo & F. R. Co. v. Titus*, 35 N. J. Eq. 384, holding that equity will perpetually enjoin enforcement of judgment unless party consent to new trial decreed.

Cited in notes in 30 L.R.A. 708, on injunction against judgments for irregularities in trial; 32 L.R.A. 328, on general equitable jurisdiction as to injunction against judgment where there is a remedy at law; 1 L.R.A. 745, on special circumstances in case to warrant issuance of injunction to restrain trespass.

Equity jurisdiction in actions of tort.

Distinguished in *Genet v. Howland*, 30 How. Pr. 360, 45 Barb. 560, holding action of tort triable by jury where equitable action for redemption of pledge, united therewith fails.

Ground for new trial.

Cited in *Allen v. Perry*, 6 Bush, 85, holding newly discovered evidence not ground for new trial unless of such character as have a decisive influence.

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Cited in reference note in 34 A. D. 497, on entry to stop running of statute of limitations.

15 AM. DEC. 41, *LOFLAND v. EWING*, 5 LITT. (KY.) 42.

Sheriff's duty under execution.

Cited in *Wolford v. Phelps*, 2 J. J. Marsh. 31, holding that sheriff cannot sell more than will satisfy execution unless thing sold is indivisible; *Humphrey v. Wade*, 84 Ky. 391, 1 S. W. 648, holding levy of execution on defendant's interest in land not void for failure to specify nature or extent of such interest.

-After expiration of term of office.

Cited in *Colyer v. Higgins*, 1 Duv. 6, 85 A. D. 601, holding that sheriff who levies must finish it even after return day and though out of office.

Cited in reference notes in 65 A. D. 60, on powers and duties of sheriff after expiration of term; 36 A. D. 543, on right of outgoing sheriff or deputies to sell property previously levied on.

Cited in note in 36 A. D. 706, on duty of sheriff after expiration of term, to sell personalty levied upon.

Authority of deputies.

Cited in note in 19 L.R.A. 179, as to whose name acts by deputy officers should be performed in.

-After expiration of principal's term of office.

Cited in reference notes in 58 A. D. 217; 83 A. D. 76,—on authority of deputy sheriff after expiration of principal's term; 21 A. D. 316, on right of deputy to execute deed after expiration of principal's term.

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Cited in reference notes in 55 A. D. 177; 78 A. D. 370,—on rejection of immaterial evidence; 50 A. D. 435, on necessity of submitting to jury evidence tending to prove material fact in issue.

15 AM. DEC. 44, THOMPSON v. PATTON, 5 LITT. (KY.) 74.

Parol evidence as to writing.

Cited in reference notes in 20 A. D. 84, on parol evidence to vary, control, or alter written instrument; 45 A. D. 242, on parol evidence to vary writing or annex conditions thereto.

Cited in note in 122 A. S. R. 546, on parol evidence to explain meaning of words used in written contract.

-To contradict deed.

Cited in *Munford v. Green*, 103 Ky. 140, 44 S. W. 419, holding parol evidence inadmissible in absence of fraud to show that deed was intended to secure debt; *Fairchild v. Rasdall*, 9 Wis. 379, holding evidence of parol agreement that absolute deed was in trust for grantor, inadmissible unless deed was fraudulent.

Cited in reference notes in 22 A. D. 216; 24 A. D. 458; 27 A. D. 348; 34 A. D. 213; 35 A. D. 127; 29 A. S. R. 369; 41 A. S. R. 345,—on parol evidence to show that absolute deed was intended as a mortgage; 20 A. D. 100, on parol evidence to show that bill of sale absolute in form was intended as a mortgage.

Cited in note in 18 E. R. C. 13, on parol evidence to show that bill of sale absolute on its face was intended as a mortgage.

Distinguished in *Murphy v. Trigg*, 1 T. B. Mon. 73, holding parol evidence to prove absolute bill of sale a mortgage to secure usurious loan, admissible; *Hudson v. Isbell*, 5 Stew. & P. (Ala.) 67, holding parol evidence to prove bill of sale, a mortgage, admissible.

15 AM. DEC. 48, McCAMPBELL v. McCAMPBELL, 5 LITT. (KY.) 92.

Allowance for improvements.

Cited in reference notes in 56 A. D. 329; 78 A. D. 53,—on right of vendee to recover for improvements.

Cited in note in 81 A. S. R. 191, on improvements on property sold at private sale and allowance therefor.

Statute of frauds as to parol contracts.

Cited in *Grumley v. Webb*, 48 Mo. 562, holding executed parol contract assigning equitable interest in land, valid and indefeasible; *McGowen v. West*, 7 Mo. 569, 38 A. D. 468, upholding note whose consideration is parol contract to convey land unless shown to be in fault; *Gillespie v. Battle*, 15 Ala. 276, holding purchase-money note, indefeasible for failure of consideration, at instance of vendee, in possession under parol contract, which vendor has fulfilled; *Stout v. Ennis*, 28 Kan. 706, holding parol contract to employ one for three years not necessarily void for all purposes.

Cited in reference notes in 51 A. S. R. 237, on enforceability of contract within statute of frauds; 93 A. D. 56, on validity of oral contract for sale of personalty; 18 A. D. 296, as to how far statute of frauds may be relied upon as a defense; 32 A. D. 190, on effect of statute of frauds on contracts performed on one side only; 33 A. D. 604, on effect of statute of frauds on contract fully or partially performed; 22 A. D. 218, on effect of statute of frauds upon verbal executed contract; 30 A. D. 271, on inapplicability of statute of frauds to contract fully executed; 24 A. D. 255, on part performance of oral agreement as to lands taking case out of statute of frauds.

Cited in notes in 53 A. D. 543, as to what acts are part performance of contract of sale of land; 102 A. S. R. 231, on what amounts to a contract for the sale of land within the meaning of the statute of frauds; 105 A. S. R. 795, on recovery of money paid under contract unenforceable by statute of frauds as affected by vendee's possession.

Parol evidence as to intention.

Cited in reference notes in 64 A. S. R. 776, on parol evidence of testator's intention; 45 A. D. 719, on admissibility of extrinsic evidence as to intention of testator.

Fund for payment of decedent's debts.

Cited in *Sturges v. Sturges*, 31 Ky. L. Rep. 537, 12 L.R.A.(N.S.) 1014, 102 S. W. 884, holding damages for death by negligence applicable to lien debt on real estate which decedent had devised.

Marshaling assets to pay debts of decedent.

Cited in *Alexander v. Waller*, 6 Bush, 330, holding debts and special devises payable by marshaling assets, and applying them to personal estate not exempted, lands specially devised and set apart for payment of debts, lands descended, and then to lands specially devised.

Cited in reference notes in 35 A. D. 291, on marshaling of assets; 43 A. D. 629, on order to be observed in marshaling assets for payment of debts of decedent; 22 A. D. 744, on personalty primarily liable for payment of decedent's debts.

Cited in note in 2 E. R. C. 242, on exoneration of personalty from payment of legacies.

Construction of will, generally.

Cited in reference note in 27 A. D. 607, on controlling effect of testator's intention in construction of will.

Cited in note in 21 A. D. 81, on construction of will.

Provision in will for sale of land.

Cited in *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552, holding that provision of will to convert residue authorizes sale of reversion in homestead, furniture and statuary.

Abatement of legacies.

Cited in note in 8 A. S. R. 722, on abatement of legacies in case of deficiency of assets.

Legacies charged upon land.

Cited in *Lacey v. Collins*, 134 Iowa, 583, 112 N. W. 101, holding pecuniary legacy chargeable to realty where such intention of testator is deducible from will.

Cited in reference notes in 26 A. D. 594, on legacies chargeable upon land; 38 A. D. 773, as to when legacy is charge on land and remedy for recovery thereof; 69 A. S. R. 757, on recovery from true owner of legacy charged on land paid under mistaken belief that it was devised to one paying it.

New trial at law.

Cited in reference note in 43 A. D. 288, as to when equity will decree new trial at law.

When interest allowed.

Cited in reference note in 60 A. D. 478, on liability for interest.

15 AM. DEC. 64, MATTOX v. HELM, 5 LITT. (KY.) 185.**Lease as evidence of rights.**

Cited in *Fisher v. McCauley*, 2 Dauphin Co. Rep. 180, holding lease prima facie evidence of quiet, peaceable possession in action to recover possession of the premises.

Right to dispute landlord's title.

Cited in note in 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title.

Writ of possession.

Cited in *Higginbotham v. Higginbotham*, 10 B. Mon. 369, holding habere facias enforceable against party in ejectment, his family or tenants at will.

Cited in reference notes in 50 A. D. 788, on who may be dispossessed under writ of habere facias possessionem; 87 A. D. 630, as to who may be turned out by execution of writ of possession; 55 A. D. 722, on executing writ of possession by turning out all tenants at will or sufferance.

Cited in notes in 15 A. S. R. 60, on who may be removed under writ of restitution; 39 A. D. 312, on who may be dispossessed under judgment in ejectment.

Distinguished in *Bushong v. Rector*, 32 W. Va. 311, 25 A. S. R. 817, 9 S. E. 225, holding that wife cannot be turned out of her separate estate derived from another prior to action, by writ of possession in ejectment against husband to which she was not a party.

Unlawful detainer as a possessory remedy.

Cited in *Cummings v. Kilpatrick*, 23 Miss. 106, holding unlawful detainer inapplicable to purchaser at execution sale unless possession was originally held as tenant.

Cited in reference notes in 22 A. D. 496; 30 A. D. 396,—on forcible entry and detainer.

Effect of judgment in forcible entry and detainer.

Cited in note in 112 A. S. R. 40, on general effect of judgment against tenant in actions of forcible entry and detainer, on landlord's right to maintain ejectment or other suits involving title.

15 AM. DEC. 66, STANLEY v. EARL, 5 LITT. (KY.) 281.**Statute of limitations as bar to action.**

Cited in *Buford v. Gaines*, 6 J. J. Marsh. 34, holding landlord entitled to be admitted as defendant in ejectment where tenant in possession has been settled on the land long enough to bar plaintiff's right of action; *Cunningham v. Frandtzen*, 26 Tex. 34, on right of vendee of one holding adversely to plead statute in trespass action; *Duckett v. Crider*, 11 B. Mon. 188, holding that limitation in action of detainee may be relied upon, though not specially pleaded; *Dorsey v. Phillips*, 84 Ky. 420, 1 S. W. 667, holding that ten years' lapse bars action or execution against fraudulent conveyance and perfects grantee's title; *McCracken County v. Mercantile Trust Co.* 84 Ky. 344, 1 S. W. 585, holding that lien, depending on barred tax claim, dies with it; *Hamilton v. Cooper*, Walk. (Miss.) 542, 12 A. D. 588, holding that Kentucky statute barring remedy and conferring title may be pleaded with averment of title; *Goodman v. Munks*, 8 Port. (Ala.) 84, holding bar created by South Carolina statute of limitations defense to same note in Alabama; *Urton v. Hunter*, 2 W. Va. 83, holding that statute of limitations of another state cannot be pleaded as bar to action in West Virginia.

— As to personal property. generally.

Cited in *Hicks v. Flint*, 21 Ark. 463, holding that adverse possession of personal property for limitation period creates title assertable against original owner; *Dragoo v. Cooper*, 9 Bush, 629, holding that innocent holder's five years' adverse possession of stolen horse bars recovery.

Cited in notes in 95 A. S. R. 671, on prescriptive title to personal property; 48 L.R.A. 636, on statute as to adverse possession of personal property governing action in another state or country, in absence of statutory provision in forum as to effect of bar in other state.

— As to slaves.

Cited in *Cargill v. Harrison*, 9 B. Mon. 518, holding that adverse possession of slaves for over twelve years bars recovery; *Smart v. Baugh*, 3 J. J. Marsh. 363, holding that five years' adverse possession of slave bars owner's remedy and vests title in possessor; *Sadler v. Sadler*, 16 Ark. 628, holding that possession of slave thirteen years, as owner, creates title barring recovery; *Frierson v. Irwin*, 5 La. Ann. 525, holding that foreign state prescriptive title to slave removed to Louisiana will not be disturbed; *Collins v. America*, 9 B. Mon. 565, holding that Kentucky slave, sent temporarily into Ohio, does not thereby acquire right to freedom.

15 AM. DEC. 71, SCOTT v. COLEMAN, 5 LITT. (KY.) 349.**Foreign attachment.**

Distinguished in *Branigan v. Rose*, 8 Ill. 123, holding plea of prior attachment to abate action in *assumpsit* not good.

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Cited in reference note in 96 A. D. 643, on proceedings against nonresidents and how far jurisdiction may be acquired by order of publication.

Cited in note in 53 A. S. R. 180, on service of process to acquire jurisdiction over absent citizens.

Validity and conclusiveness of foreign judgment.

Cited in *Biesenthal v. Williams*, 1 Duv. 329, 85 A. D. 629, holding Ohio personal judgment against person not personally served, valid in Kentucky, as between Ohio citizens; *Kerr v. Condy*, 9 Bush. 372, holding foreign judgment

no presumption of debt unless debtor had opportunity to defend and foreign court's authority is shown: *Hanley v. Donoghue*, 118 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242, holding proof of state law where foreign judgment was rendered necessary to credit allowed judgment; *Savin v. Bond*, 57 Md. 228, holding foreign-paid judgment of condemnation in attachment, validity presumed, bar to subsequent action on same cause; *Rogers v. Odell*, 39 N. H. 452, holding that Massachusetts judgment may be pleaded in bar of assumpsit action for same cause; *Anderson v. Barry*, 2 J. J. Marsh. 265, holding plea of prior injunction, defective in substance, not good as defense in debt action; *Waldo v. Beckwith*, 1 N. M. 97, holding same parties plaintiff necessary to sustain abatement plea that suit for same cause is pending in another state.

Cited in reference notes in 53 A. D. 124, 125; on effect of judgments of sister states; 23 A. S. R. 22, on conclusiveness of judgment of sister state; 35 A. D. 155, on full faith and credit due judgments of sister states; 65 A. D. 704, on force and effect as domestic judgment of judgment of sister state fairly obtained; 34 A. S. R. 435, on conclusiveness of foreign judgment.

—Necessity of alleging or proving jurisdiction.

Cited in *Gunn v. Howell*, 27 Ala. 663, 62 A. D. 785, holding that power and authority of court rendering judgment need not be affirmatively set out; *Bank of United States v. Merchants' Bank*, 7 Gill, 415, holding that plea of prior judgment in bar to suit need not affirmatively set out court's jurisdiction; *Reed v. Boyd*, 13 Tex. 241, 65 A. D. 61, holding allegation of foreign court's jurisdiction unnecessary in action on judgment of another state; *Lincoln v. Tower*, 2 McLean, 473, Fed. Cas. No. 8,355, holding that court acting on record of judgment must inquire whether court rendering judgment had jurisdiction; *Gebhard v. Garnier*, 12 Bush, 321, 23 A. R. 721, holding that jurisdiction of court rendering foreign judgment must be shown to give it faith and credit.

Cited in note in 103 A. S. R. 322, on jurisdictional presumption as to judgments of courts of sister state.

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Cited in reference notes in 37 A. D. 84, on what falls within judicial notice; 39 A. D. 406, on proof of foreign laws and laws of sister states; 33 A. D. 556, on necessity of proving laws of sister state.

Cited in notes in 25 L.R.A. 450, on oral proof of foreign laws; 89 A. D. 672, on judicial notice of foreign laws and laws of sister state.

Attachment of debt sued on as ground for abatement.

Cited in reference note in 41 A. D. 95, on pendency of attachment of debts sued on as ground for abatement.

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Cited in reference notes in 60 A. D. 183, on what property passes by deed of assignment; 87 A. D. 204, as to whether assignment for benefit of creditors passes property not enumerated in schedule.

Schedule in assignment for creditors.

Cited in reference note in 43 A. S. R. 641, on sufficiency of description in schedule in assignment for creditors.

Admissions or declarations of former owner.

Cited in notes in 42 A. D. 632, as to when declarations of vendor are evidence

against vendee to show fraud; 42 A. D. 80, on admissibility of declarations of former owner of chattel or chose in action against party claiming under him.

Inconsistency between different parts of assignment.

Cited in *Bock v. Perkins*, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677, holding general description in assignment limited by particular description following in schedule.

Distinguished in *Stratton v. Thompson*, 10 Lea, 229, holding assignor's general intention in trust deed will not be considered when deed's specific clauses ignore it.

15 AM. DEC. 77, CLAY v. CAPERTON, 1 T. B. MON. 10.

Justification under process.

Cited in *Newberry v. Lee*, 3 Hill, 523, holding that creditor sued for trespass under execution must show judgment and execution valid; *Collins v. Mann*, 15 W. Va. 171, holding that officer sued for taking property, may justify by showing execution regular on face; *Waite v. Dolby*, 8 Humph. 406, holding that where one, suing out erroneous execution, becomes purchaser, he acquires no title.

Cited in reference notes in 82 A. S. R. 174, on how far officers are protected by process; 60 A. S. R. 387, on process as protection to officer; 21 A. D. 190; 57 A. S. R. 740,—on process as justification for acts of officer; 23 A. D. 299, on right to give execution in evidence without proof of judgment.

15 AM. DEC. 78, SPEEDS v. HANN, 1 T. B. MON. 16.

When judgment or record may be amended.

Cited in *Herndon v. Ashby*, 4 B. Mon. 491, holding mistake in entering judgment on note, of computable date of interest, amendable at subsequent term; *Roman v. Caldwell*, 2 Dana, 20, holding judgment against heirs *de bonis propriis* instead of *de bonis testatoris* amendable at subsequent term; *Hull v. Caldwell*, 6 J. J. Marsh. 208, holding erroneous judgment for damages and accruing interest in covenant action amendable at subsequent term; *Smith v. Todd*, 3 J. J. Marsh. 298, holding judgment *de bonis propriis* against administrator on intestate's note, amendable at subsequent term or while judgment is unsatisfied; *Anderson v. Barry*, 2 J. J. Marsh. 265, holding that after term, objection cannot be made to fraudulent record; *Williams v. Thompson*, 80 Ky. 325, holding that defective record may be corrected but after expiration of three years, too late.

Cited in reference notes in 44 A. D. 431, on amendment of judgment; 53 A. D. 632, as to when judgment can be amended; 24 A. S. R. 917, on amendment of judgment after end of term; 28 A. D. 578, on amendment of record pending appeal.

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Cited in *Leathers v. Meglasson*, 2 T. B. Mon. 63, holding judgment *de bonis propriis* against administrator or heirs, on demurrer, erroneous.

Cited in reference note in 26 A. D. 166, on form of judgment against executor.

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Cited in *Roanoke Grocery & Mill. Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, on validity of entering two judgments on note where principal debtors default and one claims defense.

Merger of covenant, agreement, or estates.

Cited in *Jones v. Waggoner*, 7 J. J. Marsh. 144, holding covenant to refund not merged in conveyance; *Mills v. Chicago & N. R. Co.* 103 Wis. 192, 79 N.

W. 245, holding agreement by railroad company to maintain passage under bridge not merged in deed consenting to changes in right of way.

Cited in reference notes in 19 A. D. 473; 30 A. D. 338; 72 A. S. R. 235,—on doctrine of merger; 46 A. S. R. 272; 76 A. S. R. 463,—on merger of estates; 45 A. D. 210; 13 A. S. R. 706; 25 A. S. R. 779; 62 A. S. R. 732,—as to when merger of estates takes place; 33 A. D. 202; 49 A. D. 170,—on merger of estates in realty; 83 A. D. 678, on what constitutes merger of estates in realty; 72 A. D. 632, on merger of estates in realty where interests of parties or equitable rights of third parties require estates to be kept separate; 43 A. S. R. 501, on merger of contract of sale in deed; 69 A. D. 559, on merger of securities; 38 A. D. 764, on merger of debt in higher security.

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Cited in reference notes in 42 A. D. 391, on merger by judgment; 33 A. D. 686, 21 A. S. R. 461,—on merger of cause of action in judgment; 32 A. D. 167; 40 A. D. 618,—on merger of debt in judgment; 61 A. S. R. 931; 71 A. S. R. 655,—on merger of cause of action in judgment; 75 A. D. 258, on merger by recovery against one joint obligor; 21 A. D. 475, on merger of joint note in judgment against one maker.

15 AM. DEC. 83, BELL v. LAYMAN, 1 T. B. MON. 39.

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Cited in reference notes in 52 A. D. 77; 36 A. D. 372,—on maintenance of trover or trespass by one tenant in common against another; 24 A. D. 164, as to when tenant in common may maintain trover against cotenant; 69 A. D. 508, on remedy of cotenant for conversion or sale of common property; 40 A. D. 653, on remedy of one cotenant for sale or destruction of common property by the other cotenant.

Cited in notes in 21 A. D. 166, on conversion by tenant in common; 12 L.R.A. 262, on liability of tenant in common in action of trover for conversion of the property; 16 A. S. R. 661, on sale by one tenant in common of chattels; 12 L.R.A. 266, on liability of tenant in common in trover who sells the common property.

Recovery against cotenant.

Cited in *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195, holding that cotenant, though perfecting title to claim by fraud, may recover half interest from cotenant.

Necessary parties to action.

Cited in *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77, holding beneficiary necessary party to action against trustee to cancel instrument creating trust.

Cited in reference notes in 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of; 41 A. D. 296, as to when and how objection of nonjoinder is made; 27 A. D. 720, as to time and place for taking objection of want of proper parties; 37 A. D. 69, on nonjoinder of parties as matter for plea in abatement; 43 A. D. 259, on joinder of cotenants as plaintiffs.

Cited in note in 1 E. R. C. 164, on taking advantage of nonjoinder of plaintiff in tort by plea in abatement.

15 AM. DEC. 86, READ v. BANK OF KENTUCKY, 1 T. B. MON. 91.

Notice of protest.

Cited in *Moreland v. Citizens' Nat. Bank* (*Taylor v. Citizens' Nat. Bank*)

114 Ky. 577, 61 L.R.A. 900, 71 S. W. 520, holding notary's words "protested for nonpayment" with day of month and year on bill of exchange, sufficient noting of protest; *Hogatt v. Bingham*, 7 How. (Miss.) 565, holding that notice of demand and protest of negotiable paper cannot be given through postoffice unless to be transmitted by mail.

Cited in notes in 43 A. D. 219; 55 A. S. R. 785,—on necessity for protest of negotiable instruments; 43 A. D. 217, 218, on proper person to protest foreign draft.

Assessment of damages by court.

Cited in *Goff v. Hawks*, 5 J. J. Marsh. 341, holding damages, uncontrollable by extraneous facts, assessable by court without jury when covenant renders sum certain.

Allowance of interest on amount of verdict.

Cited in *Cummins v. Williams*, 5 J. J. Marsh. 384, upholding allowance of interest where verdict was for debt and one cent in damages, subject to certain credits.

15 AM. DEC. 89, COX v. NELSON, 1 T. B. MON. 94.

Irregular executions.

Cited in *Com. v. O'Cull*, 7 J. J. Marsh. 149, 23 A. D. 393, holding officer liable on failure to obey mandate in irregular execution.

Cited in reference note in 65 A. D. 94, on effect of sending executions to other counties than that in which judgment is recovered.

Cited in notes in 43 A. D. 52, on effect of issuance of execution to wrong county; 32 A. D. 312, 313, on effect of quashing writ of execution.

— Validity of sale under.

Cited in *Brown v. Miller*, 3 J. J. Marsh. 435, holding issuing execution to improper county an irregularity not affecting bona fide purchaser; *Adamson v. Cummins*, 10 Ark. 541,—holding sale under irregular execution against administrator, valid, as to innocent purchaser though execution may be quashed; *M'Connell v. Brown*, 5 T. B. Mon. 479, holding that sale under execution improperly sent out of county passes title to purchaser; *Sanders v. Ruddle*, 2 T. B. Mon. 139, 15 A. D. 148, holding sale under irregular execution, invalid as to purchaser, with opportunity of knowing irregularity; *Young v. Smith*, 10 B. Mon. 293, holding that execution issued not in conformity to statute does not render sale void; *Coleman v. McAnulty*, 16 Mo. 173, 57 A. D. 229, holding judgment in favor of one dying before rendition, not void and passes good title; *Sydnor v. Roberts*, 13 Tex. 598, 65 A. D. 84, upholding purchaser's title acquired, under execution sent without county, before return of executions, previously sent out of county; *Byers v. Fowler*, 12 Ark. 218, 54 A. D. 271, holding that sheriff's failure to advertise under execution according to statute will not invalidate purchaser's title; *Williams v. Cummins*, 4 J. J. Marsh. 637, holding sale under execution to issuer, vests title in purchaser although judgment is afterwards reversed; *Myers v. Sanders*, 7 Dana, 507, holding that fraud, not in execution but in inducing sheriff's deed renders it voidable only, not void.

Cited in reference notes in 65 A. D. 95, on rights and duties of purchasers at execution sale; 61 A. D. 138, as to when purchaser at execution sale is affected by irregularities; 74 A. D. 521, on rights of purchaser under voidable execution; 24 A. D. 268; 45 A. D. 341,—on effect on title of purchaser at execution

sale of irregularities in conduct of sale; 76 A. D. 124, on binding force of plaintiff's irregular acts upon purchaser at execution sale; 31 A. D. 704, on effect on title of purchaser at execution sale of errors or irregularities in the proceeding; 48 A. D. 706, on effect of quashing an execution irregularly issued on sale previously made thereunder; 17 A. D. 130, on effect of fraud in sheriff's sale on purchasers thereat.

Cited in notes in 39 A. D. 573, on binding force upon purchasers without notice at execution sale of officer's irregular acts; 21 L.R.A. 41, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy; 21 L. ed. U. S. 466, as to whether purchaser at judicial sale is protected against irregularities in the proceedings or sale.

15 AM. DEC. 92, HANCOCK v. HANCOCK, 1 T. B. MON. 121.

Compelling conveyance of part of premises.

Cited in reference note in 16 A. D. 136, on right to compel covenantor to convey part of premises to grantee of covenantee.

Sufficiency of description.

Cited in reference note in 34 A. S. R. 141, on sufficiency of description to entitle one to specific performance.

Survey: when ordered.

Cited in *Cardweil v. Strother*, 2 Dana, 439, holding that court may order survey, on omission to show survey and patent in conformity to entry.

15 AM. DEC. 95, BLUE v. KIBBY, 1 T. B. MON. 195.

Impeaching witness.

Cited in *Gilbert v. Sheldon*, 13 Barb. 623, holding proof of general bad character without proving character for truth bad, insufficient to impeach witness; *People v. Rector*, 19 Wend. 569, holding inquiry of general character and veracity upon oath proper to impeach witness; *Carter v. Cavanaugh*, 1 G. Greene. 171, holding general moral character without reference to character for truth, inadmissible to impeach witness; *Ward v. State*, 28 Ala. 53, holding that in impeaching witness, inquiry is not limited to general character for truth but may extend to general character; *People v. Yslas*, 27 Cal. 630, holding evidence of bad character for chastity, inadmissible to impeach witness; *Com. v. Welch*, 111 Ky. 530, 63 S. W. 984, holding Code statute prohibiting impeachment by evidence of wrongful acts without proof of felony, applicable to cross-examination.

Cited in reference notes in 21 A. D. 154; 36 A. D. 360; 39 A. D. 529,—on impeachment of witness; 75 A. D. 207, on asking questions for purpose of discrediting witness; 17 A. D. 132, on mode of impeaching witness; 36 A. D. 765, on questions allowable on impeachment of witness; 73 A. D. 162, on form of interrogations to impeach witnesses; 45 A. D. 230; 53 A. D. 148,—on evidence of general bad character to impeach witness; 28 A. D. 723, on evidence of general moral character to impeach witness; 73 A. D. 162, on extent of inquiry to entire moral character, in impeachment of witness; 73 A. D. 304, on impeachment of witness by proof of prior contradictory statements made out of court; 73 A. D. 304, on predicate for impeachment of witness by previous inconsistent statements made out of court; 36 A. S. R. 801, as to who may impeach witness; 55 A. D. 177; 55 A. D. 696,—on right of party to impeach or contradict his own witness; 46 A. D. 56, as to when party may impeach witness

he has himself called; 85 A. D. 264, on impeachment of one's own witness by proof of his general reputation.

Cited in notes in 74 A. D. 398, on impeachment of witnesses; 60 A. D. 750, on right to impeach one's own witness; 73 A. D. 775, on right to prove hostility or enmity of witness against party; 73 A. D. 762, on practice upon impeaching witnesses; 73 A. D. 772, on laying foundation for proof of character of witness for veracity; 73 A. D. 772, on right to ask impeaching witness whether from his knowledge of general reputation of other witness he would believe him under oath.

Erroneous instructions to jury.

Cited in *Harrison v. Baker*, 1 J. J. Marsh. 317, holding that court will not adjudge instructions erroneous without evidence upon which instructions bear.

Cited in note in 99 A. D. 134, on necessity that error in giving or refusing instructions appear of record.

15 AM. DEC. 100, HUTCHCRAFT v. SHROUT, 1 T. B. MON. 206.

Nonjoinder of parties.

Cited in *De Wolf v. Mallet*, 2 J. J. Marsh. 401, holding all stockholders necessary parties to action against company where each stockholder is individually liable; *Linconfelter v. Kelly*, 6 J. J. Marsh. 339, holding A. and B. necessary parties to bill in equity to enforce separate covenants to C.

Liability of sureties on guardian's bond.

Cited in *Frederick v. Moore*, 13 B. Mon. 470, holding remaining cosureties liable for contribution where one or more joint sureties are released; *Cuddeback v. Kent*, 5 Paige, Ch. 92, holding that equitable bill lies against guardian and sureties for accounting without first proceeding against guardian; *Walton v. Williams*, 1 Va. Dec. 579, holding that jurisdiction is in equity to enforce surety bonds of general receiver.

— Sureties on different bonds.

Cited in *Rush v. State*, 19 Ind. App. 523, 49 N. E. 839, holding that subsequent pension-money bond filed by guardian does not release surety on original bond; *Stevens v. Tucker*, 87 Ind. 109, holding original sureties and sureties on additional bond, liable for contribution; *Douglass v. Kessler*, 57 Iowa, 63, 10 N. W. 313, holding undischarged sureties on original bond and sureties on new bond, liable for defalcation; *Bosley v. Taylor*, 5 Dana, 157, 30 A. D. 677, holding that where one surety pays debt, all like bound, even on different bonds, liable for contribution; *Taylor v. Nunn*, 2 Met. (Ky.) 199, holding sureties on first and second bond covering same tax liability, liable for sheriff's nonpayment; *Moore v. Potter*, 9 Bush, 357, holding trustee's surety, suing for release, released by new bond with surety required by court; *Abshire v. Rowe*, 112 Ky. 545, 99 A. S. R. 302, 56 L.R.A. 936, 66 S. W. 394, holding sureties on new bond of guardian given to release surety on original bond, liable equally with sureties on original bond for past defalcations of guardian; *Miller v. Kelsey*, 100 Me. 103, 60 Atl. 717, holding that guardian's second bond, accepted by court, will not supersede original without statutory proceedings discharging sureties; *Wilborne v. Com.* 5 J. J. Marsh. 617, holding surety on original bond of guardian not released by execution of second bond to indemnify sureties on original bond; *Alexander v. Mercer*, 7 Ga. 549, holding that equitable bill lies against administrator, insolvent under new bond, and both sets of sureties, to discover waste.

Cited in reference notes in 10 A. S. R. 860, on liability of sureties on successive bonds; 99 A. S. R. 307, on new bonds by principal as cumulative securities for performance of duties; 44 A. D. 83, on liability of sureties on different bonds given by guardian at different times.

15 AM. DEC. 104, HUGHES v. ROBERTSON, 1 T. B. MON. 215.

When exceptions must be taken and signed.

Cited in *United States v. Jarvis*, 3 Woodb. & M. 217, Fed. Cas. No. 15,469, holding bill of exceptions defective unless it appears that objection was made to rulings at trial; *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113, holding that exceptions reserved at trial may be written out and signed thereafter during term.

Cited in reference note in 83 A. D. 457, on necessity for taking exception at trial.

Warranties on sale of chattel.

Cited in reference notes in 19 A. D. 477, on warranties on sales of chattels; 44 A. D. 358, on liability of vendor of personal property for breach of warranty of soundness.

Cited in notes in 102 A. S. R. 622, on implied warranty of quality of horses and cattle sold; 43 A. D. 680, on implication of warranty from sound price paid for goods.

Fraud in sale of chattel.

Cited in reference notes in 52 A. D. 343, on vendor's liability for fraud in absence of warranty; 90 A. D. 425, on effect of rule of *caveat emptor* upon fraudulent concealment or misrepresentation of material fact; 20 A. D. 248; 28 A. D. 482,—on fraudulent concealment in sales.

Cited in notes in 90 A. D. 431, on fraudulent concealment in sales; 3 A. S. R. 727, on effect of fraud or concealment in sale.

15 AM. DEC. 109, ALLEN v. CAMP, 1 T. B. MON. 231.

When creditors' bill maintainable.

Cited in notes in 25 A. D. 313, on creditor's right to resort to equity to reach assets; 4 L.R.A. 354, on suit to set aside fraudulent conveyance.

—Prerequisites to.

Cited in *Halbert v. Grant*, 4 T. B. Mon. 581; *Anderson v. Bradford*, 5 J. J. Marsh. 69,—holding judgment and execution necessary to enable creditor to set aside fraudulent deed, on legal claim; *Roper v. McCook*, 7 Ala. 318, holding that judgment creditor must show execution returned unsatisfied to subject debtor's equitable estate to judgment.

Cited in reference notes in 90 A. D. 288, on necessity of creditor's exhausting remedy at law before filing creditors' bill; 64 A. D. 175, on necessity of creditor's establishing debt by judgment and execution *nulla bona* to entitle him to set aside fraudulent conveyance; 44 A. D. 722, on necessity of creditor having judgment and execution unsatisfied to maintain bill to reach debtor's equitable assets or property fraudulently transferred.

15 AM. DEC. 110, BARRETT v. LIGHTFOOT, 1 T. B. MON. 241.

Abuse of process.

Cited in reference notes in 34 A. D. 80, on abuse of process as a trespass *ab initio*; 25 A. D. 400; 35 A. D. 733; 51 A. D. 231; 74 A. D. 336,—on abuse of

authority as making wrongdoer trespasser *ab initio*; 30 A. D. 731, as to when abuse of authority constitutes one a trespasser *ab initio*.

Estrays.

Cited in *State v. Armontrout*, 21 Tex. 472, holding that taking and using stray horse, without lawfully advertising, making oath and estraying, authorizes criminal prosecution; *Weber v. Hartman*, 7 Colo. 13, 49 A. R. 339, 1 Pac. 230, holding that stray horses cannot be lawfully used except to preserve from injury for owner's benefit; *Kennet v. Robinson*, 2 J. J. Marsh. 84, holding use of horse, without owner's knowledge through kindness to owner, no conversion.

Cited in notes in 11 E. R. C. 125, on right of finder to use or work an estray; 8 A. S. R. 273, on use of estrays, not necessary for their preservation, as constituting a tort.

15 AM. DEC. 113, BANK OF CARLISLE v. HOPKINS, 1 T. B. MON. 245.

Setting aside judgment.

Cited in reference note in 51 A. D. 394, on setting aside judgment.

15 AM. DEC. 115, SHACKLEFORD v. FOUNTAIN, 1 T. B. MON. 252.
Description of parties in judgment.

Cited in *Bradford v. Rogers*, 2 Posey, Unrep. Cas. (Tex.) 57, holding judgment not void because it fails to give Christian name of defendants; *Parsons v. Spencer*, 83 Ky. 305, holding judgment designating plaintiffs not individually but as "heirs" of certain person not void for uncertainty; *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210, holding judgment for "descendants" of person without naming them not void for uncertainty.

Mistake in form of judgment.

Cited in note in 12 A. D. 353, on clerical misprisions in judgments capable of correction at subsequent term.

15 AM. DEC. 116, COCHRAN'S WILL, 1 T. B. MON. 263.

Lucid intervals of testator.

Cited in *Clark v. Fisher*, 1 Paige, 171, 19 A. D. 402, holding that party maintaining will must show that previous derangement had ceased at time of will's execution; *Manley v. Staples*, 65 Vt. 370, 26 Atl. 630, holding several years' continuance of testator's delusion not presumption of same mind at time of executing will.

Cited in reference notes in 55 A. D. 717, on will executed during lucid interval; 47 A. D. 474, on presumption as to continuance of lunacy and burden of proof; 39 A. D. 592, on necessity for proof of testamentary capacity by parties claiming under will; 47 A. D. 422, on burden of proof where general mental unsoundness of testator before making will is shown; 99 A. D. 709, on necessity for proof that insane person's will was made during lucid interval; 15 A. S. R. 393, on validity of lunatic's contracts.

Cited in notes in 15 A. D. 369, on effect of lucid intervals; 35 L.R.A. 123, on presumption of continuance of alcoholism and alcoholic insanity; 39 L.R.A. 227, on presumption and burden of proof as to drunkenness affecting testamentary capacity.

15 AM. DEC. 118, LOCKE v. COLEMAN, 2 T. B. MON. 12.**Lease by defendant after execution.**

Cited in reference note in 36 A. D. 132, on right of execution purchaser where premises leased by debtor after execution.

Notice to quit by purchaser at judicial sale.

Cited in note in 42 A. D. 138, on notice to quit by purchaser at execution or judicial sale.

Purchase subject to judgment lien.

Cited in *Hargrove v. De Lisle*, 32 Tex. 170, holding that purchaser of land subject to judgment lien acquires title subject to lien.

Effect of delay on execution.

Cited in reference notes in 34 A. D. 116, on how lien of execution may be lost or postponed; 24 A. D. 593, on loss of lien of execution by delay; 57 A. S. R. 625, on effect of delay in sale under execution.

Cited in notes in 27 L.R.A. 378, on loss of priority of execution by delaying sale; 21 L.R.A. 36, on priority by record to purchaser at execution or judicial sale.

15 AM. DEC. 121, SMALLEY v. ANDERSON, 2 T. B. MON. 56.**Actionability of words.**

Cited in reference notes in 24 A. D. 104, on words actionable *per se*; 53 A. S. R. 405, on words imputing adultery as slander; 24 A. D. 763; 91 A. D. 402,—on actionability of words imputing adultery to married woman.

Cited in note in 15 A. D. 126, on what words are actionable *per se*.

Right of action for injury to married woman.

Cited in *Henneger v. Lomas*, 145 Fed. 287, 32 L.R.A. 848, 44 N. E. 462, holding that seduced woman, marrying seducer, must have marriage adjudged void, to sue for seduction.

Cited in note in 48 A. D. 621, on action for injury to wife not resulting in death.

Discretionary matters.

Cited in reference notes in 55 A. D. 743, on how far granting of continuance is discretionary; 44 A. D. 649, on reviewability of refusal of continuance.

Cited in note in 74 A. D. 142, on reviewability of discretion of court below.

15 AM. DEC. 122, BRITE v. GILL, 2 T. B. MON. 65.**What words are actionable.**

Cited in *Morgan v. Rice*, 35 Mo. App. 591, holding facts detailed, believed by slanderer, tending to prove slander, no justification of false charge; *Ayers v. Grider*, 15 Ill. 37, holding words by arrested person, accusing constable of theft, relating to arrest, not actionable; *Snyder v. Degant*, 4 Ind. 578, holding that proof that person was not sworn, does not affect defense in slander charging perjury at trial.

Cited in reference notes in 24 A. D. 104, on words actionable *per se*; 61 A. D. 498, as to words when actionable *per se* as imputing crime.

Evidence of connection in which words used.

Cited in reference note in 22 A. D. 420, on evidence of connection in which slanderous words were used.

15 AM. DEC. 126, WELCH v. WELCH, 2 T. B. MON. 83.**Proof of will.**

Cited in *Thompson v. Owen*, 174 Ill. 220, 45 L.R.A. 682, 51 N. E. 1046, holding will indefeasible by witness's failure to recollect compliance with formalities where attestation clause and signatures correct; *Re Page*, 118 Ill. 576, 59 A. R. 395, 8 N. E. 852, holding that single witness may prove contents of lost or destroyed will.

Cited in reference notes in 19 A. D. 529; 77 A. S. R. 459,—on proving will by one witness; 34 A. D. 139, on what may be proved by one of subscribing witnesses; 77 A. D. 462, as to whether witnesses' want of recollection is fatal to will.

Cited in notes in 15 A. D. 400, on proof of wills; 40 A. D. 232, on proof of will by subscribing witnesses; 77 A. S. R. 470, on number of witnesses required for proof of will.

15 AM. DEC. 129, MARTIN v. UNITED STATES, 2 T. B. MON. 89.**Acts of agent; how far binding.**

Cited in *L'Artiste Pub. Co. v. Walker*, 11 Misc. 426, 32 N. Y. Supp. 151, holding that soliciting agent, not empowered, cannot bind principal by contracting for payment in goods; *Hendry v. Benlisa*, 37 Fla. 609, 34 L.R.A. 283, 20 So. 800, holding agent's authority to receive current Confederate money in full settlement of debt is presumed.

Cited in reference notes in 22 A. D. 223, on powers of special agent; 24 A. D. 65; 40 A. D. 538,—as to what acts of special agent will bind principal; 66 A. S. R. 483, on power of collecting agent; 77 A. D. 187, as to what authority is implied in power to collect debt; 42 A. D. 616, on authority of agent to transfer debt under power to collect; 17 A. S. R. 648, on effect of payment to agent; 77 A. S. R. 632, on agent's authority to receive payment; 29 A. S. R. 585, on how far acts of public agents are binding.

What may be received by agent on payment.

Cited in reference notes in 44 A. S. R. 652, on necessity that payment to agent be in money; 42 A. D. 420, on what agent can receive as money; 52 A. D. 451, as to when agent to collect may receive bank bills; 25 A. D. 204, on authority of agent to either collect, to compromise or sell claim, or receive other than money in payment.

Cited in notes in 34 A. D. 313, as to whether collecting bank may accept anything but money in payment; 21 E. R. C. 38, on necessity that agent with authority to receive payment receive money.

15 AM. DEC. 134, BRISTOW v. PAYTON, 2 T. B. MON. 91.**Effect of death of party to execution.**

Cited in reference notes in 18 A. D. 344, on effect of death of plaintiff or defendant after levy; 22 A. D. 329; 38 A. D. 465; 68 A. D. 187,—on effect of defendant's death after issuance and levy of execution; 56 A. D. 436, on effect on sheriff's power to levy or sell of death of judgment debtor before or after execution issued.

Cited in note in 61 L.R.A. 383, on effect of death of sole judgment debtor after levy, but before sale.

Lapse of time in correcting irregularities.

Cited in *Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369, holding that ag-

grieved party's remedy to set aside sheriff's sale must be resorted to within reasonable time.

15 AM. DEC. 136, BANK OF LIMESTONE v. PENICK, 2 T. B. MON. 98.

Surety releasing principal to testify.

Cited in reference note in 56 A. D. 108, on effect of surety releasing principal to testify.

Filling blanks in instrument.

Cited in reference notes in 33 A. S. R. 706, on effect of filling in blanks; 33 A. D. 293, on effect of signing and delivering blank to be filled in as note; 30 A. D. 687, on liability on blank note filled up by payee in manner not contemplated by maker.

Cited in notes in 40 A. D. 87, on liability of person signing and delivering note with blank; 4 E. R. C. 647, on liability to bona fide holder of party issuing negotiable paper left blank in material part; 86 A. S. R. 85, on necessity that alterations of written instruments be material.

15 AM. DEC. 140, SANDERS v. MORRISON, 2 T. B. MON. 109.

Following meander line.

See *Security Land & Exploration Co. v. Burns*, 87 Minn. 97, 94 A. S. R. 684, 63 L.R.A. 157, 91 N. W. 304, holding that meander line will if consistent with other calls and distances in plat be held the boundary line of land delimited, though not a boundary line as a general rule.

15 AM. DEC. 142, PUGH v. BELL, 2 T. B. MON. 125.

Limitations in equity.

Cited in *Barton v. Long*, 45 N. J. Eq. 841, 19 Atl. 623, holding amendment to bill alleging fraud, to allege fraudulent representation known ten years, inadmissible on ground of laches.

Cited in reference notes in 52 A. D. 221, on conformity by courts of equity to statute of limitations; 52 A. D. 221, on refusal of aid of equity to stale demands.

Cited in note in 23 A. D. 755, on limitations in equity.

Dower in equitable title.

Cited in *Hall v. Hall*, 70 N. H. 47, 47 Atl. 79, holding that husband's right of conveyance in land, purchased after his decease for estate, will not support dower.

Compensation for improvements; rents and profits.

Cited in *Hentig v. Redden*, 1 Kan. App. 163, 41 Pac. 1054, holding that assessment against occupying claimant under improvement act for rents and profits should be exclusive of added improvement value.

Cited in reference notes in 46 A. S. R. 752, on mesne profits in ejectment; 35 A. S. R. 686, on rents as damages in ejectment; 65 A. S. R. 642, on recovery of rents and profits upon ejectment.

Cited in notes in 81 A. S. R. 192, on improvements on property sold at private sale and allowance therefor; 81 A. S. R. 179, on compensation for enhanced value in making allowance for betterments; 81 A. S. R. 170, on what are betterments and when allowance should be made therefor; 21 A. D. 410, on right to recover for improvements on eviction.

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15 AM. DEC. 148, SANDERS v. RUDDLE, 2 T. B. MON. 139.**Sending execution to another county.**

Cited in reference note in 65 A. D. 94, on effect of sending executions to other counties than that in which judgment is recovered.

Cited in note in 43 A. D. 52, on effect of issuance of execution to wrong county.

Validity of sale under irregular execution.

Cited in *Adamson v. Cummings*, 10 Ark. 541, holding that administrator's sale, under irregular execution, will not affect innocent purchaser, though execution voidable.

Cited in reference note in 74 A. D. 521, on rights of purchaser under voidable execution.

Cited in note in 21 L.R.A. 41, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy.

Quashing execution.

Cited in note in 32 A. D. 312, on effect of quashing writ of execution.

15 AM. DEC. 150, HALE v. AMES, 2 T. B. MON. 143.**Conversion of another's property.**

Cited in *Com. v. Barney*, 115 Ky. 475, 74 S. W. 181, on constitutionality of act fixing penalty for fraudulent conversion of another's property.

Cited in reference notes in 18 A. D. 570; 23 A. D. 704; 33 A. D. 131; 37 A. D. 60; 43 A. D. 292; 14 A. S. R. 438; 23 A. S. R. 774, 29 A. S. R. 194; 30 A. S. R. 94; 48 A. S. R. 351; 54 A. S. R. 567,—on what constitutes conversion; 40 A. S. R. 349, on wrongful exercise of dominion over property, as conversion; 35 A. S. R. 761, on conversion of mortgaged property; 85 A. S. R. 427, on sale by mortgagor in exclusion of mortgagee's right as conversion; 48 A. D. 76, on conversion by sale of property without authority.

Cited in note in 24 A. S. R. 796, on conversion of personalty sufficient to sustain trover.

Liability of execution creditor.

Cited in reference note in 57 A. D. 707, as to when execution creditor is liable as tortfeasor.

15 AM. DEC. 154, MARTIN v. REEVES, 3 MART. N. S. 22.**Evidence of fraudulent sale.**

Cited in *Allain v. Cornaux*, 3 Mart. N. S. 365, holding that finding of fraud with strong proof to sustain will not be disturbed by an appellate court.

—Admissibility of grantor's declarations.

Cited in *Williams v. Eikenberry*, 25 Neb. 721, 13 A. S. R. 517, 41 N. W. 770, holding vendor's declaration after transfer, derogatory to title, inadmissible to defeat such title; *Erwin v. Bank of Kentucky*, 5 La. Ann. 1; *Hoose v. Robbins*, 18 La. Ann. 648; *Groves v. Steel*, 2 La. Ann. 480, 46 A. D. 551,—holding vendor's declarations, out of vendee's presence, shortly before and after sale, acknowledging simulation, admissible to prove vendor's fraud; *Bogert v. Phelps*, 14 Wis. 89, holding vendor's declarations several days after sale, inadmissible to show fraud in vendee.

Cited in reference notes in 26 A. D. 238; 13 A. S. R. 524,—on admissibility in evidence of acts and declarations of grantor or vendor against grantee or

vendee; 31 A. D. 197, on admissibility of declarations of vendor in absence of vendee; 19 A. D. 185; 53 A. S. R. 223,—on admissibility of vendor's statements to show fraudulent intent; 61 A. D. 318, as to when declarations of grantor as to fraudulent conveyance are admissible.

Cited in note in 35 A. D. 92, on admissibility against grantee of declarations of grantor.

15 AM. DEC. 156, MILLER v. MERCIER, 3 MART. N. S. 236.

Repeal of statute.

Cited in *Peet v. Morgan*, 6 Mart. N. S. 580, holding that legislative declaration rendering sheriff not liable for unsecured sale does not repeal other parts law rendering liable.

Cited in reference notes in 22 A. D. 379, on repeals by implication; 34 A. D. 493, on effect of repeal of statute.

15 AM. DEC. 157, BRENT v. ERVIN, 3 MART. N. S. 303.

Actions on lost instruments.

Cited in reference notes in 41 A. D. 298, on actions on lost or destroyed notes; 20 A. D. 64, on recovery in action at law on lost bond or note.

Cited in notes in 27 A. D. 128, on actions on lost and destroyed notes; 94 A. S. R. 473, on actions on lost bond of indemnity; 4 E. R. C. 653, on right to maintain action on lost negotiable instrument; 13 A. D. 481, on exclusiveness of equitable jurisdiction over lost bills and notes.

15 AM. DEC. 159, DEBUYS v. MOLLERE, 3 MART. N. S. 318.

Evidence of notice of protest.

Cited in *Hyde v. Stone*, 20 How. 170, 15 L. ed. 874, holding insertion of bill among insolvent's debts in schedule, evidence of notice; *Helm v. Ducayet*, 20 La. Ann. 417, holding indorser's promise to pay nonprotested note evidence of notice, and provable by parol; *Tebbetts v. Dowd*, 23 Wend. 379, holding indorser's promise to pay check presumptive evidence of demand and notice.

Waiver of notice.

Cited in *Tebbetts v. Dowd*, 23 Wend. 379, holding indorser's promise to pay after maturity enforceable by indorsed check holder without direct proof of demand and notice.

Cited in reference notes in 23 A. D. 504; 28 A. D. 299,—on waiver of demand and notice by indorser; 43 A. D. 171; 44 A. D. 259,—on promise after maturity to pay note as waiver of notice; 53 A. D. 143, on effect of promise of indorser of note to pay same after failure of due notice.

Cited in note in 29 L.R.A. 308, on necessity of new consideration to support waiver of failure to give notice of dishonor.

15 AM. DEC. 161, LACROIX v. MENARD, 3 MART. N. S. 339.

Right to intervene.

Cited in reference notes in 18 A. D. 249, on intervention; 38 A. S. R. 501, 535, as to who may intervene; 17 A. S. R. 198, on who may intervene in suit and rights of persons intervening; 44 A. S. R. 802; 46 A. S. R. 290,—on interest necessary to entitle one to intervene; 26 A. S. R. 730, on sufficiency of application for intervention.

Intervener's rights in suit.

Cited in *Gold Hunter Min. & Smelting Co. v. Holleman*, 3 Idaho, 99, 27 Pac. 413, holding intervener's rights in suit as comprehensive as original party's and right to protection same.

Cited in reference note in 123 A. S. R. 311, on trial of issue presented by intervention.

Cited in note in 16 A. D. 184, on rights of intervener after becoming party.

15 AM. DEC. 163, MELLON v. CROGHAN, 3 MART. N. S. 423.**Demand on note — Mode of proving.**

Cited in *Legendre v. Woodroff*, 16 La. 477, holding that demand will not be presumed on omission of notary's demand and notice in evidence; *Smith v. Robinson*, 2 La. 405; *Bell v. Williams*, 3 La. 447; *Warren v. Allnutt*, 12 La. 434; *Fort v. Cortes*, 14 La. 180; *Allain v. Lazarus*, 14 La. 327, 33 A. D. 583; *Waldron v. Turpin*, 15 La. 552, 35 A. D. 210,—holding notary's protest of notes inadmissible to prove demand necessary to recovery.

Cited in reference note in 33 A. D. 614, as to how demand is made.

— Necessity of, at particular place.

Cited in *Hamer v. Johnson*, 15 La. 242, holding that demand is condition precedent to recovery on note payable at particular place; *Hart v. Long*, 1 Rob. (La.) 83, holding demand at designated place in note necessary to recovery against maker or indorser; *Stilwell v. Bobb*, 1 Rob. (La.) 311, holding that payment must be demanded at place where note is payable before recovery can be had; *Stillwell v. Bobb*, 2 Rob. (La.) 327, holding that demand must be alleged and proved to recover on note payable at designated place; *Erwin v. Adams*, 2 La. 318, holding demand necessary to recovery on note at designated place if existing; if not, recovery may be had without.

Cited in reference notes in 17 A. D. 471; 25 A. D. 340,—on note payable at particular place; 22 A. D. 455; 28 A. D. 335,—on note payable at particular time and place; 24 A. D. 455; 39 A. D. 114,—on necessity for demand on note or bill payable at particular bank to charge maker or acceptor; 26 A. D. 317, on necessity for presentment of note payable at a particular place; 61 A. S. R. 238, on place of payment of negotiable instrument; 37 A. S. R. 406, on place of demand of payment of negotiable instrument.

Distinguished in *Florence Oil & Ref. Co. v. First Nat. Bank*, 38 Colo. 119, 88 Pac. 182, holding demand at place designated in note not necessary to recovery.

15 AM. DEC. 167, WHITEHURST v. HICKEY, 3 MART. N. S. 589.**Effect of executing bond.**

Cited in *State v. Winfree*, 12 La. Ann. 643, holding that parties signing bond waive defects in its form.

Validity of official bonds generally.

Cited in reference notes in 60 A. S. R. 929, on validity of official bonds; 39 A. D. 110, as to what informalities do not vitiate official bond.

Cited in note in 82 A. D. 762, on effect of defects in official bonds.

Necessity of approving bond.

Cited in *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, holding filing and approval of bond on appeal before service on appellee or proof of clerk's approval, unnecessary.

Cited in notes in 82 A. D. 764, on effect on validity of official bond of failure of public authorities to approve or file it; 44 A. D. 303, on effect of governor's failure to approve and indorse official bond on liability of sureties.

Failure to record official bond.

Cited in *Heath v. Shrempp*, 22 La. Ann. 167, holding that failure of recorder and aldermen, to accept bond, under military rule, does not release surety.

Cited in reference note in 33 A. D. 376, on effect of failure to record official bond.

Cited in note in 90 A. S. R. 189, on irregularities in filing and recording official bond relieving sureties from liability.

Subsequent filling of blanks.

Cited in reference note in 17 A. D. 735, on filling blanks in instruments after execution.

15 AM. DEC. 172, MARIGNY v. REMY, 3 MART. N. S. 607.

Who may sue on contract.

Cited in *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684, on waterwork's liability to citizen taxpayer, for fire loss, under stipulation with city to furnish water.

Cited in reference notes in 24 A. D. 325, on who may sue on promise for benefit of third person; 26 A. D. 109, 263; 37 A. D. 654; 38 A. D. 692,—on right of third party for whose benefit contract is made to sue thereon.

Cited in notes in 71 A. S. R. 184, on third person's right to enforce contract for his benefit; 1 E. R. C. 706, on right of action on contract made for benefit of third person.

Acceptance as affecting validity or priority of mortgage.

Cited in *Hill v. Barlow*, 6 Rob. (La.) 142, holding that mortgage favoring absentee, executed and registered by mortgagor, has legal effect though not accepted by mortgagee; *Millaudon v. Allard*, 2 La. 547, holding mortgage executed to absent person and recorded but not accepted until after registry of subsequent mortgage not postponed thereto.

15 AM. DEC. 173, SAULET v. DREUX, 3 MART. N. S. 615.

Effect of reversal.

Cited in *Pillie v. Dreux*, 4 Mart. N. S. 75, holding that judgment, reversing that by which syndic was appointed does not avoid his acts in meanwhile.

Cited in reference notes in 16 A. D. 705, on effect of reversal of judgment; 26 A. D. 415, on rights of parties on reversal of judgment; 54 A. D. 455, on reversal of erroneous judgment as affecting rights of third persons acquired thereunder.

15 AM. DEC. 175, GRIGGS v. AUSTIN, 3 PICK. 20.

Recovery of money paid generally.

Cited in *Williamson v. Johnson*, 62 Vt. 378, 22 A. S. R. 117, 9 L.R.A. 279, 20 Atl. 279, upholding assumpsit to recover money sent woman to purchase wedding outfit where she refuses without cause to fulfill engagement; *Smith v. Farnworth*, 6 Hun, 598, upholding lessee's recovery for repairs made under lease, after destruction of leasehold by fire.

Cited in note in 50 A. D. 679, on recovery of money paid on contract to purchase.

Distinguished in *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541, denying recovery of payments made on building contract, conditions of which are fully performed before destruction of building by fire.

Refunding of freight.

Cited in *Phelps v. Williamson*, 5 Sandf. 578; *Emery v. Dunbar*, 1 Daly, 408; *Atwell v. Miller*, 11 Md. 348, 69 A. D. 206,—holding freight advanced on goods lost at sea recoverable, in absence of contrary agreement; *The Harriman*, 5 Sawy. 611, Fed. Cas. No. 6,104; *Reina v. Cross*, 6 Cal. 29; *Lawson v. Worms*, 6 Cal. 365; *Schultz v. Pacific Ins. Co.* 14 Fla. 73; *Hagedorn v. St. Louis Perpetual Ins. Co.* 2 La. Ann. 1005; *Lee v. Barreda*, 16 Md. 190,—permitting recovery of advanced freight by charterer after loss of ship or nonperformance by any reason, in absence of special agreement; *Leckie v. Sears*, 109 Mass. 424, suggesting recovery of advanced freights upon failure of vessel to deliver at final destination on account of perils of sea; *Pitman v. Hooper*, 3 Sumn. 50, Fed. Cas. No. 11,185; *Weston v. Minot*, 3 Woodb. & M. 437, Fed. Cas. No. 17,453,—raising question but not deciding whether freight paid in advance may be recovered by shipper in event of noncompletion of voyage; *The Kimball*, 3 Wall. 37, 18 L. ed. 50; *The Bird of Paradise*, 5 Wall. 545, 18 L. ed. 662,—holding acceptance of promissory note for advanced freight not sufficient payment to warrant recovery; *The Zenobia*, Abb. Adm. 48, Fed. Cas. No. 18,208, allowing recovery of passage money paid in advance if vessel sails prior to schedule time; *Brown v. Harris*, 2 Gray, 360; *Ogden v. New York Mut. Ins. Co.* 35 N. Y. 420,—permitting recovery of passage money paid in advance, on breaking up of voyage by peril of sea; *Ogden v. New York Mut. Ins. Co.* 4 Bosw. 447, holding passage money insured unrecoverable on loss of passengers with vessel in absence of contract to refund if passengers are not delivered.

Cited in note in 12 E. R. C. 375, on recovery back of freight paid in advance where same is not delivered.

What is freight.

Cited in note in 60 A. D. 149, on freight as compensation for carriage and delivery of goods.

Right to freight.

Cited in reference notes in 30 A. D. 718, as to when freight is due; 40 A. S. R. 584, as to when freight for shipping goods is earned.

Right of parties where contract is unexecuted.

Cited in *Seibel v. Purchase*, 134 Fed. 484, holding vendee's purchase money paid under unexecuted contract, recoverable on vendor's failure to perform; *Merrill v. Downs*, 41 N. H. 72, upholding right to recover back money paid on executory contract which party receiving money fails to perform; *Butterfield v. Byron*, 153 Mass. 517, 25 A. S. R. 654, 12 L.R.A. 571, 27 N. E. 667, upholding recovery for contracted services on building destroyed by lightning.

Cited in note in 1 E. R. C. 349, on *vis major* or inevitable accident as excusing performance of contract.

Distinguished in *Minturn v. Warren Ins. Co.* 2 Allen, 86, denying recovery of carrier's insurance on prepaid freight by owner of cargo who pays freight in advance.

15 AM. DEC. 180, HALL v. YOUNG, 3 PICK. 80.

Judgment against consul.

Cited in *Springfield Card Mfg. Co. v. West*, 1 Cush. 388, holding fact that one was a public minister at time of arrest no defense to execution against bail.

Cited in note in 45 L.R.A. 583, on jurisdiction in state courts of civil actions against consuls.

Judgment by default.

Cited in reference note in 50 A. D. 221, on rendition, validity, and effect of judgments by default.

Defense to scire facias.

Cited in note in 122 A. S. R. 104, on defenses to scire facias and their presentation.

15 AM. DEC. 181, UNION BANK v. KNAPP, 3 PICK. 96.

Documentary evidence.

Cited in *Lee v. Walker*, 25 Fla. 149, 6 So. 57, holding checks inadmissible showing money drawn on them for payment to another, latter never having possession; *Freeman v. Kelly*, Hoffm. Ch. 90, on production of checks in party's favor with bank teller's evidence payment as showing payment to payee; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 30 A. D. 130, holding checkrolls of day's work performed, inadmissible unless supplemented by oath of person making them if alive; *Amherst Bank v. Root*, 2 Met. 522 (dissenting opinion), on admissibility of record books of corporation containing doings at meetings on vote of directors; *Shove v. Wiley*, 18 Pick. 558, holding book kept by bank clerk for entry of certificates of notices to indorsers, admissible showing notice; *Lilly v. Larkin*, 66 Ala. 110, holding indorsement by deceased attorney on note used on settlement of administrator's accounts, admissible showing settlement correct; *Hooper v. Taylor*, 39 Me. 224, holding paper not competent evidence to prove cash items thereon in excess of 40s.

—Account books.

Cited in *Sinclair v. Price*, 2 Hill, Eq. 160 note, holding agent's books admissible against principal in action for account against agent, both being dead; *Ball v. Bank of State*, 8 Ala. 590, 42 A. D. 649, holding account of sales rendered by agent to principal admissible against shipper if former also agent for latter; *Wallabout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42, holding bank discount register admissible in action against maker of note where supplemented by clerk's testimony; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111, holding corporation books kept by treasurer in his handwriting admissible on proof of his death; *White v. Ambler*, 8 N. Y. 170, holding books of bank not of themselves evidence against customers of facts indicated by their entries; *Oliver v. Phelps*, 21 N. J. L. 597, holding bank's books admissible showing check given by party was credited to other party latter receiving money; *Brassett v. Spofford*, 11 N. H. 167, holding account books supported by oath competent showing payment of not exceeding \$6.67 in money; *McKavlin v. Bresslin*, 8 Gray, 177, holding bank books admissible in action by husband for deposit by wife transferred to defendant's credit; *Watson v. Phoenix Bank*, 8 Met. 217, 41 A. D. 500, on admissibility of bank ledger in action against bank where book produced at depositor's request; *Dunn v. Whitney*, 10 Me. 9, holding books accompanied by oath insufficient proof of charge of \$26 in money; *Leighton v. Manson*, 14 Me. 208, holding partnership-account books admissible where kept in handwriting of deceased partner if admissible during his lifetime; *Young v. Jones*, 8 Iowa, 219; *Inslee v. Prall*, 23 N. J. L. 457; *Harmon v. Decker*, 41 Or. 587, 93 A. S. R. 748, 68 Pac. 11; *Veiths v. Hagge*, 8 Iowa, 163,—holding account books inadmissible to prove charge of "money paid" or "money lent" by party making

charge; *McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760, holding bank's books admissible showing counterclaim in action by payee of note to recover money collected; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 A. S. R. 87, 9 So. 299, holding books of stock exchange inadmissible showing sale of stock where entries made by person available as witness.

Cited in reference notes in 16 A. D. 555; 17 A. D. 709; 25 A. D. 596; 27 A. D. 279; 38 A. D. 506; 39 A. D. 128; 41 A. D. 507; 61 A. D. 299; 63 A. D. 227; 7 A. S. R. 780; 10 A. S. R. 300; 17 A. S. R. 388; 32 A. S. R. 605; 33 A. S. R. 314; 39 A. S. R. 316; 43 A. S. R. 452; 44 A. S. R. 665; 46 A. S. R. 208; 82 A. S. R. 950; 93 A. S. R. 760; 105 A. S. R. 174,—on books of account as evidence; 64 A. D. 329, on account books and entries therein as evidence; 50 A. D. 400, on admissibility in evidence of books of account and entries therein; 18 A. D. 649, on admissibility of books of account and books of tradesmen; 53 A. D. 657, as to what books and accounts are admissible in evidence; 1 A. S. R. 451, on what are account books so as to be admissible in evidence; 81 A. D. 249, as to when bank books are admissible in evidence; 66 A. D. 714, on admissibility of memorandum and account books where entries have been transcribed therein; 71 A. D. 155, on want of date to item as affecting admissibility of account book.

Cited in notes in 67 A. S. R. 569, on admissibility of books of account in evidence; 30 A. D. 142, on books of accounts and original entries as evidence; 95 A. D. 75, on admissibility of entries and books of account as part of *res gestæ*; 52 L.R.A. 565, on entries by bookkeeper in books of account as evidence in party's favor where bookkeeper is insane.

Distinguished in *Burns v. Fay*, 14 Pick. 8, holding account books of decedent not competent to prove cash charges in excess of 40s.

— Book entries.

Cited in *Browning v. Flanagin*, 22 N. J. L. 567, holding entries in "sealing docket," admissible in action against sheriff for escape showing issuing of writ; *Dismukes v. Tolson*, 67 Ala. 386, holding entries made at time of transaction in shop books by person having personal knowledge, admissible; *Gale v. Norris*, 2 McLean, 469, Fed. Cas. No. 5,190, holding entries in account books made by deceased clerk, admissible in evidence, handwriting being proved; *Todd v. McCravey*, 77 Ala. 468, on necessity of proving in whose handwriting entries were made and that they were made at time of transaction; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, holding entries in book admissible where person making them testifies he made them correctly at time of transaction; *Burr v. Byers*, 10 Ark. 398, 52 A. D. 239, holding entries made by clerk absent from state, inadmissible in merchant's favor, though handwriting proved; *Elliott v. Dycke*, 78 Ala. 150, holding entries in usual course of business made at time of transaction, admissible where witness beyond jurisdiction; *Livingston v. Tyler*, 14 Conn. 493, holding entries made by agent of both parties, admissible in action between them where agent dead; *Petit v. Teal*, 57 Ga. 145, holding entries without dates and not shown to be made in regular course of business, inadmissible; *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164, holding entries of deposits made by cashier, who is dead, admissible showing extent of depositor's account; *Jones v. Howard*, 3 Allen, 223, holding entries in book of deceased agent of moneys received for rent admissible showing defendant's tenancy; *Costello v. Crowell*, 133 Mass. 352, holding entry in book made at time admissible showing date clerk being unable to fix date; *Parkerson v. Nickerson*, 137 Mass. 487, holding entries by clerk in bank's book admissible on proof of handwriting where clerk

dead; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162, holding entries in bank's books showing discount of note went to maker's credit, admissible in action on note; *Tucker v. Peaslee*, 36 N. H. 167, holding entries in partnership books by either of partners admissible against and bind all partners; *Bailey v. Harvey*, 60 N. H. 152, holding book entries, supported by oath, inadmissible to prove payment of money on particular debt; *Lassone v. Boston & L. R. Co.* 66 N. H. 345, 17 L.R.A. 525, 24 Atl. 979, on admissibility of entries of wheelwright in books against third person in action by latter for personal injuries; *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919, holding entries made at time of transaction in ordinary course of business supplemented by party's oath, admissible; *Vinal v. Gilman*, 21 W. Va. 301, 45 Pac. 562, holding copy of book entry admissible where book without the state and cannot be produced; *Vinal v. Gilman*, 21 W. Va. 301, 45 Pac. 562, holding entries in account books inadmissible unaccompanied by testimony of bookkeeper, if his attendance enforceable; *Mahaaka County v. Ingalls*, 16 Iowa, 81, on admission of verbal declarations of third party latter being insane.

Cited in reference notes in 36 A. D. 213, on books of entry as evidence; 22 A. D. 416, on what are admissible as books of original entries; 71 A. D. 156, on erasures or alterations in books of entry affecting admissibility.

Cited in note in 105 A. S. R. 745, on effect of entries in savings-bank-pass book upon its negotiability.

Corporation books; right of inspection.

Cited in *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 A. & E. Ann. Cas. 989, on right of stockholder to inspect books of corporation for purpose of ascertaining company's financial condition; *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392, 2 Atl. 274, on court's power to order corporate books kept outside state brought within for stockholder's inspection.

Cited in note in 12 L.R.A. 791, on relation between bank and depositor.

Use of memoranda to refresh memory.

Cited in *Lovell v. Wentworth*, 39 Ohio St. 614, denying right of witness to use copy of memoranda of alleged facts to refresh memory.

Cited in reference notes in 49 A. D. 46; 14 A. S. R. 545,—on memoranda to refresh memory of witnesses; 25 A. D. 204, on books of account as memoranda to refresh memory; 29 A. D. 443, as to when memoranda may be used to refresh witness's memory.

Cited in note in 98 A. D. 619, on use of memoranda by witness to assist or refresh memory.

Interest affecting competency of witness.

Cited in *Manchester Bank v. White*, 30 N. H. 456, holding assignment of stock, though stockholders liable for corporate debts, makes stockholder competent witness for corporation; *Frankfort Bank v. Johnson*, 24 Me. 490, holding a contingent liability does not affect competency of witness; *Marwick v. Georgia Lumber Co.* 18 Me. 49, holding stockholder not rendered competent witness for corporation by assignment of stock to apply on debt; *Frink v. McClung*, 9 Ill. 569, holding that an honorary obligation will not constitute a disqualifying interest in a witness; *Crary v. Carradine*, 4 Ark. 225, holding witness who without consideration promised to pay account sued on, competent as witness for defendant; *Littlefield v. Portland*, 26 Me. 37, holding driver competent witness for party employing dray in action against town for loss of goods on dray caused by defective highway.

Cited in reference notes in 30 A. D. 694, on interest rendering person incompetent as witness; 45 A. D. 620, on competency of agent to testify for principal. **When limitations commence to run.**

Cited in note in 11 L.R.A.(N.S.) 1194, as to when limitations commence to run against action to recover money paid by mistake.

— On account.

Cited in *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798, holding statute runs as to all transactions included in account from time mutual account becomes account stated; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817, holding statute begins to run against account stated from the date it becomes such; *Gage v. Dudley*, 64 N. H. 271, 9 Atl. 786; *Estes v. Hamilton-Brown Shoe Co.* 54 Mo. App. 543,—holding running account ceases to be such on settlement and balance struck though balance not paid; *Belchertown v. Bridgman*, 118 Mass. 486, holding statute runs against item omitted from town treasurer's annual settlement; *Lancey v. Maine C. R. Co.* 72 Me. 34, holding statute runs against item omitted by mistake at time account stated and balance paid; *Porter v. Chicago, I. & D. R. Co.* 99 Iowa, 351, 68 N. W. 724, holding statute begins to run from date of stating account though balance carried to new account; *McLellan v. Crofton*, 6 Me. 307, holding cessation of dealings between parties does not cause statute to operate on merchant's account between them; *Sayward v. Dexter, H. & Co.* 19 C. C. A. 176, 44 U. S. App. 376, 72 Fed. 758, holding statute not available as to separate items where account stated consisted of monthly statements rendered and accepted; *Lowe v. Dowbarn*, 26 Tex. 507, holding items of mutual accounts, due more than two years barred, though other items not barred; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371, holding statute begins to run from date account is stated and new verbal promise is binding; *Spring v. Gray*, 5 Mason, 505, Fed. Cas. No. 13,259, holding contract between shipowners and shipper to receive half profits not merchant's account within statute of limitations; *Blair v. Drew*, 6 N. H. 235, holding items in mutual accounts within six years before action no admission of unsettled account extending beyond six years.

Cited in reference notes in 60 A. D. 258, on commencement of running of limitations on balanced account; 69 A. D. 696, on operation of statute of limitations in case of extended account.

Cited in notes in 62 A. D. 94, on statute of limitations in case of account stated; 89 A. D. 85, on application of statute of limitations to stated accounts; 89 A. D. 77, on application of statute of limitations to merchants' accounts; 2 L.R.A.(N.S.) 573, on necessity of demand for deposit to start statute of limitations running; 19 A. D. 420, on running of limitations against depositor's claim; 3 A. D. 48, on item taking open account out of state of limitations.

What is an account stated.

Cited in notes in 62 A. D. 85, on definition and elements of account stated; 1 E. R. C. 431, on account stated as agreement that all items are correct; 27 L.R.A. 825, on balance brought forward as account stated; 24 L.R.A. 737, on entries in bank book as contracts.

Conclusiveness of account stated.

Cited in reference notes in 41 A. D. 66; 55 A. D. 259,—on conclusiveness of stated account; 16 A. S. R. 347, on conclusiveness of entries in bank books; 91 A. D. 148, on binding effect upon bank, of credits in depositor's book.

Effect of account stated as evidence.

Cited in *Benites v. Hampton*, 3 Utah, 369, 3 Pac. 206, holding proof of an account stated prima facie proof of accuracy of balance found due therein.

15 AM. DEC. 198, McMECHAN v. GRIFFING, 3 PICK. 149.**Effect of notice as to title.**

Cited in *Tuttle v. Walton*, 1 Ga. 43, holding lien on stock under act of 1822 unaffected by sheriff's sale of stock, purchaser having notice; *Kent v. Plummer*, 7 Me. 464, holding attachment creditor's lien not impaired by subsequent notice of prior conveyance; *Rogers v. Hussey*, 36 Iowa, 664, holding purchaser from grantee without notice of outstanding title takes indefeasible title notwithstanding notice thereof; *Doe v. Flake*, 17 Me. 249, holding levy by one acting as appraiser on former levy not defeated because of notice; *Clark v. Watson*, 141 Mass. 248, 5 N. E. 298, holding levy on land of grantee in form only, invalid if person levying had notice; *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280, holding purchaser of land with knowledge of outstanding lease but not of renewal clause, not bound thereby; *Mullins v. Butte Hardware Co.* 25 Mont. 525, 87 A. S. R. 430, 65 Pac. 1004, holding purchaser of mine without notice of outstanding equity protected though his vendor had notice.

Distinguished in *Pope v. Cutler*, 22 Me. 105, on effect on subsequent levy under attachment of notice of former unrecorded levy.

— Of unrecorded deed or mortgage.

Cited in *Stafford Nat. Bank v. Sprague*, 21 Blatchf. 473, 17 Fed. 784, holding notice of unrecorded deed sufficient to raise legal presumption of notice to attaching creditor; *Lord v. Doyle*, 1 Cliff. 453, Fed. Cas. No. 8,505, holding knowledge of prior unrecorded mortgage as effective as if mortgage recorded; *McLaughlin v. Shepherd*, 32 Me. 143, 52 A. D. 646, holding subsequent purchaser of land with notice of unrecorded conveyance cannot by registry thereof defeat former deed; *Hanly v. Morse*, 32 Me. 287 (dissenting opinion), on effect of notice of unrecorded deed upon rights of subsequent purchaser; *Hill v. McNichol*, 76 Me. 314, holding purchaser with notice of unrecorded deed from one without notice gets good title; *Whittemore v. Bean*, 6 N. H. 47, holding purchaser without notice of unrecorded deed from devisee of original grantor protected against unrecorded deed.

Cited in reference notes in 1 A. D. 696, on constructive notice of prior unrecorded conveyance; 38 A. D. 130, on effect of actual or constructive notice of unrecorded deed; 16 A. D. 337, on validity of unrecorded instruments as against persons having notice thereof; 23 A. D. 185, on validity as to subsequent creditors with notice, of unrecorded marriage settlement; 31 A. S. R. 217, on conveyance of title by unrecorded deeds.

Cited in note in 21 E. R. C. 815, on effect of actual notice of prior unrecorded deed.

Sufficiency of notice.

Cited in *Reed v. Munn*, 80 C. C. A. 215, 148 Fed. 737, holding stockholder's knowledge of outstanding equitable title not attributable to corporation; *Lawrence v. Tucker*, 7 Me. 195, holding implied notice of conveyance not recorded must leave no reasonable doubt of existence of conveyance; *Wilson v. Hunter*, 30 Ind. 466 (dissenting opinion), on sufficiency of notice of unrecorded mortgage to put purchaser on inquiry; *Martin v. Dryden*, 6 Ill. 187, holding attachment lien dates back to date of levy when followed by judgment being notice to purchasers; *Smith v. Gibson*, 15 Minn. 89, Gil. 66, holding record of land contract for purchase of unoccupied land not notice to subsequent purchaser; *Flynt v. Arnold*, 2 Met. 619, on effect of record of mortgage as against subsequent mortgage; *Grundies v. Reid*, 107 Ill. 304, on effect of record of deed where

one appearing to hold title by one name known by another; *Bell v. Twilight*, 22 N. H. 500, on sufficiency of description of unrecorded deed referred to in mortgage to charge mortgagee with notice; *Janvrin v. Janvrin*, 60 N. H. 169, holding purchaser charged with notice of unrecorded deed where he has knowledge of facts inviting inquiry; *Dougherty v. Western & A. R. Co.* 53 Ga. 304, on effect of designation by chief engineer of boundary of right of way.

Cited in reference note in 1 A. S. R. 300, on notice as either express or implied.

— Possession as notice generally.

Cited in *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357,—on visible possession as notice of title; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847, on possession of *cestui que trust* as constructive notice to purchaser of legal title from trustees; *Stevens v. Magee*, 81 Miss. 644, 33 So. 73, on nature of change of possession of land occupied by tenants necessary to constitute notice of sale; *Hamilton v. Fowlkes*, 16 Ark. 340, holding visible possession by settler sufficient to put purchaser on inquiry; *Fair v. Stevenot*, 29 Cal. 486, holding possession under unrecorded deed evidence admissible in proof of title; *Smith v. Yule*, 31 Cal. 180, 89 A. D. 167, holding vendee's possession, with unrecorded conveyance, not notice to subsequent purchaser whose conveyance is first recorded; *McRae v. McMinn*, 17 Fla. 876, holding possession by other than grantor of land puts purchaser on inquiry to ascertain title; *Stockton v. National Bank*, 45 Fla. 590, 34 So. 897, holding attachment creditor unaffected by unrecorded deed, because hold-over tenant attorns to grantee; *Hewes v. Wiswell*, 8 Me. 94, holding entry under unrecorded deed with visible occupancy not equivalent of registry; *Knox v. Silloway*, 10 Me. 201, holding tenant in common in enjoyment of rights necessarily in possession of whole; *Matthews v. Demeritt*, 22 Me. 312, holding visible possession of estate by grantee, though no "visible change" implied notice to subsequent purchaser; *Boggs v. Anderson*, 50 Me. 161, holding second mortgagee notified where father in possession gave deed to son for support taking mortgage back; *Lash v. Hardick*, 5 Dill. 505, Fed. Cas. No. 8,097, holding possession under unrecorded deed must be open, notorious, and exclusive to afford notice to judgment creditor; *Sheldon v. Conner*, 48 Me. 584, on effect of open possession as constructive notice of unrecorded deed; *Pomroy v. Stevens*, 11 Met. 244, holding "open occupation, etc." insufficient notice to third person of unrecorded deed; *Jenkins v. Bodley, Smedes & M. Ch.* 338, holding actual possession of land constructive notice of nature and extent of rights of occupant; *Vaughn v. Tracy*, 22 Mo. 415, holding possession of land under unrecorded deed not, as matter of law, actual notice to subsequent purchaser; *Pritchard v. Brown*, 4 N. H. 397, 17 A. D. 431, holding possession of land by *cestui que trust* notice of trust to purchaser; *Rogers v. Jones*, 8 N. H. 264, holding notice of possession of third person sufficient to put purchaser on inquiry; *Patten v. Moore*, 32 N. H. 382, holding person purchasing land in possession of third person has constructive notice of title of latter; *Cook v. Travis*, 20 N. Y. 400 (affirming 22 Barb. 338), holding possession by judgment debtor after sale not notice to subsequent mortgagee under junior judgment; *Tuttle v. Jackson*, 6 Wend. 213, 21 A. D. 306, holding purchaser at sheriff's sale has constructive notice of unrecorded deed where grantee is in actual possession; *Mainwarring v. Templeman*, 51 Tex. 205, holding that under statutes possession either in person or by tenant equivalent to registration; *Rublee v. Mead*, 2 Vt. 544, holding possession under unrecorded deed sufficient

notice of title against person attaching against person having record title; dissenting opinions in *Wickes v. Lake*, 25 Wis. 71; *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183,—on sufficiency of possession to put purchaser upon inquiry as to title; *Brown v. Volkening*, 64 N. Y. 76, holding possession to be equivalent to actual notice must be actual, open, and visible occupation; *Adams-Booth Co. v. Reid*, 112 Fed. 100, holding not constructive notice to mortgagee where young sons occupied the land and did business thereon; *Baker v. Thomas*, 61 Hun, 17, 15 N. Y. Supp. 359; *Union College v. Wheeler*, 59 Barb. 585, 5 Lans. 160; *Coleman v. Barklew*, 27 N. J. L. 357,—holding use by grantee of land having no buildings, for pasture, not notice of title; *Holmes v. Stout*, 10 N. J. Eq. 419, holding cutting wood occasionally not evidence of possession sufficient to put purchaser on inquiry; *Merritt v. Northern R. Co.* 12 Barb. 605, holding that staking out line of railroad and setting fence posts insufficient possession to charge subsequent purchaser; *Meehan v. Williams*, 48 Pa. 238, 22 Phila. Leg. Int. 164, holding occasional entries for mining coal insufficient possession to give notice of title to subsequent purchaser.

Cited in reference note in 28 A. D. 51, as to when possession is notice of occupant's title.

Cited in notes in 11 E. R. C. 548, on possession as evidence of seisin in fee; 13 L.R.A.(N.S.) 79, on requisites and sufficiency of notice of title by possession of land; 13 L.R.A.(N.S.) 89, on ambiguity and indefiniteness of possession of land as affecting notice of title; 13 L.R.A.(N.S.) 113, on possession of land by vendee under unrecorded deed as notice of title; 13 L.R.A.(N.S.) 100, on possession of land by tenant as notice of landlord's title or interest; 104 A. S. R. 343, on fencing and pasturing land as notice of rights; 104 A. S. R. 342, on cutting of wood and timber as notice of rights in land; 13 L.R.A.(N.S.) 87, on necessity of change of possession of land to give notice of title.

—Proof of notice.

Cited in *Loughridge v. Bowland*, 52 Miss. 546; *Williamson v. Brown*, 15 N. Y. 354; *Claiborne v. Holmes*, 51 Miss. 146,—holding notice, showing subsequent purchase to be in bad faith, must be clearly proved.

15 AM. DEC. 204, PALMER v. STEBBINS, 3 PICK. 188.

Contracts in restraint of trade.

Cited in *Kellogg v. Larkin*, 3 Chand. (Wis.) 133, 3 Pinney (Wis.) 123, 56 A. D. 164, holding agreement to store wheat for one person only at specified place for specified time and compensation, valid; *Oregon Steam Nav. Co. v. Hale*, 1 Wash. Terr. 283, 34 A. R. 803, holding a greater restraint in respect to territory cannot be imposed than interest to be protected requires; *Crystal Ice Mfg. Co. v. San Antonio Brewing Asso.* 8 Tex. Civ. App. 1, 27 S. W. 210, holding ice dealer's contract with brewery to furnish it ice for one year, latter not to compete, valid; *Lange v. Werk*, 2 Ohio St. 519, holding contracts in partial restraint of trade illegal unless upon valuable consideration good reasons shown; *Lawrence v. Kidder*, 10 Barb. 641, holding contract not to compete in New York west of Albany in manufacture of palm-leaf beds, void; *Chappel v. Brockway*, 21 Wend. 157, on necessity of consideration in contracts in restraint of trade and reason for entering into such contract; *Webster v. Buss*, 61 N. H. 40, 60 A. R. 317, upholding agreement to relinquish teaming business limited as to place but unlimited as to time; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155, holding contract by distilling corporation which tends to prevent competition within state, void; *Mit-*

chell v. Branham, 104 Mo. App. 480, 79 S. W. 739, holding contract not to engage in saloon business in same town for three years, valid; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 68 A. S. R. 403, 41 L.R.A. 189, 50 N. E. 509, holding contract by business managers of three corporations to form new corporation agreeing not to compete for five years, valid; Gameville Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 39 A. S. R. 458, 22 L.R.A. 673, 35 N. E. 98, holding contract not to compete in manufacture or sale of fire-alarm machines for ten years, illegal; Taylor v. Blanchard, 13 Allen, 370 90 A. D. 203, holding contract never to "carry on trade of manufacturing and selling shoe cutters within state," illegal; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, on validity of sleeping car company contract "not to engage in business of manufacturing, using, or hiring sleeping cars;" Holmes v. Martin, 10 Ga. 503, holding restriction in sale of town lot that it should not be used for tavern, valid; Whitney v. Slayton, 40 Me. 224, holding agreement not to engage in iron casting business within 60 miles, valid on sale of foundry; Ross v. Sadgbeer, 21 Wend. 166, holding consideration not implied from seal on bond against engaging in certain business in specified locality.

Cited in reference notes in 43 A. D. 96, on validity of contracts in restraint of trade; 63 A. D. 385, on validity of contract in reasonable restraint of trade; 63 A. D. 385, on necessity for consideration in contract in restraint of trade.

Cited in notes in 31 A. D. 122: 1 L.R.A. 456; 22 L. ed. U. S. 316,—on contracts in restraint of trade; 92 A. D. 752, on validity of contracts in restraint of trade; 4 L.R.A. 154, on validity of contracts in partial restraint of trade; 92 A. D. 758, on restraint as to space in contracts in restraint of trade; 74 A. S. R. 240, on what combinations constitute unlawful trusts.

Burden of proof in action on bond.

Cited in Philbrook v. Burgess, 52 Me. 271, holding burden of proving performance of condition of bond upon defendant on plea of *nil debet*.

15 AM. DEC. 207. WHITING v. EARLE, 3 PICK. 201.

Waiver of right to earnings of minor.

Cited in Lowell v. Newport, 66 Me. 78; Monaghan v. School Dist. No. 1, 38 Wis. 100; Morse v. Welton, 6 Conn. 547, 16 A. D. 73,—holding that father may by agreement relinquish to minor son his right to son's services; Culberson v. Alabama Constr. Co. 127 Ga. 599, 9 L.R.A. (N.S.) 411, 56 S. E. 765, 9 A. & E. Ann. Cas. 507, holding father's assent implied, he not objecting to employment nor demanding earnings; Armstrong v. McDonald, 10 Barb. 300, holding father's assent implied where minor makes contract for services with father's knowledge, father not objecting; House v. House, 5 Luzerne Leg. Reg. 61; Atkins v. Sherbino, 58 Vt. 248, 4 Atl. 703,—holding that father cannot recover minor's wages when latter made contract with father's knowledge and without objection; Treadwell v. Wells, 4 Colo. 260, holding minor entitled to earnings where he contracts on his own account and with father's assent; Boynton v. Clay, 58 Me. 236, holding action lies by minor through next friend with mother's consent for services, father being dead; Waugh v. Emerson, 79 Ala. 295, holding that minor may discharge employer by receipting for money received where father dead and mother married; Schoonover v. Sparrow, 38 Minn. 393, 37 N. W. 949, holding action lies by minor for services rendered, father knowing of contract and not objecting; State ex rel. Jewett v. Barrett, 45 N. H. 15, holding father may relinquish right to minor's services by informal indenture

of apprenticeship not binding on infant; *Com. ex rel. Gilkeson v. Gilkeson*, 1 Phila. 194, 8 Phila. Leg. Int. 86, 5 Clark (Pa.) 30, 3 Am. L. J. 505, holding father could not reassert parental claim against daughter's will where latter fulfills informal apprenticeship; *Varney v. Young*, 11 Vt. 258, on right of father to relinquish by agreement right to services of minor son; *Kerwin v. Wright*, 59 Ind. 369, holding mother's indenture of apprenticeship of minor providing for compensation protects master for payments made minor; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569, holding that fact of emancipation to be question for jury where minor lived with uncle; *Wodell v. Coggeshall*, 2 Met. 89, 35 A. D. 391, holding no action lies by father for enticing away minor where minor emancipated; *Com. ex rel. Terry v. Dougherty*, 1 Legal Gaz. Rep. 63, holding father's right to custody lost where child's aunt with father's consent supported child for eight years.

Cited in reference notes in 31 A. D. 119, on earnings of infant child; 53 A. D. 779, on right of father to earnings of minor child.

Cited in notes in 35 A. R. 119, on presumption of parent's relinquishment of right to earnings of child; 113 A. S. R. 115, on acts amounting to emancipation of infants.

—As affecting father's creditors.

Cited in *Merrill v. Hussey*, 101 Me. 439, 64 Atl. 819, holding insolvent father may relinquish right to future earnings of minor as against his creditors; *McCall v. Sinclair*, 14 Ala. 760, holding creditors of father cannot take earnings of minor son where father relinquished right to earnings; *Johnson v. Silsbee*, 49 N. H. 543, holding emancipated minor daughter's earnings as housekeeper for father not subject to payment of father's debts; *Manchester v. Smith*, 12 Pick. 113, holding father's creditors cannot attach minor's wages where minor with father's consent hired out latter not claiming earnings; *Donegan v. Davis*, 66 Ala. 362, holding minor's wages released from father's creditors where minor supports himself, paying for board at home.

—Proof of waiver.

Cited in *Dierker v. Hess*, 54 Mo. 246; *Everett v. Sherfey*, 1 Iowa, 356,—holding that emancipation of minor may be proved by direct proof or implied from circumstances.

Garnishee as trustee.

Cited in *Adams v. Blodgett*, 2 Woodb. & M. 233, Fed. Cas. No. 46, holding liability of garnishee that of trustee.

15 AM. DEC. 208, *COOK v. HULL*, 3 PICK. 269.

Rights of riparian owner.

Cited in reference notes in 26 A. D. 390, on rights of riparian proprietor; 16 A. D. 698, on rights in water course; 35 A. D. 239, on prescriptive right to overflow another's land; 36 A. D. 338, on water rights obtained by appropriation and prescription.

Cited in notes in 23 A. D. 513, on extent of owner's right in stream flowing through his land; 79 A. D. 643, on what is reasonable use of water for irrigation purposes by riparian owner; 32 A. R. 165, on rights of riparian owners as to ice.

—Right to divert.

Cited in *Stein v. Burden*, 29 Ala. 127, 65 A. D. 394, holding riparian proprietor diverting running water liable to lower proprietor for material diminution; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674, holding riparian proprietors entitled to reason-

able use of waters of stream for purpose of irrigation; *Blanchard v. Baker*, 8 Me. 253, 23 A. D. 504, holding right to divert water of stream for irrigation must be so exercised as not to essentially diminish quantity; *Stowell v. Lincoln*, 11 Gray, 434; *Newhall v. Ireson*, 8 Cush. 595, 54 A. D. 790,—holding that action lies against upper riparian owner for material diminution by division though no actual damage shown; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 A. D. 85, holding action does not lie against upper riparian owner for diversion unless actual damage shown; *Garwoods v. New York C. & H. R. R. Co.* 17 Hun, 356, holding injunction lies restraining upper riparian owner from diverting water of stream into tanks and reservoirs; *Paine v. Woods*, 108 Mass. 160, on right of milldam owner under mill act to cut ice on land overflowed by erection of dam; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 A. R. 580, holding owner of easement to overflow another's land not entitled to ice formed on water covering land; *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446, holding owner of land on one side of river cannot divert unreasonable amount of water

— **Loss of right to use water.**

Cited in note in 41 L.R.A. 758, on nonforfeiture of right to use and flow of water in stream by mere nonuse.

15 AM. DEC. 209, *WHITE v. HALE*, 3 PICK. 291.

Admissions by joint debtors.

Cited in *McCutchin v. Bankston*, 2 Ga. 244, holding admissions by member of firm not party to suit admissible as evidence to charge other members; *Parker v. Merrill*, 6 Me. 41, holding declarations by partner after dissolution admissible for plaintiff in action against all; *Cady v. Shepherd*, 11 Pick. 400, 22 A. D. 379, holding admissions of partner after dissolution in relation to demand against firm not barred, admissible against copartner; *Reid v. McNaughton*, 15 Barb. 168; *Montgomery v. Dillingham*, 3 Smedes & M. 647,—holding admissions of joint maker of note evidence against comakers in suit against them all; *Mann v. Locke*, 11 N. H. 246, holding admissions by partner after dissolution competent against firm as to contracts made before dissolution; *Dunham v. Dodge*, 10 Barb. 566; *Armstrong v. Farrar*, 8 Mo. 627,—holding declarations by one devisee as to competency of testator evidence against all.

Effect on limitations of payment or promise by joint debtor — Payment.

Cited in *Sigourney v. Drury*, 14 Pick. 387, holding note within statute as against surety where principal in joint and several note paid interest annually; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 A. D. 95, holding payment by one joint and several maker before bar does not affect defense of other makers; *Exeter Bank v. Sullivan*, 6 N. H. 124, holding payment by surety on note does not take case out of statute as to other sureties; *Craig v. Callaway County Court*, 12 Mo. 94 (dissenting opinion), on effect of payment of interest by one joint obligor on operation of statute.

— Promise.

Cited in *Bird v. Adams*, 7 Ga. 505, holding promise made to former holder of negotiable note by maker sufficient to take case out of statute; *Brewster v. Hardeman*, Dudley (Ga.) 138, holding debt not revived against other partners by promise of one partner after dissolution and debt barred; *Cox v. Bailey*, 9 Ga. 467, 54 A. D. 358, holding promise by one joint promisor before bar takes case out of statute as to all.

Cited in reference note in 54 A. D. 360, on acknowledgment by one of several joint and several obligors as affecting limitation of action against others.

Cited in notes in 62 A. D. 102, on promise, acknowledgment, or payment by joint debtor, partner, etc., as taking case out of statute of limitations; 65 A. S. R. 686, on part payment or acknowledgment of barred claim by one joint debtor; 15 L.R.A. 656, on power of partner after dissolution to interrupt statute of limitations as to firm debt.

15 AM. DEC. 210, *PIERCE v. PIERCE*, 3 PICK. 299.

Refusal of divorce for plaintiff's fault or connivance.

Cited in *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855, holding divorce cannot be granted where both parties are found guilty of matrimonial offense; *Karger v. Karger*, 19 Misc. 236, 44 N. Y. Supp. 219, 26 N. Y. Civ. Proc. Rep. 161, holding husband not entitled to divorce for wife's adultery when he could have prevented it; *May v. May*, 108 Iowa, 1, 75 A. S. R. 202, 78 N. W. 703, holding wife's adultery committed with spy of husband does not entitle him to divorce; *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 70 N. E. 837, holding party guilty of adultery not entitled to divorce on ground of abandonment; *Dennis v. Dennis*, 68 Conn. 186, 57 A. S. R. 95, 34 L.R.A. 449, 36 Atl. 34, holding husband's adultery brought about by wife's connivance not ground for divorce; *Viertel v. Viertel*, 86 Mo. App. 494, holding wife's adultery with connivance of husband not ground for divorce; *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277, holding provocation a defense in action for divorce for extreme cruelty where words alone relied on; *Loud v. Loud*, 129 Mass. 14, holding appearance by wife in foreign court and decree against her prevents decree in her favor; *Pratt v. Pratt*, 157 Mass. 503, 21 L.R.A. 97, 32 N. E. 747, on effect of husband's connivance in wife's adultery on husband's action for divorce.

Cited in reference notes in 15 A. D. 547; 25 A. D. 99; 26 A. D. 732; 27 A. D. 80,—as to when plaintiff's misconduct is a bar to suit for divorce; 49 A. S. R. 783, on effect upon right to divorce of plaintiff's violation of marriage contract; 57 A. S. R. 101, on connivance as defense against divorce on ground of adultery.

Cited in notes in 29 A. D. 679, on necessity that ill-treatment must not be provoked in order to entitle to divorce; 12 L.R.A. 527, on propriety of methods of obtaining proof of adultery to obtain divorce; 25 L.R.A. 565, on how far divorce statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong.

15 AM. DEC. 214, *COM. v. BLANDING*, 3 PICK. 304.

Place of committing crime.

Cited in *Com. v. Macloon*, 101 Mass. 1, 100 A. D. 89, holding foreigner may be convicted of manslaughter of person dying within state though wound inflicted elsewhere; *Crow v. State*, 18 Ala. 541, holding person who with intent to convert slave entices him to another county indictable there; *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400, 82 C. C. A. 135, 153 Fed. 1, holding receiving rebates in violation of Elkins law continuous crime punishable in any district transportation conducted; *Com. v. Pettes*, 114 Mass. 307, holding felony caused to be committed in one county by letters written elsewhere indictable in that county; *Lindsey v. State*, 38 Ohio St. 507, holding one who employs innocent agent to utter forged deed in another state liable to prosecution therein; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034, holding that tendering money by letter to officer to induce him to violate duty punishable where letter received.

Cited in note in 19 L.R.A. 775, on locality of crime committed through agency of mails or of carriers.

— Libel.

Cited in *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102, holding person composing libel in one jurisdiction and causing its publication in another punishable in latter; *Re Cook*, 49 Fed. 833, on liability of person to punishment in place where libel published though party in another jurisdiction; *State ex rel. Taubman v. Huston*, 19 S. D. 644, 117 A. S. R. 970, 104 N. W. 451, 9 A. & E. Ann. Cas. 381, holding newspaper proprietor sending paper containing libel by mail punishable where printed and in county received; *Belo v. Wren*, 63 Tex. 686, holding action for libel published in newspaper may be brought in any county where newspaper circulated; *Re Kowalsky*, 73 Cal. 120, 14 Pac. 399, holding § 9, art. 1 of Constitution applies to one causing publication of libel in newspaper.

Cited in reference note in 117 A. S. R. 971, on place where libel is committed when published in one state but circulated in another.

Cited in note in 15 A. S. R. 337, on place where newspaper libel committed.

Malice as element of libel.

Cited in reference notes in 37 A. D. 36, on malice in libel; 27 A. S. R. 369, on alleging of malicious publication in criminal libel.

Cited in note in 2 L.R.A. 129, 130, on malice as element of libel.

Presumption of malice.

Cited in note in 21 A. D. 114, on inference of malicious intent if publication is false.

Malice as question for jury in libel.

Cited in *Com. v. Sanderson*, 2 Clark (Pa.) 54, 3 Pa. L. J. 269, holding question of malice in publication of libel for jury where defendant permitted to rebut presumption; *Com. v. Anthes*, 5 Gray, 185 (dissenting opinion), on right of jury to determine law and fact on indictment for libel.

Liability for libel.

Cited in note in 86 A. D. 91, 92, on liability of newspapers for libel.

Publication of libel.

Cited in *Sproul v. Pillsbury*, 72 Me. 20, holding declaration for newspaper libel sufficient allegation being that libel was printed and published in newspaper; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144, holding distinct deliveries of pamphlet containing libel admissible to substantiate publication and as basis of recovery.

Cited in reference note in 52 A. D. 770, on what constitutes publication of libel.

Privileged communications.

Cited in reference notes in 66 A. D. 486, on what are privileged communications; 78 A. D. 290, as to when publication of judicial proceedings is libelous.

Cited in notes in 2 A. D. 433, on statements before judicial bodies as privileged; 7 E. R. C. 731, on liability of counsel for defamatory words published in course of judicial proceeding.

Libel; truth as defense.

Cited in *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689, holding proof of truth of an improper publication made pending suit no defense in contempt proceedings; *Perry v. Porter*, 124 Mass. 338, holding under statute truth of libel sufficient justification in civil as well as criminal actions; *Cowley v. Pulsifer*, 137 Mass. 392, 50 A. R. 318, holding publication of petition to disbar attorney filed in clerk's office in vacation not privileged; *State v. Conklin*, 47 Or. 509, 84 Pac. 482, on admissibility of proof of the truth of matter constituting criminal libel, as defense.

Cited in reference notes in 31 A. D. 780, on truth as justification and in mitigation; 97 A. D. 615, on truth as defense to criminal prosecution for libel; 77 A. S. R. 564, on belief in truth of charge as justification or excuse for libelous publication.

Cited in notes in 21 A. D. 114, on truth as justification and in mitigation; 91 A. S. R. 290; 21 L.R.A. 510,—on truth as defense to criminal prosecution for libel; 9 E. R. C. 194, on admissibility in action for libel of proof of truth of criminal charge.

Liberty of the press.

Cited in *Fitzpatrick v. Daily States Pub. Co.* 48 La. Ann. 1116, 20 So. 173; *State v. McKee*, 73 Conn. 18, 84 A. S. R. 124, 49 L.R.A. 542, 46 Atl. 409,—on what was understood by "liberty of the press" at time of framing Constitution.

Cited in note in 13 L.R.A. 420, on provisions as to malicious libel as violation of guaranty of free speech.

Libel as a crime.

Cited in *Comm. v. Whitmarsh*, Thacher, Crim. Cas. 441; *State v. Burnham*, 9 N. H. 34, 31 A. D. 217,—holding that libel an offense for which party is liable to be indicted and punished.

Cited in reference note in 73 A. S. R. 913, on libel as a public offense.

Damages for newspaper libel.

Cited in note in 15 A. S. R. 340, 364, 368, on elements increasing or mitigating damages for newspaper libel.

15 AM. DEC. 226, POTTER v. HALL, 3 PICK. 368.

Property liable to attachment.

Cited in *Harmon v. Moore*, 59 Me. 428, holding attachment of horses harnessed to mail wagon in charge of mail-carrier, void; *Mack v. Parks*, 8 Gray, 517, 69 A. D. 267, holding watch upon debtor's person not liable to attachment; *Eddy v. O'Hara*, 132 Mass. 56, on right to subject to attachment wages of seaman on coasting voyage; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 A. D. 336, holding locomotive engines, freight, and passenger cars of railway liable to attachment when not in use.

15 AM. DEC. 228, BODWELL v. OSGOOD, 3 PICK. 379.

What publications are privileged.

Cited in *White v. Nicolls*, 3 How. 266, 11 L. ed. 591, holding letter to President of United States containing charges against officer, actionable if false and malicious; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775, holding letter to superintendent of census charging enumerator with murdering two Union soldiers and defrauding writer, actionable; *Logan v. Hodges*, 146 N. C. 38, 59 S. E. 349, holding postal card containing libelous communication concerning official not privileged when not addressed to proper official; *Clemmons v. Danforth*, 67 Vt. 617, 48 A. S. R. 836, 32 Atl. 626, holding words spoken in judicial proceedings privileged only so far as material to matter in controversy; *Dow v. Long*, 190 Mass. 138, 76 N. E. 667, on what constitutes libel in commenting on attitude concerning public of person seeking or holding office; *Johnson v. Brown*, 13 W. Va. 71, holding plea that libelous publication was made in pleadings must show pertinency or must deny malice.

Cited in reference notes in 31 A. D. 224; 16 A. S. R. 596,—on privileged communications; 66 A. D. 486, on what are privileged communications; 43 A. S. R.

596, on privilege in discussion of official conduct; 56 A. S. R. 177, on qualified privilege in communication necessary to protection of interests.

Cited in notes in 27 A. D. 158, on privileged communications; 34 A. D. 249, on communication designed to secure removal of officer as libel; 9 E. R. C. 81, on communication made in discharge of public or private duty as privileged.

Defense to libel suit.

Cited in *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding probable cause for publication of what is false about another unaccompanied by good motives, no defense.

Presumption and burden of proof as to malice.

Cited in *Gilmer v. Eubank*, 13 Ill. 271, holding malice presumed where words actionable in themselves are spoken unless when spoken under privilege; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170, holding malice implied where charges in libel published in newspaper are false; *French v. White*, 4 W. Va. 170, on presumption of malice in deliberate publication of libel knowing it to be false; *Center v. Spring*, 2 Iowa, 393, on necessity of proving malice in action for prosecution felony charge without probable cause.

Cited in reference notes in 76 A. D. 52, on implication of malice where publication is false; 66 A. D. 202, on presumption of malice from publication of libel.

Evidence of malice.

Cited in *Symonds v. Carter*, 32 N. H. 458, holding evidence of other words or acts than those in complaint tending to show malice, admissible.

Cited in reference note in 30 A. S. R. 533, on evidence of malice in publishing libel.

Rebuttal of malice.

Cited in *Knight v. Foster*, 39 N. H. 576; *King v. Root*, 4 Wend. 113, 21 A. D. 102 (dissenting opinion),—on admissibility of evidence of probable cause for purpose of rebutting evidence of malice.

Cited in reference note in 76 A. D. 53, on rebuttal of malice by showing communication privileged.

Aggravation of damages by defense.

Cited in *Denslow v. Van Horn*, 16 Iowa, 476, on effect of failure to prove allegations of unchastity in action for breach of promise, as affecting damages.

Excessive damages.

Cited in *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217, holding damages for violation of patent right not excessive unless greater than sufficient to indemnify patentee.

—As ground for new trial.

Cited in *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 A. D. 785; *Aldrich v. Palmer*, 24 Cal. 513,—holding court will not disturb damages as fixed by jury unless verdict not result of cool dispassionate judgment; *Howard v. Grover*, 28 Me. 97, 48 A. D. 478, on power of court to set aside verdict on ground of excessive damages.

Cited in notes in 38 A. D. 106; 8 E. R. C. 459,—on excessive damages as ground for new trial.

Malicious prosecution; when action lies.

Cited in note in 26 A. S. R. 130, on want of jurisdiction in court in which prosecution was commenced as defense to action for malicious prosecution.

Distinguished in *Lark v. Bande*, 4 Mo. App. 186, holding party telling officer

alleged facts accusing person of felony but without directing arrest not liable for malicious prosecution; *Castro v. DeUriarte*, 12 Fed. 250, 2 N. Y. Civ. Pro. Rep. 210, holding action for malicious prosecution lies where subject-matter and person were within jurisdiction of magistrate or court.

15 AM. DEC. 233, FANNING v. CHADWICK, 3 PICK. 420.

When assumpsit lies.

Cited in *Pickering v. De Rochemont*, 45 N. H. 67, holding assumpsit lies by person creating trust for unexpended balance in trustee's hands trust purpose being accomplished.

Remedy between joint owners or tenants in common.

Cited in *Clark v. Sidway*, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. Rep. 327, holding persons jointly purchasing land for speculation may sue each other at law for reimbursement of money invested; *Andrews v. Murphy*, 12 Ga. 431, holding equity has concurrent jurisdiction with courts of law over matters of account between tenants in common; *Maguire v. Pingree*, 30 Me. 508, holding one joint owner of vessel cannot sue other at law for proportion of avails in absence of settlement; *Nelson v. Clapp*, 127 Mass. 476, holding action at law lies for share of dividends received by cotenant on stock purchased for joint benefit; *Blood v. Blood*, 110 Mass. 545, on right of tenant in common to maintain bill for account of profits of personaity; *Coleman v. Coleman*, 1 Pearson (Pa.) 470, holding tenants of mines liable to account at common law and under act of 1850; *Peabody v. Allen*, 194 Mass. 345, 80 N. E. 582, holding under statute administrator required to retain assets to satisfy unascertained amount due on intestate's joint adventure.

Cited in note in 23 A. D. 393, on cotenants.

— Assumpsit.

Cited in *King v. Martin*, 67 Ala. 177, holding assumpsit lies by tenant in common against other tenants for share of estate received by latter; *Dickinson v. Williams*, 11 Cush. 258, 59 A. D. 142, holding assumpsit lies by tenant in common against cotenant for money expended in removing joint encumbrance; *Shepard v. Richard*, 2 Gray, 424, 61 A. D. 473, holding assumpsit lies against cotenant receiving more than his share of profits leaving balance after proper deductions; *Wheeler v. Wheeler*, 111 Mass. 247, holding assumpsit lies against cotenant on his agreement to repay proportion of expenditures for estate; *McLellan v. Longfellow*, 34 Me. 552, implying promise to pay co-owner from admission of correctness of account by joint owner after sale of his interest; *Cochran v. Carrington*, 25 Wend. 409, holding assumpsit lies against cotenant for share of sum received by latter for hire of joint property.

Cited in reference notes in 61 A. D. 475, on assumpsit against cotenant; 59 A. D. 144, on right of tenant in common to sue cotenant in assumpsit when account authorized.

Cited in notes in 14 A. D. 587; 28 L.R.A. 845,—on remedy by action in assumpsit to compel cotenants to account for use and occupation and rents and profits.

Remedy between partners.

Cited in *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516, holding partner must account for profits made by clandestinely carrying on another trade injurious to partnership; *Stevens v. Baker*, 1 Wash. Terr. 316, holding partner cannot sue copartner at law upon unsettled copartnership indebtedness; *Gibson v. Moore*, 6

N. H. 547, holding action lies by partner against copartner for balance found due on portion of partnership affairs; *Richmond v. Parker*, 12 Met. 48; *Burley v. Harris*, 8 N. H. 233, 29 A. D. 650; *Williams v. Henshaw*, 11 Pick. 79, 22 A. D. 366,—on right of one partner to maintain action at law against copartner to recover balance admitted; *Martin v. Solomon*, 5 Harr. (Del.) 344, holding partners may sue at law, after settlement and admitted balance, without express promise to pay; *Goldthwait v. Day*, 149 Mass. 185, 21 N. E. 359, holding bill on mutual account imports offer to pay balance found due from plaintiff to defendant.

Cited in notes in 12 A. D. 651, on action between partners on final settlement; 40 A. S. R. 574, on remedy which one partner has by suit or action against another after dissolution.

— **Assumpsit.**

Cited in *Dakin v. Graves*, 48 N. H. 45, holding assumpsit lies against copartner for share of assets in latter's hands at dissolution unaccounted for; *Textile Workers Union No. 1 v. Barrett*, 19 R. I. 663, 36 Atl. 5, holding assumpsit lies by one partner against copartner after dissolution to recover ascertained balance; *Ryder v. Wilcox*, 103 Mass. 24, holding assumpsit does not lie against copartner for breach of agreement in failing to make annual settlements; *Capen v. Barrows*, 1 Gray, 376, holding assumpsit does not lie against copartner for damages for neglect of business no settlement being had.

When partnership exists.

Cited in notes in 19 E. R. C. 422, on joint owners as partners; 27 L.R.A. 494, on sufficiency of facts and circumstances to constitute real estate partnership property.

Auditor's report as evidence.

Cited in *Holmes v. Hunt*, 122 Mass. 505, 23 A. R. 381, upholding statute making auditor's report prima facie evidence.

15 AM. DEC. 235, BABCOCK v. THOMPSON, 3 PICK. 446.

Bill of particulars.

Cited in *Carson v. Calhoun*, 101 Me. 456, 64 Atl. 838, holding in writ containing money counts and "account annexed" proofs limited by specification "for money earned;" *Gooding v. Morgan*, 37 Me. 419, holding that in writ containing only money counts proofs are limited to bill of particulars.

— **Requirements.**

Cited in *Whitehouse v. Schalck*, 5 W. N. C. 122, holding bill in contested election cases showing illegal votes must be as specific as special declaration; *Gilpin v. Howell*, 5 Pa. 41, 45 A. D. 720, holding bill of particulars should disclose gist of action conveying as much information as special declaration; *Benedict v. Swain*, 43 N. H. 33, holding specification filed by court order become part of declaration and cannot be withdrawn without court order.

Cited in reference notes in 51 A. D. 51, on necessity, sufficiency, and effect of bill of particulars; 45 A. D. 730, on degree of definiteness of bill of particulars.

— **Amendment of.**

Cited in reference notes in 11 A. S. R. 611; 120 A. S. R. 343,—on right to amend bill of particulars.

— **In criminal cases.**

Cited in *Com. v. Snelling*, 15 Pick. 321, holding that in indictment for libel particulars may be required and proof limited to such particulars; *Com. v. Maize*,

4 *Luzerne Leg. Reg.* 171, 7 *Legal Gaz.* 199, 3 *Legal Chron.* 29, holding bill of particulars in criminal cases are allowed defendant in discretion of court.

Recovery of money paid on illegal contract.

Cited in *Pearce v. Foote*, 113 Ill. 228, 58 A. R. 414 (dissenting opinion), on right of recovery of money advanced pursuant to contract founded upon illegal consideration; *White v. Hunter*, 23 N. H. 128, holding money paid on contract unlawful on account of immorality or against public policy not recoverable.

Cited in notes in 6 E. R. C. 490, on right of party to recover money paid under an illegal contract; 3 A. S. R. 742, on right of one to avoid his contract upon ground of his own fraud; 5 L.R.A.(N.S.) 907, on relief to party defrauded by fraudulent scheme although he went into the scheme with intention of defrauding others.

— Gaming contract.

Cited in *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646, on right of recovery of money advanced for the purpose of dealing in "futures" or "options;" *Stewart v. Wright*, 77 C. C. A. 499, 147 Fed. 321 (dissenting opinion), on right to recover money lost at gaming accompanied by cheating; *Davis v. Holbrook*, 1 La. Ann. 176, holding no action lies for money deposited with stakeholder on election bet, such betting being criminal offense; *Ball v. Gilbert*, 12 Met. 397, holding stakeholder of money bet on election liable to trustee process by creditor of either depositors; *White v. Buss*, 3 Cush. 448, holding money loaned in public house for purpose of playing at cards for money not recoverable; *Low v. Blanchard*, 116 Mass. 272, holding that under statute person losing at gaming cannot recover unless suit brought within three months; *Scollans v. Flynn*, 120 Mass. 271, holding payment by "A" of "B's" gambling debt "A" knowing the fact gives latter no ground of action; *French v. Marshall*, 136 Mass. 564, holding under statute right of infant to recover money lost at gaming expired at end of three months; *Chapin v. Haley*, 133 Mass. 127, holding charge leaving to jury question of gambling feature of "draw poker" where loser applied for poor-debtor's oath, unexceptionable; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576, holding it unnecessary to show interest in action on policy on life of another; *Cooper v. Rowley*, 29 Ohio St. 547, holding that action authorized by act for prevention gaming is action for penalty within meaning of Code.

Cited in reference notes in 18 A. D. 501, on gaming contracts; 36 A. D. 757; 40 A. D. 421,—on right to recover money lost in gaming.

15 AM. DEC. 238, CHICHESTER v. CANDE, 3 COW. 39.

Conclusiveness of judgment or order.

Cited in reference notes in 52 A. D. 225, as to when judgments are not a bar to subsequent actions; 52 A. S. R. 597, on application of doctrine *res judicata* to motions and orders; 88 A. S. R. 755, on order of court on motion or summary application as *res judicata*.

Cited in note in 96 A. D. 778, on necessity to conclusiveness of judgment that it be rendered on the merits.

Powers of court as to amendments.

Cited in *Sedgwick v. Dawkins*, 16 Fla. 198, holding circuit court has power to inquire into judgment irregularly entered by clerk and correct on parol evidence; *Shirley v. Phillips*, 17 Ill. 471, holding amendment of judgment cannot affect intervening rights of third person acquired between rendition and amendment; *Berthold v. Fox*, 21 Minn. 51, holding money judgment erroneously entered by

clerk in replevin amendable in discretion of court; *Bowman v. McLaughlin*, 45 Miss. 461, holding presumption exists that circuit court's action in permitting amendment of pleadings is correct in absence of record; *Park v. Church*, 5 How. Pr. 381, Code Rep. U. S. 47, on power of court to amend defects in form of execution; *Bowman v. De Peyster*, 2 Daly, 203, holding order allowing amendment of answer by setting up additional defense not appealable under Code; *Bank of Rochester v. Emerson*, 10 Paige, 359, on power of court to supply omission and cure defects in proceedings and process; *Sears v. Burnham*, 17 N. Y. 445, holding amendable error in judgment will not vitiate lien as against persons not misled or prejudiced thereby; *King v. Harris*, 34 N. Y. 330, on power of court to correct its own error in vacating judgment that was lien upon land; *Union Bank v. Bush*, 36 N. Y. 631, holding supreme court has power to amend statement in confession of judgment; *Cook v. Whipple*, 55 N. Y. 150, 14 A. R. 202, holding that amendment of verification to statement of judgment by confession may be made in collateral action; *Hunt v. Grant*, 19 Wend. 90, holding mistake in entering judgment for less than true sum amendable except as to subsequent equities; *Hill v. Hoover*, 5 Wis. 386, 68 A. D. 70, holding error of clerk in making record of judgment amendable where judgment correctly entered on minute book; *Rockwell v. Carpenter*, 25 Hun, 529 (dissenting opinion), on power of special term to correct mistake made by same judge in directing judgment; *Clute v. Clute*, 4 Denio, 241, holding execution issued before filing judgment record becomes effective upon filing record; *Neele v. Berryhill*, 4 How. Pr. 16, holding court has power to correct mistakes of attorney in entering judgment where substantial right involved; *King v. State Bank*, 9 Ark. 185, 47 A. D. 739, holding that circuit court may order record amended to speak the truth by exercise of equity powers; *Burkle v. Luce*, 1 N. Y. 163, holding substitute execution issued by court order in place of one lost admissible as primary evidence; *Geller v. Hoyt*, 7 How. Pr. 265, holding judgment correct except initial of middle name prior lien to subsequent judgments docketed before correction; *Ninis v. Sabine*, 44 How. Pr. 252, on equitable power of court to revive judgment in name of executor of judgment creditor on motion.

Cited in reference notes in 26 A. D. 166, on amendment of judgments; 44 A. D. 136; 47 A. D. 340,—on power of court to amend its record.

Cited in note in 15 A. D. 401, on allowance of amendments.

— Time of amendment generally.

Cited in *Coughran v. Gutcheus*, 18 Ill. 390, holding court's power over records after term limited to correction of errors and officer's mistakes, after notice; *Hall v. Williams*, 10 Me. 278, holding that erroneous judgment cannot be amended at subsequent term where error was upon part of court; *Andresen v. Lederer*, 53 Neb. 128, 73 N. W. 664; *De Kalb v. Hixon*, 44 Mo. 341,—holding court has power after appeal to amend its records so as to express accurately proceedings before appeal; *Frink v. Frink*, 43 N. H. 508, 80 A. D. 189, holding court has power to correct clerk's mistake in making up judgment twelve years after entry; *Grant v. Griswold*, 21 Hun, 509, on power of court to allow judgment to be entered against a party after his death; *Stewart v. Bennett*, 1 Fla. 487, holding before final judgment amendment to pleadings may be allowed on equitable terms.

— *Nunc pro tunc*.

Cited in *First Cong. Soc. v. Shaw*, 1 Mich. N. P. 96, holding rule to plead being defective as to name of plaintiff may be amended *nunc pro tunc*; *Re Christ-*

ern, 11 Jones & S. 523, 56 How. Pr. 5, holding that record of admission to citizenship may be amended by directing entry in minute book *nunc pro tunc*; Butler v. Lewis, 10 Wend. 541, holding common pleas judgment by confession not signed by proper judge not amendable *nunc pro tunc* by proper signing; People ex rel. Holdsworth v. Superior Court, 18 Wend. 675, holding court unauthorized to amend proceedings *nunc pro tunc* where declaration filed by mistake in another court; Produce Bank v. Morton, 67 N. Y. 199, 52 How. Pr. 157, holding amendment *nunc pro tunc* of judgment against two of three partners valid after creditor's action begun.

-When notice required.

Cited in Montgomery v. Merrill, 36 Mich. 97, holding adverse party entitled to notice on application to amend proof of service of process showing jurisdiction; Lewis v. Ross, 37 Me. 230, 59 A. D. 49, holding record amendable without notice where trustee entitled to costs but clerk omitted to recite allowance.

Entry or filing *nunc pro tunc*.

Cited in Roth v. Schloss, 6 Barb. 308, holding court may order transcript filed *nunc pro tunc* in another county where property seized on execution; Jones v. Porter, 6 How. Pr. 286, on right to file execution *nunc pro tunc* where judge's order issued two hours before filing; Bradford v. Read, 2 Sandf. Ch. 163, holding execution return filed *nunc pro tunc* as of day prior to commencement of creditor's suit sufficient; Rogers v. Cherrier, 75 Wis. 54, 43 N. W. 828, holding filing transcript cures defect in issuing execution before filing as to claims arising subsequently.

-Of judgment or order.

Cited in Wight v. Alden, 3 How. Pr. 213, permitting entry of order *nunc pro tunc* where attorney entered judgment by confession two years after warrant; Burns v. Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527, holding justice's court cannot enter judgment *nunc pro tunc* ten years after rendition.

Cited in reference notes in 35 A. D. 526, on entry of judgment *nunc pro tunc*; 37 A. D. 690, on effect of *nunc pro tunc* entry or amendment of judgments or order.

Cited in notes in 4 A. S. R. 828, on *nunc pro tunc* entry of judgments; 4 A. S. R. 830, as to when entry of judgment *nunc pro tunc* is proper; 4 A. S. R. 833, on effect of entry of judgment *nunc pro tunc*; 20 L.R.A. 147, as to *nunc pro tunc* judgment affecting third persons; 15 L.R.A.(N.S.) 684, on right to enter judgment *nunc pro tunc* as of date of rendition so as to affect intervening rights of third persons.

Lien of judgment.

Cited in Blossom v. Barry, 1 Lans. 190, holding justice's judgment against "H." and "C." lien on "C's" land as against purchaser with notice though transcript was docketed only against "H."

15 AM. DEC. 242, JACKSON v. RAMSAY, 3 COW. 75.

Relation back to initiatory act.

Cited in State v. Itasca Lumber Co. 100 Minn. 355, 111 N. W. 276, holding doctrine of relation applies only when necessary to protect persons with equitable rights or claim to title; Stark v. Barnes, 4 Cal. 412, on relation back of last act to initiatory act where series of acts essential to obtain title to land; Brook v. McComb, 38 Fed. 317, holding recording of will related back to date of conveyance where foreign executor conveyed land before recording; Small v. West-

chester F. Ins. Co. 51 Fed. 789, holding decree appointing receiver in creditor's action did not operate by relation as of date of suit; *Steiner Bros. v. First Nat. Bank*, 115 Ala. 379, 22 So. 30, on effect by relation of adoption by corporation as garnishee at subsequent term of invalid answer; *Burns v. Campbell*, 71 Ala. 271, holding one cannot be made defendant by amendment when act creating liability done after suit commenced; *Allison v. Little*, 85 Ala. 512, 5 So. 221, holding appointment of trustees of church property relates back to time of vacancy for purpose of suing for prior trespass; *Berly v. Taylor*, 5 Hill, 577, holding that third person may adopt trust for his benefit and adoption relates back to creation; *McAfee v. McAfee*, 19 S. C. 337, holding purchaser's title at sheriff's sale had relation back to levy as against *lis pendens* in foreclosure; *Elmore v. Harria*, 13 Ala. 360, holding possessory action not maintainable by purchaser at execution sale against vendee in possession with only bond for title.

Cited in reference notes in 18 A. D. 450; 25 A. D. 600; 56 A. D. 547; 57 A. D. 203; 87 A. D. 631,—on doctrine of relation; 100 A. D. 597, on rent not due as incident of reversion.

— In case of bond.

Cited in *Fox v. Lipe*, 24 Wend. 164, holding bond by executor on execution of mortgage filed seven days after date of mortgage filed in time; *Cullinan v. Bowker*, 180 N. Y. 93, 72 N. E. 911 (dissenting opinion), on relation back to time of delivering indemnity bond by unauthorized clerk upon agent's signing. *State ex rel. Atty. Gen. v. Tool*, 4 Ohio St. 553, holding approval of county treasurer's bond relates back to time of filing and taking necessary oath.

— In case of land patents.

Cited in *Peyton v. Desmond*, 63 C. C. A. 651, 129 Fed. 1, holding land patent deemed to relate back to initiatory act when necessary to cut off intervening claimants; *Henderson v. Tennessee*, 10 How. 311, 13 L. ed. 434 (dissenting opinion), on relation back to commencement of proceedings on ratification of title to land; *Teller v. United States*, 54 C. C. A. 349, 117 Fed. 577, holding payment of price of government land vests equitable title by relation as of date of application; *Landes v. Brant*, 10 How. 348, 13 L. ed. 449, holding claim, founded on ten years' settlement prior to 1803, on granting patent, related back to date of petition; *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282, holding patents for lands when issued become operative as of date of the entries; *Ashley v. Eberts*, 22 Ind. 55, holding approval of President related back to date of conveyance of Indian lands against claim by adverse possession; *Cavender v. Smith*, 3 G. Greene, 349, 56 A. D. 541, holding government patent relates back to date of purchase evidencing title in patentee from that date; *Johnson v. Ballou*, 28 Mich. 379, holding patent for land for purpose of building railroad relates back to time earned; *Museer v. McRae*, 44 Minn. 343, 46 N. W. 673, holding patent for land in aid of railroads relates back to selection of land as against trespassers; *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340, holding patent related back to time of application for survey under New Madrid certificate; *Jackson ex dem. Atwood v. Douglass*, 5 Cow. 458, on application of doctrine of relation as affecting strangers on grant of land by state.

Cited in reference note in 50 A. S. R. 74, on rights of holders of certificates of purchase of public lands.

— In case of deeds generally.

Cited in *Rivers v. Thompson*, 46 Ala. 335, holding giving of deed deemed to

relate back to date of contract to defeat adverse possession; *Ferguson v. Miles*, 8 Ill. 358, 44 A. D. 702, holding deed takes effect from time grantee entitled to it unless third parties injuriously affected thereby; *Jackson ex dem. Tousley v. Rhodes*, 8 Cow. 47, on relation back to date of mortgage to loan office of title of mortgagor after payment of arrears; *Lawrence v. Miller*, 2 N. Y. 245, holding that on assignment of dower widow's title by relation commenced at time husband became seised; *Sheldon v. Wright*, 7 Barb. 39, on relation back of deed correcting defective deed of land ordered sold by surrogate, to time of sale; *Bellows v. McGinnis*, 17 Ind. 64, holding executor's deed related back to time of confirmation of sale so as to vest title; *Hunter v. Hatton*, 4 Gill, 115, 45 A. D. 117, holding trustee's deed operates retrospectively vesting title in grantee from date of sale.

—In case of sheriff's deeds generally.

Cited in *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181, holding record of sheriff's deed relates back to record of certificate of sale as against unrecorded deed; *Page v. Rogers*, 31 Cal. 293; *Alexander v. Merry*, 9 Mo. 511,—holding sheriff's deed relates back to time of sale against parties or privies not against strangers; *Whipple v. Farrar*, 3 Mich. 436, 64 A. D. 99; *Ridgeway v. First Nat. Bank*, 78 Ind. 119,—on relation back of sheriff's deed to time of sale to protect purchaser from intervening claims; *Williams v. Brunton*, 8 Ill. 600, holding judgment, subsequent purchase and deed from sheriff regarded as in aid of mortgagee's original title; *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 43 A. D. 465, holding purchaser's title on mortgage sale on expiration of period of redemption, relates back to purchase; *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 13, 93 A. D. 289, holding purchaser's deed relates back to time of mortgage sale vesting title within meaning of insurance policy; *Holman v. Holman*, 66 Barb. 215, holding sheriff's deed relates to time of sale so as to sustain a deed by purchaser prior to sheriff's deed; *Siegel v. Anger*, 13 Abb. N. C. 362, holding sheriff's deed of land though judgment not a lien vests title as of date of sale; *Fuller v. Van Geesen*, 4 Hill, 171, on relation back of confirmation of foreclosure sale to date of delivery of master's deed; *Rich v. Baker*, 3 Denio, 79, holding under redemption law sheriff's deed does not retrospect to time of sale giving purchaser rents and profits; *Averill v. Wilson*, 4 Barb. 181; *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429; *Wright v. Douglass*, 2 N. Y. 373,—holding sheriff's deed on execution, executed after time to redeem relates back to that period; *Cheney v. Woodruff*, 45 N. Y. 98, holding deed on foreclosure does not relate back to time of sale so as to give purchaser rent; *Re Guenzler*, 6 Mo. App. 96, denying application, under statute, for deed from deceased sheriff's successor after lapse of nearly thirty years; *White v. Farley*, 81 Ala. 563, 8 So. 215, on right of sheriff to reacknowledge after expiration of term a deed defectively acknowledged.

Cited in reference notes in 45 A. D. 760, on doctrine of relation as applied to sheriff's deeds; 27 A. D. 295; 63 A. S. R. 131,—on effect of sheriff's deed by relation; 44 A. D. 784, on relation of sale to time when writ of lien attached; 34 A. 288, as to when sheriff's deed relates to day of sale; 44 A. D. 707, on relation of sheriff's deed to time when party is entitled thereto; 23 A. S. R. 505, on effect of sheriff's deed to grantee of purchaser at execution sale; 36 A. D. 132, on right of execution purchaser of premises under lease to rent.

Cited in notes in 58 A. D. 58, on relation of sheriff's deed; 15 A. D. 250, on application of doctrine of relation to execution sales; 22 A. D. 711, on relation

back of sheriff's deed to day of sale; 21 A. D. 403, on execution of sheriff's deed to pass title.

Distinguished in *Den ex dem. Green v. Steelman*, 10 N. J. L. 193, holding sheriff's deed does not relate back to sale so as to sustain an intermediate sale by sheriff.

— In case of tax deeds.

Cited in *Spratt v. Price*, 18 Fla. 289, holding tax deed admissible in evidence in ejectment though acquired after action if entitled to it before; *Paul v. Fries*, 18 Fla. 573, holding tax deed to plaintiff after ejectment commenced inadmissible although he held certificate before suit.

— In case of mortgage.

Cited in *Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 604, holding recorded mortgage when delivered has relation to time of agreement for loan as against mechanics' lien.

— In case of insurance policies.

Cited in *Continental Ins. Co. v. Allen*, 26 Ill. App. 576, on relation back of insurance policy not delivered before loss to time premium was paid; *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276, holding insurance policy relates back to time of agreement to insure where policy executed at subsequent date; *Lightbody v. North American Ins. Co.* 23 Wend. 18, holding policy bearing date on day premium was paid takes effect by relation then though delivered afterwards.

Lien of attachment.

Cited in reference notes in 57 A. D. 371, on lien of attachment; 35 A. D. 210, on nature of attachment lien; 74 A. S. R. 454, on priority of unrecorded deed over attachment.

Cited in note in 39 A. D. 607, on origin and nature of attachment lien.

Necessity of pleading matters arising after commencement of suit.

Cited in *Buell v. Irwin*, 24 Mich. 145, holding assignment of agreement after joinder of issue if constituting defense should be connected with case by plea or notice; *Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521, holding appointment of town clerk's successor should be pleaded where appointment made after mandamus against predecessor; *Moss v. Shear*, 30 Cal. 467, holding title acquired pending ejectment action must be pleaded or it cannot be given in evidence; *Chicago v. Babcock*, 41 Ill. App. 238, holding settlement with abutter after action against abutter and city for injury on sidewalk should be pleaded; *Crowley v. Wallace*, 12 Mo. 143; *Farlin v. Sook*, 30 Kan. 401, 46 A. R. 100, 1 Pac. 123,—holding sheriff's deed on execution sale before action admissible in ejectment by purchaser though dated after action; *Clark v. West*, 23 Mich. 242, holding judgment of reversal in replevin pending cross-replevin suit admissible without plea; *Madison Ave. Baptist Church v. Baptist Church*, 9 Jones & S. 369, on right to plead possession under mortgage due and unpaid acquired after ejectment action commenced; *Nellis v. Lathrop*, 22 Wend. 121, 34 A. D. 285, holding tenant may use as defense for rent sheriff's certificate of sale dated prior to accrual.

Cited in reference note in 43 A. D. 750, on necessity that matters of defense arising after issue joined be pleaded *puis darrein continuance*.

Cited in note in 12 L.R.A. 301, on plea *puis darrein continuance*.

15 AM. DEC. 256, GARDNER v. BUCKBEE, 3 COW. 120.

Judgment as a bar.

Cited in *Baker v. Rand*, 13 Barb. 152, holding judgment bar if matter might

have been litigated in former action; *The Tubal Cain*, 9 Fed. 834, holding judgment against charterers for not furnishing cargo bars action against owners for not waiting for cargo; *Caperton v. Schmidt*, 26 Cal. 479, 85 A. D. 187, holding bar of judgment for recovery of realty limited to rights of parties at rendition; *Taylor v. Taylor*, 26 Abb. N. C. 360, 14 N. Y. Supp. 420, holding judgment for property purchased with stolen money bar to action for other property similarly purchased; *Burdick v. Cameron*, 10 App. Div. 589, 42 N. Y. Supp. 78, holding judgment that premises untenable bar to action for subsequent rent; *Hargus v. Goodman*, 12 Ind. 629, holding recovery for trespass, determination of title being unnecessary, no bar to ejectment; *Penny v. Corey*, 147 Ala. 617, 41 So. 978, holding judgment for less than some notes for goods sold no bar to action upon others; *Fessenden v. Barrett*, 50 Fed. 690, holding foreclosure judgment sustaining tax title no bar to foreclosure of same mortgage as to another tract; *Washington, A. & G. Steam Packet Co. v. Sickles*, 24 How. 333, 16 L. ed. 650, holding judgment upon special count and common-money counts no bar to suit on special count; *Greely v. Smith*, 1 Woodb. & M. 181, Fed. Cas. No. 5,749, holding former judgment cannot avail as bar to action, unless between same parties or privies.

Cited in note in 26 A. D. 609, as to when former judgment is a bar or estoppel.

—Judgment on demurrer.

Cited in *Bouchaud v. Dias*, 3 Denio, 238; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42,—holding judgment on demurrer bar to action between same parties on same subject-matter.

—Judgment of dismissal.

Cited in *Gudger v. Barnes*, 4 Heisk. 570, holding dismissal, because outlawed, of suit to enforce vendor's lien no bar to ejectment by vendor.

Conclusiveness of verdict or judgment — Of verdict.

Cited in *Wilbur v. Brown*, 3 Denio, 356; *Etheridge v. Osborn*, 12 Wend. 399; *Kidd v. Laird*, 15 Cal. 161, 76 A. D. 472,—holding verdict found on fact or title distinctly put in issue conclusive upon parties or privies; *Pfennig v. Griffith*, 29 Wis. 618, holding verdict possible upon either of two theories not conclusive as to which is true one; *Henderson v. Kenner*, 1 Rich. L. 474, holding verdict for defendant in trespass to try title, where general issue alone pleaded, not conclusive.

—Of judgment generally.

Cited in *Embury v. Conner*, 3 N. Y. 511, 53 A. D. 325; *Wilson v. Deen* (Milne v. Deen) 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1044,—holding former judgment operates as estoppel as to things in issue and determined by verdict; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690, holding estoppel extends to decision of legal rights of parties on facts common to both suits; *Shepard v. Stockham*, 45 Kan. 244, 25 Pac. 559; *Huntley v. Holt*, 59 Conn. 102, 21 A. S. R. 71, 22 Atl. 34,—holding judgment conclusive in all suits involving same question of controversy, though concerning other subject-matters; *Brown v. First Nat. Bank*, 66 C. C. A. 293, 132 Fed. 450, holding judgment in action in which defendant fails to interpose purely defensive matters renders them *res judicata*; *Boyd v. State*, 53 Ala. 601; *Ehle v. Bingham*, 7 Barb. 494,—holding judgment of court of competent jurisdiction directly upon point, conclusive; *Primm v. Raboteau*, 56 Mo. 407, holding participation of party in previous litigation wholly immaterial, provided his title depends on same facts; *Keller v. Feldman*, 81 Hun, 593, 31 N. Y. Supp. 41, holding judgment conclusive whether pleaded or given in evidence under general issue; *Broadhead v. McConnell*, 3 Barb. 175, holding judgment of court without jurisdiction not conclusive;

Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342 (dissenting opinion), on judgment as conclusive evidence of fact adjudged; Conery v. New Orleans Waterworks Co. 41 La. Ann. 910, 7 So. 8 (dissenting opinion), on judgment for tax as *res judicata* in action to annul city water contract; Hoisington v. Brakey, 31 Kan. 560, 3 Pac. 353, holding replevin judgment conclusive on replevin of different article, where parties, evidence, defense, and issues, same; Paterson v. Baker, 51 N. J. Eq. 49, 26 Atl. 324, holding when second action on different claim, judgment conclusive only as to matters actually determined; Collins v. Butler, 14 Cal. 223, holding judgment for partners for trespass on firm property conclusive as to joint ownership of damages; Tyler v. Carleton, 16 Me. 380, holding arrangements by parties on reference concerning means profits cannot be re-examined in action for land; Empire State Nail Co. v. American Solid Leather Button Co. 21 C. C. A. 152, 33 U. S. App. 522, 74 Fed. 864 (reversing 71 Fed. 588), holding decree declaring patent valid in action deciding title conclusive in infringement suit; Demarest v. Daig, 11 Abb. Pr. 9, holding decision of referee settling receiver's accounts, when made order of court, conclusive; Mercein v. People, 25 Wend. 64, 35 A. D. 653, holding adjudication as to custody of infant upon habeas corpus conclusive; Philadelphia v. Ridge Ave. R. Co. 142 Pa. 484, 24 A. S. R. 512, 28 W. N. C. 106, 21 Atl. 982, holding recovery of taxes under statute not conclusive as to constitutionality as to taxes for subsequent years; Westervelt v. Westervelt, 14 Jones & S. 298, holding surrogate's order that administrator is entitled to bank book not conclusive in action to recover deposit; Wales v. Lyon, 2 Mich. 276, holding unsuccessful opponent of discharge of bankrupt estopped from claiming fraud in action for his debt; Higgins v. Mayer, 10 How. Pr. 363, holding judgment establishing fraudulent consideration conclusive in action on another note given upon same transaction.

Cited in reference notes in 24 A. D. 615, as to when former judgment is a bar; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded.

Cited in notes in 1 L.R.A. 573, on conclusiveness of judgments; 21 A. D. 327; 23 A. D. 449; 7 L.R.A. 578, on doctrine of *res judicata*; 112 A. S. R. 36, 37, on judgment against tenant for rent or instalment thereof, as *res judicata*.

— As to matters on contract.

Cited in Fellows v. Jeter, 3 Phila. 130, 15 Phila. Leg. Int. 139; Davis v. Hart, 66 Miss. 642, 6 So. 318,—holding issues determined in action on notes *res judicata* in suits on other notes given in same transaction; Young v. Brehe, 19 Nev. 379, 3 A. S. R. 892, 12 Pac. 564; Cleveland v. Creviston, 93 Ind. 31, 47 A. R. 367,—holding judgment, in action on one note, sustaining defense which is good as to others estoppel as to such others; Meiers v. Pinover, 21 Ill. App. 551, holding judgment on note deciding partnership of makers conclusive in suit on contemporaneous note; Jackson v. Lodge, 36 Cal. 28, holding judgment for sureties upon defense that land deeded by principal in satisfaction of note *res judicata*; Felton v. Smith, 88 Ind. 149, 45 A. D. 454, holding judgment in action on one note, where partial failure of consideration pleaded, not necessarily conclusive in others; Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205, 1 Legal Gaz. 77, holding judgment for bondholder upon municipal bonds conclusive on validity in action upon similar bonds; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, holding bona fide holder not estopped by judgment of invalidity of bonds not so held; Whitaker v. Johnson Co. 12 Iowa, 595, holding judgment of validity of bond coupons conclusive in action upon other coupons; Lynch v. Swanton, 53 Me. 100, holding judgment determining question of defendant's membership in firm conclusive in subsequent action between

parties; *Wilcox & G. Sewing Mach. Co. v. Sherborne*, 59 C. C. A. 363, 123 Fed. 875, holding judgment for royalties notwithstanding defense of termination of contract conclusive as to subsequent royalties; *Flanagin v. Thompson*, 4 Hughes, 421, 9 Fed. 177, holding judgment sustaining validity of assignment of two mortgages *res judicata* on foreclosure of other; *Liddell v. Chidester*, 84 Ala. 508, 5 A. S. R. 387, 4 So. 426, holding recovery of wages from discharge to end of month estops denial of monthly payments; *Hanna v. Read*, 102 Ill. 596, 40 A. R. 608, holding decree finding deceased grantor insane conclusive upon grantees of other lands in another state; *Wiese v. San Francisco Musical Soc.* 82 Cal. 645, 7 L.R.A. 577, 23 Pac. 212, holding recovery of instalment of sick benefits estops defense of invalidity of by-law in action for subsequent instalments; *Louisville, N. A. & C. R. Co. v. Carson*, 169 Ill. 247, 48 N. E. 402, holding judgment for instalments of rent, establishing validity of lease conclusive in suit for subsequent instalments; *Grant v. Ramsey*, 7 Ohio St. 157, holding judgment determining duration of term conclusive in action for subsequent instalments of rent.

Distinguished in *Jacobs v. Miller*, 41 Mich. 90, 1 N. W. 1013, holding when execution of lease not denied, not conclusive in subsequent actions for rent.

— **Matters as to real property.**

Cited in *Greenup v. Crooks*, 50 Ind. 410, holding judgment for enforcement of mechanics' lien subject to mortgage conclusive as to priority of mortgage; *Wolf River Lumber Co. v. Brown*, 88 Wis. 636, 60 N. W. 996, holding judgment in replevin conclusive as to title to land put in issue; *Hurd v. McCiellan*, 1 Colo. App. 327, 29 Pac. 181, holding ejectment judgment estops assertion of title by participating grantee of defendant under unrecorded deed; *Burt v. Sternburgh*, 4 Cow. 569, 15 A. D. 402, holding judgment for trespass conclusive as to title in action for subsequent trespass.

— **Judgment by default.**

Cited in *Shelbina Hotel Asso. v. Parker*, 58 Mo. 327, holding default judgment conclusive.

— **In collateral action.**

Cited in *Ridgley v. Stillwell*, 27 Mo. 128, holding conclusiveness of judgment extends to matters collaterally or incidentally considered; *Wottrich v. Freeman*, 71 N. Y. 601, holding judgment cannot be attacked collaterally either for error or irregularity; *White v. Coatsworth*, 6 N. Y. 137, holding verdict in summary proceedings that no rent due conclusive in replevin for property subsequently distrained; *Harris v. Harris*, 36 Barb. 88, holding judgment in action to establish lost will conclusive in partition involving will.

— **Admissibility of former judgment.**

Cited in *Treadwell v. Stebbins*, 6 Bosw. 538, holding judgment in action on note admissible in action on another note given upon same consideration; *Dyett v. Hyman*, 37 N. Y. S. R. 261, 13 N. Y. Supp. 895, holding judgment sustaining assignment for creditors admissible in action by assignee to recover assignor's property; *Brunhill v. Freeman*, 80 N. C. 212, holding record in justice's court may be used as estoppel in trial of appeal in superior court.

Cited in note in 15 A. D. 405, on necessity of pleading prior judgment.

— **Under general issue.**

Cited in *Smith v. Pettit*, 2 N. Y. Legal Obs. 257; *Young v. Rummell*, 2 Hill, 478, 38 A. D. 594,—holding former recovery admissible under general issue in assumpsit; *Coles v. Carter*, 6 Cow. 691, holding former recovery inadmissible under general issue in action of trespass; *Whitaker v. Bramson*, 2 Paine, 209, Fed.

Cas. No. 17,526, on reception of proof of former judgment under general issue without notice of special matter; *Miller v. Manice*, 6 Hill, 114 (dissenting opinion), on admissibility of former recovery under general issue in trover.

Cited in note in 26 A. D. 610, on admissibility and effect of former recovery as evidence under general issue.

— When not pleaded.

Cited in *Calkins v. Allerton*, 3 Barb. 171; *Wright v. Butler*, 6 Wend. 284, 21 A. D. 323; *Isaacs v. Clark*, 12 Vt. 692, 36 A. D. 372; *Chase v. Walker*, 26 Me. 555,—holding judgment, which cannot be pleaded, may be given in evidence under general issue; *Krekeler v. Ritter*, 62 N. Y. 372, holding judgment in former action admissible as evidence of facts established thereby, though not pleaded; *Derby v. Hartman*, 3 Daly, 458, holding judgment admissible under any form of pleading amounting to general denial of matter concluded; *Barras v. Bidwell*, 3 Woods, 5, Fed. Cas. No. 1,039, holding fraud in recovering judgment cannot be pleaded in action in another state upon judgment.

Admissibility of proof aliunde record.

Cited in *Jolley v. Foltz*, 34 Cal. 321, holding evidence *aliunde* record as to jurisdictional fact of residence of defendant admissible; *Crum v. Boss*, 48 Iowa, 433, holding under issue of former adjudication evidence inadmissible to show action taken by jury; *Splahn v. Gillespie*, 48 Ind. 397, holding return of process can be evidence of official acts only, other facts must be proved; *White v. Yell*, 12 Ark. 139, holding plea in abatement of former suit pending must be verified by affidavit; *Wood v. Jackson*, 18 Wend. 107 (dissenting opinion), on admissibility of *parol* evidence to prove fact in issue in former action.

Cited in notes in 42 L. ed. U. S. 358, on *parol* evidence as to judgments; 44 A. S. R. 562, on proof of *res judicata* by extrinsic evidence.

— As to matter decided.

Cited in *Rake v. Pope*, 7 Ala. 161; *Strother v. Butler*, 17 Ala. 733; *Supples v. Cannon*, 44 Conn. 424; *Robinson v. Fries*, 22 Fla. 303; *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892; *Royce v. Burt*, 42 Barb. 655; *Wood v. Jackson*, 8 Wend. 9, 22 A. D. 603; *Birkhead v. Brown*, 5 Sandf. 134; *Kelly v. Public Works*, 25 Gratt. 755; *Foster v. Wells*, 4 Tex. 101; *Perkins v. Walker*, 19 Vt. 144; *Driscoll v. Damp*, 16 Wis. 106; *Spicer v. United States*, 5 Ct. Cl. 34,—holding proof *aliunde* record admissible to show matter decided in former action.

Cited in reference note in 36 A. D. 439, on evidence extrinsic of record to show matters included in issues.

Cited in notes in 53 A. D. 356, on admissibility of evidence to show what was decided in former judgment; 26 A. D. 610, on admissibility of evidence *aliunde* as to matters passed upon in former action between same parties.

— As to grounds of decision.

Cited in *Davis v. Talcott*, 14 Barb. 611; *Stedman v. Patchin*, 34 Barb. 218; *Williams v. Fitzhugh*, 44 Barb. 321; *Johnson v. Albany & S. R. Co.* 5 Lans. 222; *Doty v. Brown*, 4 N. Y. 71, 53 A. D. 350; *Howe v. Buffalo, N. Y. & E. R. Co.* 37 N. Y. 297; *Yates v. Yates*, 81 N. C. 397; *Rogers v. Libbey*, 35 Me. 200,—holding grounds of former decision, when not apparent of record, may be proved by *parol*.

— To contradict record.

Cited in *Davidson v. Shipman*, 6 Ala. 27; *Ansley v. Pearson*, 8 Ala. 431; *Robinson v. New York, L. E. & W. R. Co.* 64 Hun, 41, 18 N. Y. Supp. 728; *Lorillard v. Clyde*, 122 N. Y. 41, 19 A. S. R. 470, 25 N. E. 292,—holding evidence to

show what litigated in former action cannot be admitted to contradict record; *Evans v. Billingsley*, 32 Ala. 395, holding parol evidence in aid of record must be within scope of issues of former actions.

15 AM. DEC. 259, BISSELL v. HOPKINS, 3 COW. 166.

Possession after transfer as evidence of fraud.—By vendor.

Cited in *Davis v. Turner*, 4 Gratt. 422; *Peck v. Land*, 2 Ga. 1, 46 A. D. 368,—holding retention of possession by vendor only prima facie evidence of fraud; *Hall v. Tuttle*, 8 Wend. 375, holding possession by vendor after sale not conclusive evidence of fraud; *Hobbs v. Bibb*, 2 Stew. (Ala.) 54; *Bryant v. Kelton*, 1 Tex. 415; *Callen v. Thompson*, 3 Yerg. 475, 24 A. D. 587,—holding continuance of possession of vendor not fraud *per se*; *Seward v. Jackson*, 8 Cow. 406, holding voluntary conveyance only prima facie evidence of fraud; *Hombeck v. Vanmetre*, 9 Ohio, 153, holding retention of possession after conditional sale prima facie evidence of fraud; *Stoddard v. Butler*, 20 Wend. 507, holding sale void, when nature of property or circumstances of parties does not prevent immediate delivery; *Archer v. Hubbell*, 4 Wend. 514, holding simultaneous lease to brother of vendor, living with him, renders sale of household furniture invalid; *Masten v. Webb*, 19 Hun, 172, holding statute making sale without change of possession fraudulent and void applicable to execution sale; *Meade v. Smith*, 16 Conn. 346, holding property passes, though retained by vendor, which is only evidence of fraud; *Collins v. Brush*, 9 Wend. 198, holding possession by vendor three months after sale, without reason, prima facie fraudulent against judgment creditor; *Oriental Bank v. Haskins*, 3 Met. 332, 37 A. D. 140, holding secret trust, inconsistent with conveyance by debtor of realty, not conclusive evidence of fraud; *Curtis v. Leavitt*, 15 N. Y. 9, holding conveyance of personalty favorable consideration valid, though incidental benefits reserved to grantor.

Cited in reference notes in 20 A. D. 639; 20 A. D. 199, 639; 24 A. D. 590,—on retention of possession by vendor or mortgagor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 28 A. D. 45, 114; 30 A. D. 262,—on retention of possession by vendor or mortgagor as evidence of fraud; 29 A. D. 363, on retention of possession of personal property by vendor; 6 A. D. 287, on validity as to creditors of sale of chattels with agreement that vendor keep possession.

—By mortgagor.

Cited in *Woods v. Bugbey*, 29 Cal. 466; *Hall v. Snowhill*, 14 N. J. L. 8; *Runyon v. Groshon*, 12 N. J. Eq. 86,—holding retention of possession by mortgagor prima facie evidence of fraud; *Lunt v. Whitaker*, 10 Me. 310; *Ash v. Savage*, 5 N. H. 545; *Divver v. McLaughlin*, 2 Wend. 596, 20 A. D. 655; *Watson v. Williams*, 4 Blackf. 26, 28 A. D. 36,—holding mortgagor's possession not conclusive evidence of fraud, but explainable as fair and consistent with contract; *Ferguson v. Union Furnace Co.* 9 Wend. 345; *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256,—holding possession retained by mortgagor not *per se* fraudulent; *Newell v. Warren*, 44 N. Y. 244, holding chattel mortgage need not be filed after first renewal; *Brinley v. Spring*, 7 Me. 241, holding assignment by way of mortgage permitting retention to complete manufacture and sale of articles, valid; *D'Wolf v. Harris*, 4 Mason, 515, Fed. Cas. No. 4,221, holding bill of sale of ship and cargo, mortgagor retaining management of voyage, valid; *Tregear v. Etiwanda Water Co.* 76 Cal. 537, 9 A. S. R. 245, 18 Pac. 658, holding mortgage of corporate stock valid, without change of possession, in absence of fraud; *Doane v. Eddy*, 16 Wend. 523,

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holding no distinction between absolute sale and mortgage as to effect of retention of possession.

Cited in reference note in 26 A. D. 552, on effect of retention of possession by mortgagor of personal property.

Cited in note in 20 A. D. 663, on retention of possession by one giving mortgage to secure future advances.

Distinguished in *Smith v. Acker*, 23 Wend. 653, holding possession by mortgagor conclusive proof of fraudulent intent, unless rebutted by evidence of good faith.

Rebuttal of presumption of fraud from possession.

Cited in *Lunt v. Whitaker*, 10 Me. 310, holding continuance of possession explainable to render it perfectly consistent with honesty in both parties; *Planters' & M. Bank v. Willis*, 5 Ala. 770, holding retention by mortgagor up to period of forfeiture does not make security *prima facie* fraudulent; *Hanford v. Artcher*, 4 Hill, 271, holding good faith and absence of intent to defraud rebut presumption of fraud from possession; *Taylor v. Mills*, 2 Edw. Ch. 318, holding permission to debtor to retain household effects sold on execution fraudulent as to creditors; *Jennings v. Carter*, 2 Wend. 446, 20 A. D. 635, holding fraud not repelled by explanation that vendee had no farm or forage for oxen purchased; *Briggs v. Parkman*, 2 Met. 258, 37 A. D. 89, holding mortgage of trader's stock, authorizing retention and sale, not fraudulent *per se*; *Leland v. The Medora*, 2 Woodb. & M. 93, Fed. Cas. No. 8,237, holding mortgage of vessel not fraudulent because possession not given, when immediate voyage contemplated; *Tallman v. Kearney*, 3 Thomp. & C. 412, holding agreement for compensation for use of wagon by vendor overcomes presumption of fraud; *White v. Cole*, 24 Wend. 116, holding absence of vessel from port sufficient excuse, which ceases on return to port; *Crosby v. Huston*, 1 Tex. 203, on disproportion between value of mortgaged property and debt as suspicious circumstance; *Blocker v. Burness*, 2 Ala. 354 (dissenting opinion), on rebuttal of fraud by proof that sale *bona fide*.

Distinguished in *McLachlan v. Wright*, 3 Wend. 348, holding mortgage by embarrassed brewer, using and disposing of stock as owner, fraudulent.

Criticized in *The Romp, Olcott*, 196, Fed. Cas. No. 12,030, holding retention of vessel till mortgagee enforces mortgage does not affect rights of *bona fide* purchasers.

Definition of mortgage.

Cited in *Cotten v. Blocker*, 6 Fla. 1, to point that mortgage is immediate sale to mortgagee, with privilege of mortgagor to redeem.

Cited in note in 6 L.R.A. 643, on necessity that title vest on default of the agreement to constitute it a chattel mortgage.

15 AM. DEC. 264, ADKINS v. BREWER, 3 COW. 206.

Jurisdiction of proceeding.

Cited in *Aiken v. Richardson*, 15 Vt. 500, holding attachment without required affidavit void and arrest thereunder illegal; *Broadhead v. McConnell*, 3 Barb. 175, holding warrant issued, under act to abolish imprisonment for debt, without prescribed preliminary proof, void; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 A. D. 41, holding decree appointing guardian for minor, not cited, alleged to be under fourteen, without finding, valid on face; *Rash v. Whitney*, 4 Mich. 495, holding award of execution upon improper testimony erroneous merely and not in excess of jurisdiction; *Hard v. Shipman*, 6 Barb. 621, holding justice

does not lose jurisdiction by erroneously adjourning case contrary to agreement of parties; *Stone v. Miller*, 62 Barb. 430, holding justice loses jurisdiction in attachment by defective return of constable and proceedings are void; *Livingston v. Hallenbeck*, 4 Barb. 9, 3 How. Pr. 346, holding that the supreme court has no power to enjoin collection of taxes irregularly or erroneously assessed as the remedy at law is adequate.

Cited in reference note in 34 A. D. 717, on what jurisdiction of cause on attachment in justice's court depends on.

Cited in note in 22 L.R.A. 705, on injunction against collection of illegal tax to prevent cloud on title.

-Against nonresident.

Cited in *Schroepel v. Taylor*, 10 Wend. 196, holding attachment against person temporarily residing in county valid, though usual residence elsewhere; *Bennett v. Brown*, 4 N. Y. 254, 1 Code Rep. N. S. 267 (dissenting opinion), on necessity of bond with security to authorize justice to issue attachment against nonresident.

Necessity of showing jurisdiction.

Cited in *The Atlantic*, Abb. Adm. 451, Fed. Cas. No. 620, holding power of consul to discharge seaman must be established by proof of facts conferring it; *Hutchinson v. Brand*, 6 How. Pr. 73, holding power of court of general jurisdiction to award process, presumed; *Loder v. Phelps*, 13 Wend. 46, holding justice not authorized to issue warrant against inhabitant having family, unless grounds of application stated; *Morrison v. Ream*, *Burnett* (Wis.) 83, 1 Pinney (Wis.) 244, holding to entitle party to attachment strict compliance with statutory requirements necessary; *People ex rel. Rogers v. Spencer*, 55 N. Y. 1, holding petition for municipal aid to railroad must be presented in form and at time prescribed; *Clark v. Norton*, 6 Minn. 412, Gil. 277, holding in pleading process of inferior court every fact on which jurisdiction depends must be alleged; *Wheeler v. Townsend*, 3 Wend. 247, holding in plea of discharge of insolvent, \$25 debt to creditor instituting proceedings must be averred; *Wight v. Warner*, 1 Dougl. (Mich.) 384, holding justice's return to certiorari must show that affidavit was filed and bond executed before attachment issued; *Mayer v. Adams*, 27 W. Va. 244, holding judgment nullity, if jurisdictional facts, though existing, do not appear on face of record; *Barnes v. Harris*, 4 N. Y. 374 (dissenting opinion), on necessity of alleging defendant's residence in action on justice's judgment in suit commenced by long summons.

Collateral attack.

Cited in *Doty v. Brown*, 4 How. Pr. 429, upholding right to inquire into jurisdiction of other court exercising authority over subject-matter; *Pursley v. Hayes*, 22 Iowa, 11, 92 A. D. 350, holding that defect in service in proceeding by guardian to sell land treated as immaterial, cannot avail to defeat title in collateral proceeding; *Stell v. Glass*, 1 Ga. 475, holding order of court having jurisdiction, authorizing guardian's investments cannot be invalidated in another court; *Jackson ex dem. Jenkins v. Robinson*, 4 Wend. 436, holding error of surrogate in sale of decedent's realty cannot be shown in collateral action.

Distinguished in *Jackson ex dem. Sitzer v. Waltermire*, 7 Cow. 353, holding petition to admeasure dower, not showing husband's death forty days before unimpeachable therefor in ejectment.

Liability for unauthorized official action.

Cited in *Earl v. Camp*, 16 Wend. 562, holding ministerial officer protected in

execution of process regular on face, not disclosing want of jurisdiction; *Ex parte Thompson*, 1 Flipp. 507, Fed. Cas. No. 13,934, holding writ regular on face no protection to party procuring it by fraud; *Cloutman v. Pike*, 7 N. H. 209, holding collector to justify in action of trespass must show tax legally granted; *Williams v. Dunkirk*, 3 Lans. 44, holding village liable for property seized for assessment levied not in conformity to charter.

— Judicial action.

Cited in *Shadbolt v. Bronson*, 1 Mich. 85, holding justice, issuing execution after unauthorized stay of judgment, liable as trespasser; *Adams v. Whitcomb*, 46 Vt. 708, holding in trespass for false imprisonment defendant cannot justify under void process; *Harrington v. People*, 6 Barb. 607; *Clark v. Holmes*, 1 Dougl. (Mich.) 390,—holding inferior courts must have jurisdiction both of person and subject-matter, otherwise liable as trespassers; *Nachtrieb v. Stoner*, 1 Colo. 423, holding justice and plaintiff, in attachment issued, because defendant resided outside county, liable in trespass; *Miller v. Grice*, 1 Rich. L. 147, holding magistrate issuing warrant for offense not within jurisdiction, unless apparent on face, not liable in trespass; *Blincoe v. Head*, 103 Ky. 106, 44 S. W. 374, holding police justice, issuing attachment without statutory affidavit or bond, liable; *Tompkins v. Sands*, 8 Wend. 462, 24 A. D. 46, holding case lies against justice of peace corruptly refusing to approve surety in appeal bond; *Cunningham v. Bucklin*, 8 Cow. 178, 18 A. D. 432, holding no action lies against commissioner corruptly discharging insolvent, statute declaring record conclusive; *Davis v. Marshall*, 14 Barb. 96, holding justice issuing attachment without bond, and applicant therefor, liable for damages therefrom; *Russell v. Perry*, 14 N. H. 152, holding judgment by justice interested in cause, void and no justification in action of trespass against him; *Hoose v. Sherrill*, 16 Wend. 33 (dissenting opinion), on liability of justice, issuing summons instead of warrant against nonresident; *Green v. Talbot*, 36 Iowa, 499 (dissenting opinion), on liability of mayor for unauthorized imprisonment for violation of ordinance.

Cited in reference notes in 32 A. D. 49, on judicial liability; 86 A. D. 291, on liability of person or officer issuing process without jurisdiction; 67 A. D. 404, on liability of justice of the peace as trespasser exceeding jurisdiction.

Cited in notes in 18 A. D. 440, on liability of judicial officers for misconduct; 67 A. S. R. 423, on liability of judicial officer for false imprisonment; 15 E. R. C. 53, on civil liability of judge for his judicial acts; 19 A. D. 490, on liability of magistrate issuing warrant for arrest; 14 L.R.A. 143, on civil liability for irregular issuance of warrants, attachments, and the like.

Distinguished in *Horton v. Auchmoody*, 7 Wend. 200, holding justice of peace, granting unauthorized adjournment and issuing execution, not liable as trespasser.

15 AM. DEC. 266, ROWLEY v. BALL, 3 COW. 303.

Right of action on lost instrument.

Cited in *Re Cook*, 86 App. Div. 586, 83 N. Y. Supp. 1009, holding recovery upon lost note upon indemnifying not dependent upon statute, but always existed in equity; *White v. Meday*, 2 Edw. Ch. 486, holding equity not deprived of jurisdiction over lost notes by Revised Statutes giving law courts jurisdiction; *Green v. Stone*, Walk. Ch. (Mich.) 109, upholding equitable jurisdiction of suit on indorsed negotiable promissory note lost after it became due; *Lazell v. Lazell*, 12 Vt. 443, 36 A. D. 352; *M'Nair v. Gilbert*, 3 Wend. 344,—holding lost notes enforceable, when it does not affirmatively appear that they were negotiable;

Swift v. Stevens, 8 Conn. 431, holding holder of over due note need not prove destruction, but only exemption of defendant from subsequent liability; *Blade v. Noland*, 12 Wend. 173, 27 A. D. 126, holding evidence of contents inadmissible, without accounting for destruction of note in manner to repel fraud; *Tower v. Appleton Bank*, 3 Allen, 387, 81 A. D. 665, holding owner of bank bills cannot maintain action against issuing bank upon proving destruction and tendering indemnity; *Schultz v. Pulver*, 11 Wend. 361, holding administrator neglecting to collect lost sealed notes personally responsible for debts; *Jack v. Darrin*, 3 E. D. Smith, 548, 1 Abb. Pr. 148, holding statute authorizing recovery upon indemnity and proof of contents applicable, though check lost after action commenced.

Cited in reference note in 41 A. D. 298, on action on lost or destroyed notes.

Cited in notes in 27 A. D. 128, on actions on lost and destroyed notes; 4 E. R. C. 653, on right to maintain action on lost negotiable instrument; 16 L.R.A. 207, on action upon bills or notes lost after due or otherwise subject to equities.

—Action at law.

Cited in *Kirby v. Cogswell*, 2 Wend. 550, holding action not sustainable at law on lost note payable to bearer; *Posey v. Decatur Bank*, 12 Ala. 802, holding action at law not maintainable on bill of exchange, drawn in sets, though first set only lost; *Moore v. Fall*, 42 Me. 450, 66 A. D. 297, holding plaintiff, upon proof of destruction of note, may recover in suit at law; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 A. S. R. 528, 11 N. E. 799, holding action at law maintainable on certificate of deposit, lost before indorsement, without tendering indemnity; *Barney v. Doyle*, *Dudley* (Ga.) 200, holding recovery may be had, without resort to equity, on copy of lost note, under judiciary act.

Cited in reference notes in 90 A. D. 516, on right to maintain action at law on lost note; 20 A. D. 64, on recovery in action at law on lost bond or note.

Cited in note in 13 A. D. 480, on exclusiveness of equitable jurisdiction over lost bill and notes.

—Necessity of indemnity.

Cited in *Des Arts v. Leggett*, 16 N. Y. 582 (affirming 5 Duer, 156), holding action maintainable upon note accidentally destroyed, without indemnity; *Mills v. Albany Exch. Sav. Bank*, 28 Misc. 251, 59 N. Y. Supp. 149, holding statute requiring indemnity not applicable to lost savings bank pass book; *Wofford v. Board of Police*, 44 Miss. 579, holding unnecessary to tender indemnity in equity action to enforce lost note; *Torrey v. Foss*, 40 Me. 74, holding holder may maintain action at law, without furnishing indemnity, on lost barred note; *Mackey v. Mackey*, 16 Colo. 134, 26 Pac. 554, holding indemnity against unindorsed original note unnecessary as condition to recover on renewal; *Smith v. Rockwell*, 2 Hill, 482, holding that to charge indorser, holder must tender indemnity to him and maker at time of demand; *Bishop v. Sniffen*, 1 Daly, 155, holding interest denied from demand of payment of lost note, without indemnity, unless shown note unindorsed.

Necessity of producing assigned instrument.

Cited in *Gregory v. McNealy*, 12 Fla. 578, holding assignment to plaintiff by party having legal title to note payable to bearer not essential to recovery; *Morse v. Bellows*, 7 N. H. 549, 28 A. D. 372, denying liability for consideration for procuring assignment of bond until bond is produced or shown to be lost; *Wilder v. Seelye*, 8 Barb. 408, holding indorser may require, as condition of payment, production and delivery of note; *Stewart v. Gleason*, 23 Pa. Super. Ct.

325, holding identity of note admitted established without proof that defendant had note before him when admitting.

15 AM. DEC. 269, MCKINSTRY v. DAVIS, 3 COW. 339.

Liability of married woman.

Cited in *Hall v. White*, 27 Conn. 488, holding wife not entitled to discharge upon discharge of husband upon poor-debtor's oath; *Merrill v. St. Louis*, 12 Mo. App. 466, holding judgment may be rendered against husband and wife jointly for tort of wife; *Fitzgerald v. Quann*, 33 Hun, 652, holding husband must be joined as defendant in action against wife for slander.

Distinguished in *Hovey v. Starr*, 42 Barb. 435, holding married woman, bringing action for conversion not liable to arrest upon judgment against her for costs.

15 AM. DEC. 270, SEYMOUR v. DELANCY, 3 COW. 445.

Specific performance of contract.

Cited in *Preston v. Daniels*, 2 G. Greene, 536, holding court of equity has jurisdiction, whenever remedy at law defective, doubtful, or difficult; *Bruce v. Tilson*, 25 N. Y. 194, denying right to specific performance when circumstances have changed or party has slept upon rights; *Dodge v. Miller*, 81 Hun, 102, 30 N. Y. Supp. 726, holding party seeking specific performance must come into court with clean hands and do equity; *Benton v. Shreeve*, 4 Ind. 66, holding chancery will often deny specific performance where it would refuse to set contract aside; *Fletcher v. Wilson, Smedes & M. Ch. (Miss.)* 376, holding equity requires much stronger grounds for rescinding agreement than for refusing specific performance; *Harris v. Knickerbacker*, 5 Wend. 638, holding vendor, to obtain specific performance, must tender deed in accordance with contract; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495, on sufficiency of removal of mortgage before decree for specific performance of exchange of lands; *Edgerton v. Peckham*, 11 Paige, 352, on granting of specific performance, though payment not on time, where time not essential; *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835, granting specific performance of contract to convey interest in estate based on fair consideration and not procured by undue influence; *Gotthelf v. Stranahan*, 46 N. Y. S. R. 312, 19 N. Y. Supp. 161, same as to contract for land free from encumbrances, though after extension thereof assessments for street improvements levied; *Chrisman v. Partee*, 38 Ark. 31, same as to husband's contract to convey wife's lands with her approbation, where deed by wife tendered; *Webb v. Webb*, 29 Ala. 588, same as to antenuptial contract barring wife of dower; *Docter v. Furch*, 91 Wis. 464, 65 N. W. 161, refusing specific performance after vendee's defeat in long litigation to compel conveyance for reduced price; *Shields v. Trammell*, 19 Ark. 51, same where vendor had no title or subsequently conveyed to stranger without notice; *Wright v. Taylor*, 9 Wend. 538, holding specific performance will not be decreed, where damages are commensurate with injury sustained; *Hill v. Ressegieu*, 17 Barb. 162, holding vendor's heirs, including infants, compelled to fulfil his contract to convey realty.

Cited in reference notes in 23 A. D. 280, 411, 423; 24 A. D. 485; 25 A. D. 117; 30 A. D. 530, 538; 33 A. D. 430; 37 A. D. 633,—on specific performance of contracts; 69 A. D. 140, on necessity that contract be mutual to entitle party to specific performance; 96 A. D. 591, on effect upon vendor's right to specific performance of defects of title.

Cited in notes in 3 L.R.A. 740, on seller's right to specific performance; 1 L.R.A. 382, on suit by vendor against vendee; 3 L.R.A. 739, as to when seller may recover consideration; 28 A. D. 429, as to when specific performance will be decreed against vendee; 1 L.R.A. 555, as to when tender is unnecessary to enforcement of contracts; 5 L.R.A. 655, as to whether equity will compel vendee to take defective title.

— Where title is good at time of decree.

Cited in *Barksdale v. Hendree*, 2 Patton & H. (Va.) 43 (dissenting opinion), on sufficiency of good title at time of decree; *Dresel v. Jordan*, 104 Mass. 407; *Cleveland v. Burrill*, 25 Barb. 532; *Pierce v. Nichols*, 1 Paige, 244; *Pugh v. Chesseldine*, 11 Ohio, 109, 37 A. D. 414; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355,—granting specific performance when vendor has good title at time of decree.

Cited in reference notes in 92 A. S. R. 347, on specific performance of contract to convey where vendor's title is good at time of decree; 18 A. S. R. 510, on compelling vendee in equity to take defective title which is perfected at time of decree.

— Discretion as to granting.

Cited in *Vincent v. Larson*, 1 Idaho, 241; *Rochester & K. F. Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799; *Lynch v. Birchhoff*, 15 Abb. Pr. 357,—holding specific performance not matter of right, but matter of discretion, circumstances of particular case controlling; *McMurtrie v. Bennette*, Harr. Ch. (Mich.) 124; *Dokerty v. Gordon*, 5 Luzerne Legal Reg. 233; *Frain v. Klein*, 18 App. Div. 64, 45 N. Y. Supp. 394,—holding discretion should be exercised upon well defined principles of equity; *Rogers v. Saunders*, 16 Me. 92, 33 A. D. 635, holding it is as much matter of course to decree performance as to give damages, if contract unobjectionable; *Godwin v. Collins*, 3 Del. Ch. 189 (affirmed 4 Houst. (Del.) 28), on discretionary character of jurisdiction for specific performance.

Cited in reference notes in 18 A. D. 166; 21 A. D. 641; 42 A. D. 468; 63 A. D. 485,—on specific performance as not matter of course but in sound discretion of court.

— Fairness of contract.

Cited in *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Crane v. Decamp*, 21 N. J. Eq. 414,—holding contract must be fair, reasonable, just, and equal in all its parts; *Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 275; *McWhorter v. McMahan*, Clark, Ch. 400,—holding that court will not enforce hard or unconscionable bargain, but leave parties to remedy at law; *Slocum v. Closson*, How. App. Cas. 705; *Frisby v. Ballance*, 5 Ill. 287, 39 A. D. 409,—refusing right to specific performance, unless agreement entered into with perfect fairness and without misapprehension, misrepresentation, or oppression; *Best v. Stow*, 2 Sandf. Ch. 298, holding erroneous statement by ignorant vendor that land in distant state in particular county good defense; *Henderson v. Hays*, 2 Watts, 148, refusing specific performance of contract very disadvantageous to habitually intemperate person; *Davis v. Read*, 37 Fed. 418, same as to contract to erect creamery induced by fraudulent representation of association marketing products for good price; *Stokes v. Stokes*, 155 N. Y. 581, 50 N. E. 342, same where contract inequitable whether arising from provisions of contract or external circumstances; *Lennon v. Stiles*, 2 Silv. Sup. Ct. 145, 17 N. Y. S. R. 870, 4 N. Y. Supp. 487 (affirmed in 24 N. Y. S. R. 390, 5 N. Y. Supp. 870), on refusal

of specific performance, where unfair advantage taken because of relation of parties, or circumstances.

Cited in reference notes in 33 A. R. 184, on enforcement of unconscionable contracts; 34 A. D. 477, on effect of fraud on right to specific performance; 2 A. S. R. 46, on specific enforcement of fraudulent or unconscionable bargains; 34 A. D. 353, on habitual intemperance of one party to contract as ground for refusing specific performance.

Cited in note in 13 L.R.A. 318, on fairness of contract as essential to interposition of equity.

—Inadequacy of consideration.

Cited in *Burtch v. Hogge*, Harr. Ch. (Mich.) 31; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535,—holding mere inadequacy of consideration not in itself sufficient reason for refusing specific performance; *Norris v. Clark*, 72 N. H. 442, 57 Atl. 334; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150,—holding inadequacy to prevent specific performance, must be so gross as to be conclusive evidence of fraud; *Parmelee v. Cameron*, 41 N. Y. 392, holding inadequacy insufficient, unless coupled with fraud, surprise, ignorance, mistake, delusion, or imbecility; *Harrison v. Town*, 17 Mo. 237, holding inadequacy no objection, when parties have equal means of information and not in confidential relation; *Twining v. Neil*, 38 N. J. Eq. 470, holding completion of purchase at foreclosure sale in ignorance of prior recorded mortgage not compellable; *Lobdell v. Lobdell*, 36 N. Y. 327, 33 How. Pr. 347, 4 Abb. Pr. N. S. 56, holding agreement to deed land to son on condition he improve it sustained by sufficient consideration; *Westervelt v. Matheson*, Hoffm. Ch. 37, holding purchase at \$2,900, while value estimated from \$2,800 to \$3,500, not case of gross inadequacy; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332, denying specific performance of contract for purchase of timber at 10 per cent of value; *Knobb v. Lindsay*, 5 Ohio, 468, holding conveyance of realty worth \$2,500 in consideration of becoming bail and \$100 life annuity not conclusive of fraud; *Losee v. Cramer*, 57 Barb. 561, holding fact that vendor able soon afterwards to get \$600 more no ground for relief from performance; *Margraf v. Muir*, 57 N. Y. 155, denying specific performance of contract to sell for \$800 premises recently risen in value to \$2,000; *Sowle v. Champion*, 16 Ind. 165, holding fact of foreclosure sale for \$155 of land worth \$1,500 insufficient to invalidate sale.

Cited in reference notes in 79 A. D. 457, on contracts as affected by inadequacy of consideration; 19 A. D. 59; 57 A. D. 217,—on inadequacy of consideration as evidence of fraud; 18 A. D. 166, on refusal to decree specific performance if consideration is inadequate; 37 A. D. 738; 39 A. S. R. 82,—on effect of inadequacy of consideration on right to specific performance; 21 A. D. 603, on inadequacy of consideration as ground for denying specific performance; 48 A. S. R. 789, on necessity of consideration for contract; 33 A. D. 154, on right to specific performance of contract for sale of lands without valuable consideration; 43 A. D. 320, on equitable enforcement of voluntary agreement.

Cited in notes in 15 A. D. 302, on inadequacy coupled with other circumstances showing fraud or unfairness as ground for refusing specific performance; 14 L.R.A. (N.S.) 318, on refusal of specific performance of contract to convey property because of inadequacy of consideration; 23 A. D. 424, on specific performance of voluntary agreements.

—Nature of contracts specifically enforceable.

Cited in *Parks v. Brooks*, 16 Ala. 529; *Viele v. Troy & B. R. Co.* 21 Barb. 381,

—holding equity will enforce contract, for breach of which action for damages not maintainable at law; *Thornburgh v. Fish*, 11 Mont. 53, 27 Pac. 381, holding bond for payment of money to be void if obligor conveys land, specifically enforceable; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 365, 32 A. R. 315, holding equity will compel transfer of stock to owner upon corporation's books, where damages inadequate compensation; *White v. Schuyler*, 31 How. Pr. 38, 1 Abb. Pr. N. S. 300, holding agreement to reconvey stock and pay dividends received thereon may be specifically enforced; *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, 25 S. W. 542, granting specific performance of covenant for renewal of lease.

Inadequacy of consideration as ground for rescission.

Cited in reference notes in 7 A. D. 525; 26 A. D. 109,—on inadequacy of consideration as ground for setting aside contract.

Cited in note in 15 A. D. 573, on rescission of contract for gross inadequacy of consideration.

Implied warranty of title.

Cited in *Burwell v. Jackson*, 9 N. Y. 535, holding in every executory contract of sale, implied warranty that vendor has good title.

Cited in note in 11 A. D. 37, on conveyance satisfying contract to make good and sufficient deed.

15 AM. DEC. 304, OSGOOD v. MANHATTAN CO. 3 COW. 612, Later case in 8 Paige, 137.

Liability of heirs or devisees for debts.

Cited in *Wood v. Wood*, 26 Barb. 356, holding legal action sustainable against heirs and devisees for decedent's debts for which personally liable.

Conclusiveness of judgment against executor or administrator — Against heirs.

Cited in *Ferguson v. Broome*, 1 Bradf. 10, holding judgment against executor or administrator no evidence against heir; *Baker v. Kingsland*, 10 Paige, 366, holding judgment against executor no evidence of debt as against realty in hands of heir or devisee; *Brewis v. Lawson*, 76 Va. 36, holding default judgment against administrator not evidence against heirs in creditor's proceeding to subject realty to debts; *Gwynn v. Hamilton*, 29 Ala. 233, holding distributees of estate not estopped by judgment recovered by administrator; *Darling v. Pierce*, 15 Hun, 542, holding proceedings to sell decedent's realty for debts not conclusive on heirs; *Colson v. Brainard*, 1 Redf. 324, holding devisee may contest validity of judgment against administrator, upon application to sell realty for debts; *Stone v. Wood*, 16 Ill. 177 (dissenting opinion), on conclusiveness as to heirs of judgment against administrator.

Cited in reference note in 43 A. D. 180, on record of former suit as evidence against one not a party.

Distinguished in *Jackson ex dem. Vredenburg v. Marsh*, 5 Wend. 44, holding mortgagor may set up eviction under paramount title in bar of ejectment by mortgagee.

—Against decedent's fraudulent grantee.

Cited in *Loomis v. Tift*, 16 Barb. 541; *Sharp v. Freeman*, 2 Lans. 171; *Fowler's Appeal*, 87 Pa. 449, 36 Phila. Leg. Int. 36,—holding judgment against administrator not evidence against fraudulent grantee of decedent; *Heydenfeldt v. Towns*, 27 Ala. 423, holding decree ascertaining claim against insolvent estate prima facie

evidence against intestate's fraudulent grantee; *Willett v. Malli*, 65 Iowa, 675, 22 N. W. 922, holding allowance of claim against estate not even prima facie evidence against donee of decedent.

Distinguished in *Wood v. Jackson*, 8 Wend. 9, 22 A. D. 603, on conveyance for affection as conclusive evidence of fraud as against creditors.

Reversal or new trial for improper evidence.

Cited in *People v. Gonzalez*, 35 N. Y. 49, holding improper cumulative evidence not reversible error, when not injurious to party objecting; *Duffy v. Beirne*, 30 App. Div. 384, 51 N. Y. Supp. 626, holding error in admitting improper parol evidence not cured by subsequent offer by objecting party of proper record evidence; *Norris v. Badger*, 6 Cow. 449, denying new trial for improper parol evidence, where proper documentary evidence immediately given; *Baird v. Gillett*, 47 N. Y. 186, holding improper admission of proof that no bill presented, in action for physician's malpractice reversible error; *Weeks v. Lowerre*, 8 Barb. 530, holding new trial must be granted for illegal evidence which may have had weight with jury on material point; *Worrall v. Parmelee*, 1 N. Y. 519, 49 A. D. 350, holding error in receiving evidence cannot be disregarded, though party objected afterwards introduced evidence tending to establish same fact; *Murray v. Smith*, 1 Duer, 412, denying new trial for improper evidence, upon bill of exceptions containing whole evidence, where substantial justice done; *Mateer v. Brown*, 1 Cal. 231, holding judgment founded partly on incompetent evidence, unless clearly without effect, erroneous; *Anthoine v. Coit*, 2 Hall, 40, granting new trial for improper evidence, though sufficient competent evidence to sustain verdict; *Nash v. Kneeland*, 4 N. Y. S. R. 135, holding improper evidence, though jury directed to disregard it, reversible error; *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217, denying new trial, if improper evidence became immaterial and was not probably relied on by jury; *Forrest v. Forrest*, 6 Duer, 102, 3 Abb. Pr. 144, denying new trial of divorce action for admission of value of husband's estate, limited to purpose of alimony; *Green v. Hudson River R. Co.* 32 Barb. 25, holding improper admission of statements concerning settling negligence claim reversible error; *Feith v. Chicago City R. Co.* 113 Ill. App. 381 (dissenting opinion), on error in admitting testimony of interested witness, where different verdict would be set aside; *Benedict v. Hecox*, 18 Wend. 490 (dissenting opinion), on awarding new trial for admission of evidence of interested witness, though cumulative.

— On trial by referee or court.

Cited in *Ashley v. Marshal*, 29 N. Y. 494; *Lowery v. Steward*, 3 Bosw. 505,—holding reception by referee of incompetent evidence not reversible error, when result not possibly affected; *Allen v. Way*, 7 Barb. 585, 3 Code Rep. 243, granting new trial for improper evidence admitted by referee where facts not indisputably established without it; *Spanagel v. Dellinger*, 38 Cal. 278, granting new trial of cause tried without jury, although improper evidence merely cumulative; *Clark v. Brooks*, 2 Daly, 159, 2 Abb. Pr. N. S. 385, on granting new trial for improper evidence in equity suit, where issues of fact sent to jury.

Admissibility of admissions of other persons interested.

Cited in *Brush v. Holland*, 3 Bradf. 240, holding declarations of party to record inadmissible against others having separate interests in subject-matter; *Shailer v. Bumstead*, 99 Mass. 112, holding declarations of parties to record inadmissible on probate, to prove undue influence, if other parties affected are not jointly interested; *Lane v. Doty*, 4 Barb. 530, holding payment by debtor does not prevent statute of limitations from attaching as against executor of surety.

—Of legatees or devisees.

Cited in *Schierbaum v. Schemme*, 157 Mo. 1, 80 A. S. R. 604, 57 S. W. 526, holding devisees have not that joint interest in will which makes admissions of one admissible against others; *Re Baird*, 47 Hun, 77, holding admissions of legatee to show undue influence inadmissible, where other legatees interested in estate; *Thompson v. Thompson*, 13 Ohio St. 356, holding declarations of devisee and legatee inadmissible to impeach will, where others injuriously affected; *Horn v. Pullman*, 10 Hun, 471, holding declarations of joint devisee admissible to prove undue influence; *Forney v. Ferrell*, 4 W. Va. 729, holding conversations of devisee with testatrix to prove undue influence inadmissible against codevisees; *La Bau v. Vanderbilt*, 3 Redf. 384, on admissibility in behalf of contestants of admissions of legatee as to testamentary capacity.

—Of administrators or executors.

Cited in *Elwood v. Deifendorf*, 5 Barb. 398, holding admissions of administrators or executors inadmissible as against coadministrators or coexecutors; *Reagan v. Grim*, 13 Pa. 508, holding in action against administrators, substituted for intestate, declarations of administrator, also heir, admissible; *Taylor v. Barron*, 35 N. H. 484, holding no legal privity between administrators appointed in different states; *Dale v. Roosevelt*, 1 Paige, 35, holding no privity between executor and heir or devisee of land.

—Of grantor against grantee.

Cited in *Ferriday v. Selser*, 4 How. (Miss.) 506; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812,—holding declarations of grantor, subsequent to deed, cannot be used to invalidate title; *Spanagel v. Dellinger*, 38 Cal. 278, holding declarations of grantor inadmissible to establish fraud on part of grantee; *Caldwell v. Williams*, 1 Ind. 405, holding declarations of assignor admissible, when there is common purpose between assignor and assignee to defraud.

Cited in reference notes in 61 A. D. 318, as to when declarations of grantor as to fraudulent conveyance are admissible; 24 A. D. 395, on evidence of grantor's declarations to impeach deed; 28 A. D. 564, on admissibility of declaration of vendor in possession against his vendee; 21 A. D. 360; 40 A. D. 241,—on admissibility of declarations of grantor after conveyance against those claiming under him.

Cited in note in 42 A. D. 633, on inadmissibility of declarations of vendor after conveyance.

—Of member against corporation.

Cited in *Lyman v. Norwich University*, 28 Vt. 560, holding admission of president respecting debt of university will not prevent operation of statute of limitations; *Simmons v. Sisson*, 26 N. Y. 264, holding admissions of stockholder inadmissible in action to enforce personal liability of codefendant stockholders.

15 AM. DEC. 308, THALLHIMER v. BRINCKERHOFF, 3 COW. 623,

Later case between same parties in 4 Wend. 394, 21 A. D. 155.

Champerty and maintenance.

Cited in *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, holding English rule of champerty inapplicable to present condition of society and obsolete; *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, 1 A. & E. Ann. Cas. 297, holding champerty and maintenance do not exist in America as part of common law; *Sherley v. Riggs*, 11 Humph. 53, holding one liable for breach on contract to save another harmless from suit, in consideration of transfer of property; *Mott v. Small*, 20

Wend. 212, holding obligor liable upon agreement to indemnify assignee of note upon releasing payee and guarantor; *Ethridge v. Cromwell*, 8 Wend. 629, holding grantor, without title, not liable for penalty for conveying premises, not known to be in actual possession of another under claim of title; *Hickox v. Elliott*, 10 Sawy. 415, 22 Fed. 13, sustaining transfer of interest in property in litigation upon consideration of advancing funds to recover possession thereof; *Chicago City R. Co. v. General Electric Co.* 74 Ill. App. 465, holding not maintenance for street railway company to cause actions to be instituted to determine rights of rival company; *Bartholomew County v. Jameson*, 86 Ind. 154, holding county liable to chemist, employed by coroner to analyze insured's stomach, although insurance company guaranteed payment thereof.

Cited in reference notes in 20 A. D. 611; 29 A. D. 121; 42 A. D. 197; 58 A. D. 761; 99 A. D. 233; 28 A. S. R. 757; 29 A. S. R. 205; 42 A. S. R. 359; 83 A. S. R. 159; 97 A. S. R. 145; 100 A. S. R. 577; 108 A. S. R. 647; 111 A. S. R. 208,—on champerty and maintenance; 29 A. D. 136; 37 A. D. 562,—on what constitutes champerty; 48 A. S. R. 815; 64 A. S. R. 459; 74 A. S. R. 91,—on what agreements are champertous; 83 A. S. R. 805, on nature of law of maintenance; 103 A. S. R. 336, on champertous nature of conveyance of land held adversely by stranger; 56 A. D. 451, on buying of things in litigation, or dormant titles.

Cited in notes in 83 A. S. R. 167, on champerty, barratry, and maintenance; 6 E. R. C. 391, on validity of agreements of champerty and maintenance; 66 A. D. 513, on contracts for services void as against public policy; 21 A. D. 316, on effect of champertous acts on judicial sales.

Distinguished in *Barker v. Barker*, 14 Wis. 132, holding agreement transferring interest in property in litigation to another for merely nominal consideration, without benefit to transferrer, is void.

Disapproved in *Bernstein v. Humes*, 60 Ala. 582, 31 A. R. 52, holding ejectment not maintainable by grantee of purchaser at marshal's sale against another in actual adverse possession.

—Agreements with attorneys.

Cited in *Lytle v. State*, 17 Ark. 608, sustaining transfer of interest in property, during pendency of ejectment action, to attorney for past and future services and expenses incurred; *Mathewson v. Fitch*, 22 Cal. 86, sustaining agreement to pay attorney stipulated amount upon successful termination of action establishing title to property in litigation; *Bayard v. McLane*, 3 Harr. (Del.) 139, sustaining agreement to pay attorney share of recovery as compensation for services when former paid expenses; *Newkirk v. Cone*, 18 Ill. 449, sustaining recovery by attorney for compensation in purchasing property with defective titles for client and instituting actions to recover possession; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 55 Fed. 44, holding action maintainable by attorney, as administrator, under agreement with beneficiary for percentage of recovery as compensation for services and expenses; *Muller v. Kelly*, 116 Fed. 545, sustaining agreement of attorney with client for percentage of recovery as compensation for services when client paid expenses; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024, sustaining contract for percentage of recovery as compensation of attorney in establishing disputed title to mining claims; *Quigley v. Thompson*, 53 Ind. 317, denying recovery by attorney upon agreement for compensation if client succeeds in action but none if defeated, when former pays expenses; *Backus v. Byron*, 4 Mich. 535, denying recovery by attorney of share or property recovered, or its value, as compensation for services; *Sedgwick v. Stanton*, 14 N. Y. 289, sustaining agreement to convey one-half interest in property as another's compensation for perfecting title;

Jenkins v. Hooker, 19 Barb. 435, sustaining agreement with pensioner to pay attorney one third of increase pension procured through latter's services; *Maybin v. Raymond*, Fed. Cas. No. 9,338, sustaining agreement for payment of one half of recovery to attorneys as compensation for prosecuting claim against government; *Robertson v. Gayard*, 111 Tenn. 356, 77 S. W. 1056, holding champertous contract does not destroy right of client to prosecute original cause of action; *Croco v. Oregon Short Line R. Co.* 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985, holding agreement that attorney have percentage of recovery as compensation, client advancing expenses, not defense to railroad causing injuries; *Potter v. Ajax Min. Co.* 22 Utah, 273, 61 Pac. 999, holding agreement between attorney and client for percentage of recovery, not available to another sued for negligently causing injury; *Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865, holding agreement that attorney receives percentage of recovery upon note, as compensation for services and expenses, not available to maker.

Cited in reference notes in 125 A. S. R. 281, on validity of contracts between attorney and client; 1 A. S. R. 260, on scrutiny by courts of contract between attorney and client; 27 A. D. 124, on champerty and maintenance in transactions between attorney and client; 41 A. D. 323, on contingent fees.

—Agreements with and conveyances to relatives.

Cited in *Wright v. Meek*, 3 G. Greene, 472, sustaining conveyance by father to sons of property during litigation to set aside fraudulent decree and cloud on former's title; *Thalhimer v. Brinckerhoff*, 6 Cow. 90, sustaining agreement of owner to give brother-in-law advancing expenses of litigation, interest in property recovered from another in possession; *Campbell v. Jones*, 4 Wend. 306, holding obligor liable upon bond to indemnify step-father against costs of ejectment action instituted by latter; *Gilleland v. Failing*, 5 Denio, 308, sustaining power of attorney given by owner to son-in-law to maintain action to recover property for latter's benefit; *Vrooman v. Shepherd*, 14 Barb. 441, sustaining conveyance by father to son of premises in possession of another not claiming title thereto; *Livingston v. Peru Iron Co.* 9 Wend. 511 (dissenting opinion), on validity of conveyance by father to son of lands occupied by another under claim of title.

Cited in note in 14 L.R.A. 747, on effect of interest or relationship in determining whether contract of layman is champertous.

—Contributions by interested persons.

Cited in *Brown v. Bigne*, 21 Or. 260, 28 A. S. R. 752, 14 L.R.A. 745, 28 Pac. 11, sustaining recovery by one advancing money to establish another's claim against estate under agreement for half amount realized; *Johnston v. Smiths*, 70 Ala. 108, sustaining agreement of creditor to aid another in establishing vendor's lien upon bankrupt's property whereby former would receive payment in full; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, sustaining agreement of purchaser of bonds of insolvent railroad to pay expenses of litigation to establish their priority; *Currency Min. Co. v. Bentley*, 10 Colo. App. 271, 50 Pac. 920, holding action to determine adverse mining claims not champertous because other parties, interested in result, contribute funds and assistance.

Assignment of right of action.

Cited in *Bayard v. McLane*, 3 Harr. (Del.) 139, holding that assignments of choses in action were prohibited by common law to prevent maintenance; *Anchor Invest. Co. v. Kirkpatrick*, 59 Minn. 378, 50 A. S. R. 417, 61 N. W. 29, holding agreement guaranteeing payment of notes of corporation assignable to and enforceable by transferee of notes; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785,

sustaining contract for purchase of bonds of railroad during foreclosure by parties interested therein and desiring to secure control; *Lytle v. State*, 17 Ark. 608, holding transferee of interest of heirs in real property entitled to maintain action for recovery thereof; *Hoyt v. Thompson*, 5 N. Y. 320, holding action maintainable by transferee, of receiver of insolvent corporation, upon claim for property illegally transferred to creditors; *Taylor v. Galland*, 3 G. Greene, 18, holding claim for conversion of personal property assignable by owner to third party; *Kimbro v. Hamilton*, 2 Swan, 190, sustaining transfer of owner's interest in slave in possession of another; *Ware v. Russell*, 70 Ala. 174, 45 A. R. 82, holding assignment to attorney valid if fair and on consideration and not contemplative of litigation also citing annotation on this point.

Cited in reference notes in 29 A. S. R. 205, on assignment of right of action; 71 A. D. 578, on right to assign cause of action; 62 A. S. R. 894, on assignability of right of action at common law; 21 A. S. R. 716, on assignment of part of demand; 43 A. S. R. 478, on validity of assignment of part of demand.

Cited in note in 56 A. D. 449, on assignability of right to file bill in equity.

15 AM. DEC. 322, *BARKER v. PEOPLE*, 3 COW. 686.

Nonapplicability to states, of provisions of Federal Constitution.

Cited in *People ex rel. Kemmler v. Durston*, 55 Hun, 64, 7 N. Y. Supp. 813, 7 N. Y. Crim. Rep. 364, holding provision against cruel punishment restriction upon Federal government only; *Com. v. Hitchings*, 5 Gray, 482, holding prohibition against excessive fines restriction upon Federal courts only; *State v. Shumpert*, 1 S. C. 85, holding provision for presentment of grand jury not applicable to state courts; *Campbell v. State*, 11 Ga. 353; *State v. Jones*, 7 Nev. 408,—holding provision that accused be confronted with witnesses inapplicable to state courts; *Re Smith*, 10 Wend. 449, holding provision for jury trial applies only to Federal courts; *Ex parte Hill*, 38 Ala. 458 (dissenting opinion), on application of provision as to habeas corpus to state judicial department; *Cory v. Carter*, 48 Ind. 327, 17 A. R. 738, holding limitation on power of states to fix qualifications of citizens of the state and to establish their rights in the state could not exist without special mention in Federal Constitution.

Cited in reference notes in 30 A. D. 456, on amendments to Federal Constitution as restrictions on power of general government only; 35 A. D. 626, on inapplicability to state courts of amendment to Federal Constitution as to jury trial.

Cited in note in 35 L.R.A. 579, on applicability of provision of Federal Constitution as to cruel and unusual punishment to state governments.

Cruel and unusual punishment.

Cited in *People v. Morris*, 80 Mich. 634, 8 L.R.A. 685, 45 N. W. 591, holding sentence of fifteen years for horse stealing not cruel or unusual punishment; *People ex rel. Kemmler v. Durston*, 7 N. Y. Crim. Rep. 350, 7 N. Y. Supp. 145, holding provision for death by electricity not unconstitutional as cruel punishment; *Robinson v. Miner*, 68 Mich. 549, 37 N. W. 21 (dissenting opinion), on temporary disability to do business as excessive punishment.

Cited in reference notes in 73 A. S. R. 297; 96 A. S. R. 785,—on cruel and unusual punishment; 58 A. S. R. 637, on constitutional provision against cruel and unusual punishments.

Cited in notes in 4 L.R.A. 629, on prohibition of cruel and unusual punishments; 35 L.R.A. 571, on cruel and unusual punishment for dueling.

Removal from office.

Cited in *People v. Wells*, 2 Cal. 198, holding act, authorizing governor to appoint supreme court judge, during absence of judge from state, unconstitutional; *Dullam v. Willson*, 53 Mich. 392, 51 A. R. 128, 19 N. W. 112, holding statute, permitting governor to remove state officer, void, because governor had no judicial power under Constitution; *People ex rel. Devery v. Coler*, 173 N. Y. 103, 65 N. E. 956, holding charter, abolishing police commissioners and chief of police and imposing duties of officer upon single commissioner, constitutional.

Powers of the legislature.

Cited in *Lawton v. Steele*, 119 N. Y. 226, 16 A. S. R. 813, 7 L.R.A. 134, 23 N. E. 878, upholding power of legislature to provide for destruction of fishing nets in certain waters; *People v. Pierson*, 176 N. Y. 201, 98 A. S. R. 666, 63 L.R.A. 187, 68 N. E. 243 (reversing 89 App. Div. 415, 81 N. Y. Supp. 214), holding constitutional guaranty of religious freedom not violated by requirement that parent provide medical attendance for child; *Wynehamer v. People*, 13 N. Y. 378 (dissenting opinion), on constitutionality of act providing for destruction of intoxicating liquors.

Cited in notes in 97 A. D. 267, on power of state to disfranchise; 97 A. D. 264, on right of legislature to alter prescribed qualifications for voters contained in Constitution; 35 L.R.A. 562, on legislative control over punishments.

-To take away eligibility to office.

Cited in *Com. v. Jones*, 10 Bush, 725, holding provision of state Constitution disqualifying person guilty of dueling from holding office intended as punishment; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 417, 45 N. E. 15, holding provision that only member of political party represented in common council eligible for police commissioner, unconstitutional; *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 A. R. 508, holding statute, forbidding appointment or election of supervisor as superintendent of poor, constitutional; *Steusoff v. State*, 80 Tex. 428, 12 L.R.A. 364, 15 S. W. 1100, holding citizen eligible to office of tax assessor, though not voter of county, Constitution or statutes not requiring it; Opinion of the Justices, 95 Me. 564 Appx., 51 Atl. 224, holding person holding office to profit eligible to election to legislature, in absence of express constitutional or statutory restriction; *Harkreader v. State*, 35 Tex. Crim. Rep. 243, 60 A. S. R. 40, 33 S. W. 117, holding minor eligible to office of deputy county clerk, in absence of law prescribing qualifications; *Black v. Trower*, 79 Va. 123, holding act prescribing that members of electoral boards shall be freeholders, unconstitutional; *People ex rel. Price v. Woodbury*, 38 Misc. 189, 77 N. Y. Supp. 241, holding provision of New York City charter, forbidding city pensioner to hold city office, unconstitutional; *Kentz v. Mobile*, 120 Ala. 623, 24 So. 952, holding provision of city charter, requiring recorder to be learned in law and practising attorney, unconstitutional; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 A. R. 793, 5 N. E. 596, holding election law, requiring appointment of election officials from leading political parties, constitutional; *People ex rel. Ahern v. Bollam*, 182 Ill. 528, 54 N. E. 1032, holding statute authorizing village board to appoint constable unconstitutional, where Constitution directs that such officers be elected; *Shaw v. Marshalltown*, 131 Iowa, 128, 10 L.R.A. (N.S.) 829, 104 N. W. 1121, 9 A. & E. Ann. Cas. 1039, holding soldiers preference act not unconstitutional because granting class privileges; *Re Foley*, 39 How. Pr. 356, on whether act, declaring votes for police commissioner for another office void, is not unconstitutional; *Atty. Gen. v. Abbott* (*Oren v. Abbott*), 121 Mich. 540, 47 L.R.A. 92, 80 N. W. 372 (dissenting opinion),

on eligibility of women to office; *State ex rel. Thompson v. McAllister*, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770 (dissenting opinion), on constitutionality of requirement that members of municipal councils be freeholders therein.

Cited in reference note in 59 A. S. R. 521, on eligibility to office.

Distinguished in *State ex rel. Tesch v. Von Baumbach*, 12 Wis. 311, holding provision of charter, that election of member of common council to other office void, constitutional; *Rogers v. Buffalo*, 123 N. Y. 173, 9 L.R.A. 582, 25 N. E. 274, holding provision for appointment of civil-service commissioners from political parties, constitutional.

Law of the land.

Cited in *Re Kane*, 4 Luzerne Leg. Reg. 263, 7 Phila. Leg. Gaz. 337, to point that "law of the land" requires a judgment in the regular course of administration through courts of justice.

15 AM. DEC. 331, ROSE v. SMITH, 4 COW. 17.

Error of fact.

Cited in *Gosling v. Acker*, 2 Hill, 391, holding special application for judgment of reversal necessary, upon assignment of error in fact; *Fitch v. Devlin*, 15 Barb. 47 holding service of summons upon defendant's son, error of fact, for which justice's judgment reversible; *Smith v. Cayuga Lake Cement Co.* 105 App. Div. 307, 93 N. Y. Supp. 959, holding misconduct of jury an "error of fact" as used in §§ 3057, 3066, N. Y. Code Civil Proc.; *Adsit v. Wilson*, 7 How. Pr. 64, holding "error of fact" does not refer to mistakes of jury in finding facts.

Reversal or new trial for misconduct of jury.

Cited in *Snow v. Hardy*, 3 Minn. 77, Gil. 35, holding leaving jury room and discussing case before others, ground for reversal.

Cited in notes in 15 A. D. 339, on misconduct of jurors; 21 A. D. 717, on setting aside verdict for improper conduct of jurors; 43 A. D. 81, on effect of separation of jury during trial of cases of felonies not capital.

— Drinking of liquor.

Cited in *State v. Greer*, 22 W. Va. 800; *Ryan v. Harrow*, 27 Iowa, 494, 1 A. R. 302,—holding drinking of intoxicating liquor by jurors while deliberating, sufficient ground for setting aside verdict; *State v. Bruce*, 48 Iowa, 530, 30 A. R. 403, holding use of intoxicating liquors by jurors before submission of case will not vitiate verdict; *Pelham v. Page*, 6 Ark. 535, holding circulation of spirituous liquors among jury, even with consent of parties, cause for reversal; *Hanrahan v. Ayres*, 10 Misc. 435, 31 N. Y. Supp. 458, holding drinking by jurors while deliberating, ground for reversal, though successful party not responsible therefor; *Patrick v. Victor Knitting Mills Co.* 37 App. Div. 7, 55 N. Y. Supp. 340, holding frequent drinking during all night disagreement vitiates verdict found next noon; *Richardson v. Jones*, 1 Nev. 495, holding drinking by jurors, unless sufficient to incapacitate them, or defeated party injured thereby, no ground for reversal; *Wilson v. Abrahams*, 1 Hill, 267, holding drinking by juror, while allowed to separate before evidence closed, not ground for reversal.

15 AM. DEC. 332, PEOPLE v. DOUGLASS, 4 COW. 26.

Misconduct of jurors in criminal action as ground for new trial.

Cited in *People v. Ransom*, 7 Wend. 417, to point that mistake in drawing jury will not vitiate verdict; *Appo v. People*, 20 N. Y. 531, to point that oyer and terminer cannot, after conviction for felony, order new trial upon the merits.

Cited in note in 21 A. D. 717, on setting aside verdict for improper conduct of jurors.

—Separation.

Cited in *McLean v. State*, 8 Mo. 153, holding that allowing jury in capital case to separate is ground for new trial; *State v. Miller*, 18 N. C. (1 Dev. & B. L.) 500, holding separation of juror from others in capital case not *per se* ground for new trial; *State v. Mowry*, 21 R. I. 376, 43 Atl. 871, holding temporary separation, in capital case, while out riding with deputies, not *per se* sufficient; *Stephens v. People*, 4 Park. Crim. Rep. 396, holding that separation of jury during murder trial does not vitiate verdict; *Early v. State*, 1 Tex. App. 248, 28 A. R. 409, holding that separation and mingling with crowd, caused by burning of hotel where jury were lodging entitles new trial in capital case; *Com. v. Morgan*, 3 Pa. Co. Ct. 151, 4 Kulp, 193, holding separation without authority, after charge, not ground for new trial, without proof of improper conduct; *People v. Schad*, 58 Hun, 571, 12 N. Y. Supp. 695, holding that juror, during deliberation, going alone to bar-room and drinking vitiates verdict; *State v. O'Brien*, 7 R. I. 336, holding juror while passing entered his house to change linen, not *per se* sufficient ground; *People v. Buchanan*, 25 N. Y. Supp. 481; *State v. Lawrence*, 70 Vt. 524, 41 Atl. 1027,—holding that juror's temporary separation by reason of illness does not entitle, *per se*, new trial; *Anthony v. Smith*, 4 Bosw. 503, holding separation of jury, without authority insufficient *per se* to entitle new trial; *State v. Madoil*, 12 Fla. 151, holding that separation of juror, without court's consent, will not *per se* avoid verdict in criminal action; *State v. Prescott*, 7 N. H. 287; *Monroe v. State*, 5 Ga. 85,—holding jurors temporarily separating from others, without authority, not shown prejudicial to prisoner, ground for new trial; *Friar v. State*, 3 How. (Miss.) 422; *Jarrell v. State*, 58 Ind. 293,—holding that jury, may under order of court, if prisoner does not object, seal verdict and separate; *Reins v. People*, 30 Ill. 256, holding insufficient cause for new trial, that jury in manslaughter action, after sealing verdict, separated; *Com. v. Heller*, 5 Phila. 123, 19 Phila. Leg. Int. 133, holding separation after sealed verdict in misdemeanor case not cause for new trial; *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78, holding unauthorized separation, in capital case, after sealing verdict, unchanged upon re-assembling, not *per se* ground for reversal; *Douglass v. Tousey*, 2 Wend. 352, 20 A. D. 616, holding though juror after separation after sealing verdict, dissents and after redeliberation assents thereto, insufficient ground; *State v. Miller*, 18 N. C. (1 Dev. & B. L.) 500 (dissenting opinion), on right to new trial where juror in capital case separated from others; *Creek v. State*, 24 Ind. 151, to point whether separation without authority, unattended, is sufficient ground where evidence supports verdict.

Cited in notes in 43 A. D. 86; 3 L.R.A. 211,—on effect of separation of jury in capital cases; 35 A. D. 259, on misconduct of jurors in separating during trial as ground for new trial; 103 A. S. R. 164, on presumptions and burden of proof as to separation of jury in criminal cases.

Distinguished in *Jumpertz v. People*, 21 Ill. 375, holding mere separation of the jury insufficient cause for setting aside verdict.

Disapproved in *Stephens v. People*, 19 N. Y. 549, holding not error in capital trial to permit jury, with prisoner's assent, to separate before case submitted; *Eastwood v. People*, 3 Park. C. C. 25, holding that separation in capital case vitiates verdict unless prosecution shows beyond doubt no prejudice to prisoner.

—Use of intoxicating liquors.

Cited in *Com. v. Salyards*, 13 Pa. Co. Ct. 470, holding that mere fact of drink—
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ing liquor pending murder trial, will not avoid verdict; *State v. Bullard*, 16 N. H. 139, holding that if spirits be furnished jurors while deliberating, verdict will be set aside; *State v. Greer*, 22 W. Va. 800, holding that drinking intoxicating liquor while deliberating in murder case is *per se* ground for new trial; *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719, holding drinking of liquor at meals, irrespective of quantity while deliberating in capital case, vitiates verdict; *Jones v. People*, 14 Pittsb. L. J. N. S. 99, holding that use of intoxicants while considering case will not vitiate verdict without affirmative proof of prejudice; *State v. Baldy*, 17 Iowa, 39, holding drinking of ale for diarrhea while deliberating sufficient ground for new trial; *People v. Gray*, 61 Cal. 164, 44 A. R. 549, holding that drinking, during trial of large amounts of liquors without consent or knowledge of court or prisoner, is ground; *State v. Brunetto*, 13 La. Ann. 45 (dissenting opinion), on right to new trial because jury used spirituous liquors.

Cited in reference note in 64 A. D. 329, on drinking of spirituous liquors by jurors as ground to set aside verdict.

Cited in notes in 15 A. D. 332, on misconduct of jurors in drinking spirituous liquors; 62 A. D. 562, on effect upon verdict of drinking of intoxicants by jury; 35 A. D. 258, on misconduct of jurors in drinking intoxicants as ground for new trial; 9 A. R. 764, as drinking of intoxicants by jurors as ground for setting aside verdict of guilty in trial for murder.

Distinguished in *Wilson v. Abrahams*, 1 Hill, 207, holding that jurors separated and drank spirituous liquors not ground for reversal.

Disapproved in *State v. Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *Dolan v. State*, 40 Ark. 454,—holding mere drinking of intoxicants without proof of excesses or misconduct prejudicial to prisoner, not ground; *State v. Bruce*, 48 Iowa, 530, 30 A. R. 403, holding that use of liquor pending trial, prejudice to prisoner not shown, is insufficient ground; *Thompson v. Com.* 8 Gratt. 637, holding not misbehavior to drink in moderation during adjournment, even with a stranger to action.

— Communicating with outsiders.

Cited in *State v. Igo*, 21 Mo. 459, holding mere fact that after jury has retired, one juror separates and converses with bystander, insufficient; *Caw v. People*, 3 Neb. 357, holding fact that juror, during intermission, separated and held conversation foreign to trial with bystander, insufficient ground; *People v. Montgomery*, 13 Abb. N. S. 207, holding that temporary separation in capital case, and casual conversation with stranger on indifferent matter does not affect verdict; *Davis v. State*, 35 Ind. 496, 9 A. R. 760, holding juror going with bailiff to saloon, unexplained except to procure something for diarrhea, sufficient ground; *People v. Carnel*, 2 Edm. Sel. Cas. 202, 1 Park Crim. Rep. 256, holding that jury communicated with court though officer guarding during deliberation, not ground for new trial; *State v. Watkins*, 9 Conn. 47, 21 A. D. 712, holding juror's public request, after evidence closed, that prosecutor produce certain witness, insufficient cause for new trial; *Com. v. Roby*, 12 Pick. 496, denying new trial where constable with stranger took reasonable refreshments into jury room, without conversing.

Distinguished in *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31, holding where juror's drinking with prosecutor was known to prisoner and not brought to court's attention, objection waived; *Territory v. Thomason*, 4 N. M. 154, 13 Pac. 223, holding that presence of official interpreter in jury room at request of jurors, speaking different languages, is *per se* insufficient ground.

— Attendance at theater.

Cited in *Jones v. People*, 6 Colo. 452, 45 A. R. 526, holding attendance at theater

by court's permission, without separation or communicating with others, insufficient cause.

Misconduct of jury in civil actions as ground for new trial.

Cited in *Reynolds v. Champlain Transp. Co.* 9 How. Pr. 7, holding that conversation between jurors and party to action will vitiate verdict.

— Separation.

Cited in *Evans v. Foss*, 49 N. H. 490, holding that separation without authority or consent after sealing verdict not *per se* ground for reversal; *Parsons v. Huff*, 38 Me. 137, holding that temporary absence, unattended, with court's permission, no prejudice shown is insufficient ground for reversal; *Nims v. Bigelow*, 44 N. H. 376, holding that mere fact that jury separated after rendering verdict will not vitiate it, though papers recommitted and verdict modified; *Tifield v. Adams*, 3 Iowa, 487, holding not error to instruct jury, after separating upon sealing verdict, to make proper amendment.

— Use of liquor.

Cited in *Patrick v. Victor Knitting Mills Co.* 37 App. Div. 7, 55 N. Y. Supp. 340, holding frequent use of liquor while deliberating ground for new trial; *Hanrahan v. Ayres*, 10 Misc. 435, 31 N. Y. Supp. 458, holding that drinking spirituous liquors, while deliberating *per se* vitiates verdict; *Brant ex dem. Buckbee v. Fowler*, 7 Cow. 562, holding that verdict should be set aside though juror drank small quantity of brandy to check diarrhea; *Leighton v. Sargent*, 31 N. H. 119, 64 A. D. 328, holding fact that jurors while deliberating drank brandy, though quantity small, ground for reversal; *Vose v. Muller*, 23 Neb. 171, 36 N. W. 583, holding that juror drinking at expenses of and with successful party to suit, is ground for reversal; *Ryan v. Harrow*, 27 Iowa, 494, 1 A. R. 302, holding drinking of intoxicating liquors after cause submitted, sufficient ground for new trial.

Distinguished in *Perry v. Bailey*, 12 Kan. 539, holding evidence that juror drank so as to unfit him for jury duty sufficient ground for reversal.

Disapproved in *Richardson v. Jones*, 1 Nev. 405, holding mere use of intoxicating liquor not *per se* ground for new trial.

Effect of misconduct of referees.

Distinguished in *Noyes v. Gould*, 57 N. H. 20, holding that where referees, without objection from parties litigant, drank brandy furnished by interested outsider, report will stand.

Conviction upon testimony of one convicted of perjury.

Cited in *People v. Evans*, 40 N. Y. 1, 1 Cowen, Crim. Rep. 154, holding that conviction of subornation of perjury upon uncorroborated testimony of one convicted of perjury is error.

Bill for discovery in aid of penal action.

Cited in *Bailey v. Dean*, 5 Barb. 297, holding party should not be compelled to disclose facts to enable another to maintain a penal action.

15 AM. DEC. 340, VAN ANTWERP v. NEWMAN, 4 COW. 82.

When writ of error granted.

Cited in *Allen v. Savannah*, 9 Ga. 286, holding that writ of error lies to final judgment only; *Rochester v. Roberts*, 25 N. H. 495, holding that writ of error will not be granted if brought merely for delay.

Cited in note in 91 A. D. 195, on right to sue out writ of error.

Power of supreme court to stay proceedings.

Cited in *Re Pye*, 21 App. Div. 266, 47 N. Y. Supp. 689, holding that supreme court has power to stay proceedings upon appeal from surrogate's order.

Cited in reference note in 43 A. D. 480, on superseding execution.

Sufficiency of recognizance.

Cited in *State v. Perry*, 28 Minn. 455, 10 N. W. 778, holding written instrument signed and delivered, acknowledging indebtedness to state, with condition for principal's appearance, sufficient.

15 AM. DEC. 341, ROSS v. LUTHER, 4 COW. 158.**When action is commenced.**

Cited in *Stanley v. Bank of Mobile*, 23 Ala. 652, holding that notice of motion for judgment on promissory note held by bank, commences action thereon; *Peck v. German F. Ins. Co.* 102 Mich. 52, 60 N. W. 453, holding that though summons is issued, action not commenced until delivered to proper officer to be served; *Koon v. Greenman*, 7 Wend. 121, holding issuing of summons in justice's court commencement of suit, though justice delayed service without authority; *McLarren v. Thurman*, 8 Ark. 313, holding where writ is left with court clerk to deliver to sheriff, action not commenced until delivery; *White v. Johnson*, 27 Or. 282, 50 A. S. R. 726, 40 Pac. 511, holding summons issued within meaning of Code when signed and issued to sheriff for service; *Jordan v. Bosworth*, 123 Ga. 879, 51 S. E. 755, holding filing petition with instructions to hold process not sufficient commencement until instructions are withdrawn; *Cross v. Barber*, 16 R. I. 266, 15 Atl. 69, holding where writ is to be served only upon refusal to deliver goods, action not commenced until refusal; *Hekla Ins. Co. v. Schroeder*, 9 Ill. App. 472; *West v. Engel*, 101 Ala. 509, 14 So. 333,—holding delivery to sheriff, within time, of summons signed by court clerk, necessary to avoid statute of limitation; *Jackson v. Brooks*, 14 Wend. 649, holding delivery of capias to sheriff with instructions not to serve, insufficient commencement to save statute of limitations; *United States v. American Lumber Co.* 80 Fed. 309, holding in suit by United States against nonresidents of district to cancel land patent, action not commenced until warning order is issued; *Bisbee v. Evans*, 17 Fed. 474, holding action commenced in United States circuit court against noninhabitant of district by proof of service or publication of order; *Hawley v. Griffin*, 121 Iowa, 667, 92 N. W. 113, holding actual service of original notice necessary to commence action to redeem by heirs of insane owner; *Re Clyne*, 52 Kan. 441, 35 Pac. 23, holding criminal prosecution commenced when warrant is duly issued and given to proper officer to execute; *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342 (dissenting opinion), on right to consider action to enforce mechanics' lien commenced from time summons dated; *Bennett v. Chase*, 21 N. H. 570, on right to plead in abatement other action pending, where summons was not served when attachment made; *Wiggin v. Orser*, 5 Duer, 118, on right to consider action commenced when capias is issued to coroner with intent to have it served.

Cited in reference notes in 18 A. D. 127; 22 A. D. 208; 36 A. S. R. 663; 65 A. S. R. 615; 69 A. S. R. 704; 90 A. S. R. 477,—as to when action is commenced; 34 A. S. R. 744, as to how and when actions are commenced; 83 A. S. R. 325, on what is commencement of action within meaning of statute of limitations.

Distinguished in *Carruth v. Church*, 6 Barb. 504, holding action against sheriff for escape not commenced unless capias served while debtor off the limits; *Udpike v. Ten Broeck*, 32 N. J. L. 105, holding action commenced when summons was prepared and sealed, though held awaiting answer to arbitration proposal.

Time of issuance of writ.

Cited in *Lambert v. Ensign Mfg. Co.* 42 W. Va. 813, 26 S. E. 431; *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661,—holding that unless contrary shown date of writ is *prima facie* evidence of time actually issued; *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111, holding that execution cannot be considered as being issued while it remains in attorney's possession.

Errors in writ.

Cited in reference note in 37 A. D. 602, on effect of clerical errors in writ of execution.

Right to amend writ.

Cited in *Reynolds v. Damrell*, 19 N. H. 394, holding amendment permissible, where attachment bears teste of former clerk instead of one in office; *Park v. Church*, 5 How. Pr. 381, Code Rep. N. S. 47, holding execution containing requisites of § 289 of Code amendable if teste omitted or not issued "in name of the people;" *Archibald v. Thompson*, 2 Colo. 388, holding writ of attachment returnable second term after date amendable, and seizure thereunder valid; *Whiting v. Beebe*, 12 Ark. 421, holding omission of clerk's signature to execution amendable and in collateral proceedings will be considered amended; *Elliott v. Hart*, 45 Mich. 234, 7 N. W. 812, holding omission of name of county from justice's execution curable by parol evidence to protect execution purchaser.

Cited in reference notes in 44 A. D. 204, on amendment of executions; 29 A. D. 372, on amendment of clerical errors in execution.

Cited in notes in 35 A. D. 53, on power to amend execution or other writ; 101 A. S. R. 557, on amendment of clause of attestation in execution.

Right to plead irregularity in writ.

Cited in *Bacon v. Cropsey*, 7 N. Y. 195, holding that sheriff in action for false return cannot plead irregularity in issuance of execution; *Pierce v. Alsop*, 3 Barb. Ch. 184, 4 N. Y. Legal Obs. 52, on right of one not party to action to apply to have irregular execution set aside; *McComb v. Reed*, 28 Cal. 281, 87 A. D. 115, to point that sheriff cannot question sufficiency of complaint, where attachment issued is regular.

Liability for neglect to levy.

Cited in reference note in 49 A. D. 57, on liability of sheriff for neglect in levying execution.

15 AM. DEC. 347, JACKSON v. LOOMIS, 4 COW. 168.**Rights in improvements.**

Cited in *Hearn v. Camp*, 18 Tex. 545, holding equity and sound policy require that settler in good faith should receive pay for improvements; *Powell v. Smith*, 2 Watts, 126, holding that replevin will not lie by one recovering land in ejectment for fixtures separated and removed.

Cited in reference notes in 27 A. D. 356, on right to improvements; 15 A. D. 148; 17 A. D. 603; 31 A. D. 457; 48 A. D. 297,—on compensation for improvements; 78 A. D. 53, on right of vendee to recover for improvements; 36 A. D. 34; 40 A. D. 655,—on right of bona fide possessor of land to compensation for improvements; 9 A. S. R. 805, on allowance for improvements in action for mense profits against bona fide possessor; 73 A. D. 164, on refusal to allow compensation for improvements unless they are permanent and beneficial.

Cited in notes in 6 A. S. R. 495, on right to recover for improvements; 21 A. D. 410, on right to recover for improvements on eviction; 81 A. S. R. 178, on com-

pensation for enhanced value in making allowance for betterments; 81 A. S. R. 167, 168, 169, 171, on what are betterments and when allowance should be made therefor.

— Rights of lessee.

Cited in *Worthington v. Young*, 8 Ohio, 401, holding that stipulation in lease that improvements may be removed, does not entitle set-off against mesne profits; *Bedell v. Shaw*, 59 N. Y. 46, holding that value of improvements should be allowed in reduction of damages in ejectment against bona fide lessee.

— Rights of donee against insolvent donor's creditors.

Cited in *Skiles Appeal*, 110 Pa. 248, 20 Atl. 722, 16 W. N. C. 246, holding that donee must be allowed for bona fide valuable improvements where gift is set aside.

— Rights of husband's creditors to wife's improvements.

Cited in *Bailey v. Gardner*, 31 W. Va. 94, 13 A. S. R. 847, 5 S. E. 636, holding that wife's property purchased and improved with money she earned, is subject to husband's creditors.

— Rights of tenant against cotenant.

Cited in *Pickering v. Pickering*, 63 N. H. 468, 3 Atl. 744, holding that tenant in possession in accounting to cotenant may have allowance for repairs increasing property's value; *Foster v. Weaver*, 118 Pa. 42, 4 A. S. R. 573, 12 Atl. 313, holding that tenant fraudulently depriving cotenant of interest in oil leasehold cannot set off cost of production.

Cited in notes in 28 L.R.A. 859, on liability of cotenant to account for mesne profits; 28 L.R.A. 857, on deduction on account by cotenant for use and occupation and rents and profits.

— Right to set-off against mesne profits in ejectment.

Cited in *Stark v. Starr*, 1 Sawy. 15, Fed. Cas. No. 13,307, holding that occupant under color of title may set off bona fide improvements against mesne profits; *Porter v. Doe*, 10 Ark. 186; *Hollinger v. Smith*, 4 Ala. 367,—holding that one in possession under color of title may set off improvements against mesne profits; *Woodhull v. Rosenthal*, 61 N. Y. 382, holding that occupant with knowledge that title is in another cannot demand set-off; *Byers v. Fowler*, 12 Ark. 218, 54 A. D. 271, holding innocent purchaser for valuable consideration, without notice of vendor's fraudulent title entitled to set off value of useful and permanent improvements; *Bailey v. Hastings*, 15 N. H. 525; *New Orleans & S. R. Co. v. Jones*, 68 Ala. 48,—holding that mere trespasser cannot set off value of improvements; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71, holding that occupant under color of title may set off bona fide improvements against rent enhanced thereby; *Morrison v. Robinson*, 31 Pa. 456, holding that bona fide occupant may set off against real owner's claim for damages, value of improvements; *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769, 8 N. Y. Civ. Proc. Rep. 363, holding that repairs and taxes should be allowed against mesne profits; *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448, 7 So. 760, holding where possession was under color of title in good faith, rents estimated on land's value when acquired; *Carter v. Brown*, 35 Neb. 670, 53 N. W. 580, holding that to entitle set-off under occupying claimant's act, it must appear that improvements were made bona fide under color of title; *Albee v. May*, 2 Paine, 74, Fed. Cas. No. 134, holding that state statute, retrospective, allowing ejected bona fide occupants to recover for improvements made is valid; *Learned v. Corley*, 43 Miss. 687, on right to set off clearing of land against mesne profits; *Parsons v. Moses*, 16 Iowa, 440, to point that occupant is not entitled to value of improvements without allowance for use and occupancy; *Taylor v. Morgan*, 86

Ind. 295, to point that though purchaser is ignorant of judgment liens he cannot claim improvements made, exempt therefrom.

Cited in note in 81 A. S. R. 176, on set-off of improvements in ejectment or trespass to try title.

Distinguished in *Gordon v. Tweedy*, 74 Ala. 232, 49 A. R. 813, holding actual notice of assertion of title by another fatal to occupant's claim for improvements as set-off.

-Right to compensation for, in ejectment.

Cited in *Turnipseed v. Fitzpatrick*, 75 Ala. 297, holding that bona fide occupant, adversely, will be allowed full value for improvements; *Shelley v. Cody*, 187 N. Y. 166, 79 N. E. 994, holding that where occupant wrongfully ousted and expelled true owner, improvements should not be credited; *Dawson v. Grow*, 29 W. Va. 332, 1 S. E. 564; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Effinger v. Hall*, 81 Va. 94,—holding that occupants under defective title cannot obtain compensation for improvements; *Dean v. Feely*, 69 Ga. 804, holding one holding bona fide under adverse claim of title entitled to have full value of improvements allowed; *Doe ex dem. Myrick v. Roe*, 31 Fed. 97, holding allowance for enhanced value of land by reason of improvements not permissible in courts of United States; *Haight v. Pine*, 10 App. Div. 470, 42 N. Y. Supp. 303, holding that wrongful occupant may be allowed for taxes and necessary repairs; *Sherred v. Cisco*, 4 Sandf. 480, holding that lot owner building party wall cannot compel contribution from adjoining lot owner, without agreement; *Huston v. Wickersham*, 2 Watts & S. 308, to point that trespasser may be charged with actual damage and injury to premises.

Cited in reference notes in 20 A. D. 277; 73 A. S. R. 812; 81 A. S. R. 164,—on compensation for improvements in ejectment.

Cited in note in 15 A. D. 351, on bona fides as essential for recovery in ejectment of compensation for improvements.

Evidence of title in action for mesne profits.

Cited in *Graves v. Joice*, 5 Cow. 261, holding in action for mesne profits, record in ejectment suit conclusive evidence of title.

15 AM. DEC. 354, JACKSON EX DEM. CADWELL v. KING, 4 COW. 207.

Who are incompetent persons.

Cited in *Hovey v. Chase*, 52 Me. 304, 83 A. D. 514, holding remarks mainly referring to difficulty of deciding dividing line between sanity and insanity not reversible error.

Cited in reference note in 83 A. D. 523, on who are persons of unsound mind.

Cited in note in 29 A. D. 38, on meaning of term *non compos mentis*.

Effect of mental incapacity.

Cited in *Person v. Warren*, 14 Barb. 488, holding that bona fide acts of one subsequently adjudged to have been insane not absolutely void; *Jennings v. Hennessy*, 26 Misc. 265, 55 N. Y. Supp. 833, holding that official declaration of incompetency, does not prove incompetency as to transaction two years prior; *Cook v. Cook*, 53 Barb. 180, upholding decree of divorce when evidence showed party sane when adultery committed though adjudicated insane at prior date.

Cited in note in 4 L.R.A. 637, on transactions rendered void by mental incapacity.

-On contracts generally.

Cited in *McNett v. Cooper*, 13 Fed. 586, holding that partial insanity will not

avoid bona fide contract, incapacity to understand same not shown; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460, holding adjudication of insanity and appointment of guardian not conclusive of inability to contract for necessities; *Young v. Stevens*, 48 N. H. 133, 97 A. D. 592, holding that one not known to be insane cannot avoid fair and bona fide contract; *Burnham v. Mitchell*, 34 Wis. 117, holding that mental incapacity of payee of note when action thereon accrues prevents running of statute of limitations.

Cited in reference notes in 22 A. D. 375, on contracts of insane persons; 34 A. D. 565, on manner in which insanity affects right to contract; 17 A. D. 731, on insanity affecting capacity to contract; 83 A. D. 523; 15 A. S. R. 393; 56 A. S. R. 731,—on validity of contracts of insane persons; 19 A. D. 91, as to whether contracts of lunatics are void or voidable; 17 A. D. 346, on mental unsoundness affecting liability on contract; 42 A. D. 335, on lunacy or unsoundness of mind and its effect on contract entered into; 44 A. D. 463, on effect of weakness of intellect on contracts; 36 A. D. 580, on effect of inquisition of lunacy after contract is made; 28 A. D. 647, on invalidity of contracts of lunatics after office found; 59 A. D. 502, on effect of contracts made after insanity inquisition; 27 A. D. 458, on circumstances indicating fraud and imposition, coupled with mental weakness, as ground for annulling contract; 49 A. D. 578; 54 A. D. 619; 41 A. S. R. 346; 56 A. S. R. 795,—on liability on contracts of insane persons; 16 A. D. 393, on liability of insane persons and idiots on contracts; 59 A. D. 615, on setting aside contracts in equity for weakness of mind; 44 A. S. R. 597, on return of consideration as prerequisite to rescission of contract by insane person.

Cited in notes in 22 A. D. 659, on invalidity of contracts of lunatics after office found; 40 A. D. 437, on age or mental weakness as affecting power to contract; 6 E. R. C. 76, on validity of contract between lunatic and one without knowledge of his insanity.

— On deeds.

Cited in *Hill v. Nash*, 41 Me. 585, 66 A. D. 266, upholding contractual capacity of grantor where entire loss of understanding not shown; *Hovey v. Hobson*, 55 Me. 256, holding want of absolute soundness of mind does not invalidate conveyance if grantor fully comprehends import of act; *Petrie v. Shoemaker*, 24 Wend. 85, as to whether deed of one of great imbecility of mind is void; *Canfield v. Fairbanks*, 63 Barb. 461, holding melancholy frame of mind, apprehension of want, and unsociability not sufficient evidence of incapacity to avoid deed; *Odell v. Buck*, 21 Wend. 142, holding imbecility not amounting to lunacy or idiocy insufficient to avoid deed obtained without fraud; *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 223, holding though grantor was aged, a paralytic, and of impaired mind, deed not avoided if he understood transaction; *Kelly v. McGuire*, 15 Ark. 555, holding that deed made by one not positively *non compos* yet evidently unable to resist undue influence is invalid; *Hightower v. Nuber*, 26 Ark. 604, holding deed procured from one evidently in his dotage with mind enfeebled by long illness, invalid; *Gerling v. Agricultural Ins. Co.* 39 W. Va. 689, 20 S. E. 691, holding conveyance invalid because of grantor's mental incapacity, not such transfer as forfeits policy prohibiting transfer; *Jackson v. Counts*, 106 Va. 7, 54 S. E. 570, holding that deed to one with knowledge of grantor's infirmity will be set aside, but their grantees without notice protected; *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891, holding extreme old age insufficient to have deed set aside on ground of mental incapacity; *Mulloy v. Ingalls*, 4 Neb. 115, holding that mere imbecility or weakness of mind, will not avoid deed, in absence of fraud; *Dennett v. Dennett*, 44 N. H. 531, 84 A. D. 97, holding mere weakness of mind insufficient to avoid

deed, if capacity of judge and form correct conclusions, remains; *Mann v. Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 57 U. S. App. 654, 86 Fed. 51, holding that mortgage foreclosure cannot be resisted on ground of mortgagor's incapacity, where before death she was treated as competent; *Merritt v. Merritt*, 32 Misc. 21, 66 N. Y. Supp. 123, holding mortgage executed subsequent to stroke of apoplexy valid, evidence showing general understanding of transaction; *Jacks v. Este*, 139 Cal. 507, 73 Pac. 247, holding mortgage executed by aged person without sufficient mental capacity to comprehend acts or effect, invalid; *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760, holding in action to set aside deed evidence of proceedings, after deed made, adjudging grantor insane, inadmissible.

Cited in reference notes in 35 A. S. R. 461, on validity of deed of insane person; 83 A. D. 523, on avoidance of deed by lunatic; 40 A. S. R. 474, on avoidance of deeds because of fraud or grantor's weakness of mind; 40 A. S. R. 473, on avoidance of deed on evidence of grantor's subsequent insanity; 36 A. D. 579, on right of grantor of heirs or representatives to avoid deed on ground of insanity; 66 A. D. 267, on imbecility as ground for avoiding deed or other contract; 40 A. S. R. 374, on necessity for return of consideration in avoidance of deed for insanity of grantor.

Cited in notes in 39 A. D. 749, on validity of insane person's deed; 55 A. D. 412, as to when deed can be avoided at law for fraud; 1 L.R.A. 611, as to whether deed by idiot or lunatic will be set aside; 49 A. D. 387, on estoppel as to heirs of a grantor.

Distinguished in *Redden v. Baker*, 86 Ind. 191, holding that deed of insane person is void, though made after guardian is discharged.

— On wills.

Cited in *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333,—holding instruction that person of unsound mind, cannot make valid will, whether or not capacity impaired, erroneous and citing annotation also on this point; *Jones v. Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905, holding instruction that grantor had disposing mind if capable of understanding nature of act, not error; *Riggs v. American Tract Soc.* 19 Hun, 481, 7 Abb. N. C. 433, holding allegation of legal incapacity to make disposition, because for several years preceding death, of unsound mind, sufficient; *Brown v. Torrey*, 24 Barb. 583, holding if testator fully comprehended business transacted, will valid, though at former period under some disability; *Re Bush*, 1 Connolly, 330, 5 N. Y. Supp. 23, upholding testamentary capacity in absence of entire loss of understanding; *Re Kiedaisch*, 2 Connolly, 438, 13 N. Y. Supp. 255, holding impaired mental faculties do not deprive a person of testamentary capacity; *Stewart v. Lisenard*, 26 Wend. 255, holding that imbecility of mind will not avoid a last will and testament; *Abraham v. Wilkins*, 17 Ark. 292, holding evidence that testator's intellect was too far wasted by disease, though occasionally rational, avoids will; *Miller v. White*, 5 Redf. 320, holding that insane delusion as to niece avoids codicil revoking provisions for her in the will; *Mairs v. Freeman*, 3 Redf. 181, holding slight aberrations will not avoid will against evidence of mental vigor when he executed same; *Shaw's Will*, 2 Redf. 107, holding insane delusions of testator as to any of his relatives, sufficient to avoid his will; *Godden v. Burke*, 35 La. Ann. 160, holding that eccentric conduct and occasional partial aberration will not avoid will if mentally sound when will made; *Delafield v. Parish*, 25 N. Y. 9 (dissenting opinion), on right to judge from tenor of will, testator's mental capacity.

Cited in note in 19 A. D. 408, on insanity affecting testamentary capacity or capacity to contract.

— On marriage.

Cited in *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003, on what degree of mental unsoundness will avoid marriage contract.

Cited in reference notes in 26 A. D. 440, on marriage of insane person; 53 A. D. 167, on validity of marriage of persons incapable of giving consent.

Cited in note in 40 A. D. 456, on effect on validity of marriage of insanity of one of the parties.

Validity of infant's contract.

Cited in reference note in 70 A. D. 200, on validity of contracts with infant.

Presumption as to mental capacity.

Cited in reference note in 47 A. D. 474, on presumption as to continuance of lunacy and burden of proof.

Cited in notes in 36 L.R.A. 721, on presumption of sanity; 35 L.R.A. 118, on presumption of continuance of habitual insanity.

Burden of proof as to mental capacity.

Cited in *Phelan's Case*, 9 Abb. Pr. 286, holding that where examination shows mental soundness, burden is on party alleging incapacity to prove same; *Ricketts v. Jolliff*, 62 Miss. 440, holding that one endeavoring to enforce contract with person habitually insane must prove lucid interval when contract made; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575, holding that where general derangement of grantor's mind has been established, party attacking must prove lucid interval; *Douglas v. Hartzell*, 15 Ill. App. 251, holding burden of proving sanity on one claiming its existence after mental derangement is once established or conceded.

Cited in note in 36 L.R.A. 727, on burden of proof as to sanity.

Evidence as to mental capacity.

Cited in *Brand v. Brand*, 39 How. Pr. 193, holding that subscribing witness to deed may testify, though not an expert, as to grantor's competency to contract; *Culver v. Haslam*, 7 Barb. 314, holding opinion of intimate acquaintance not medical man, competent if connected with facts within his knowledge; *Dewitt v. Barley*, 9 N. Y. 371 (dissenting opinion), on right of unprofessional witnesses to testify as to mental capacity; *Culver v. Haslam*, 7 Barb. 314 (dissenting opinion), on right to permit one not a physician to give opinion on mental capacity; *Clinton v. Estes*, 20 Ark. 216, holding where party is afflicted with epilepsy, evidence of time afflicted and effects of paroxysms upon mind, admissible.

Presumptive evidence as to fraud.

Cited in *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75, holding grantor's extreme age and feebleness, insufficient consideration, and not providing for self or other children, presumptive evidence; *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389, holding that conveyance to son by aged woman will not raise presumption of undue influence, in absence of direct proof; *Bunell v. Stoddard*, Fed. Cas. No. 2,135, holding evidence that by suppression and misrepresentation of facts, trustees acquired property at less value, presumptive evidence; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50, holding evidence that client knew of attorney's fraudulent acts and profited by them, presumptive evidence; *Hatch v. Spooner*, 37 N. Y. S. R. 151, 13 N. Y. Supp. 642, holding presumption not sustained where evidence shows that representations were necessarily matters of opinion; *Hall v. Perkins*, 3 Wend. 626, holding inducing simple, ignorant relative to accept land of less value than

claim, as settlement, presumptive evidence; *Newman v. Cordell*, 43 Barb. 448, holding husband's conveyance to one through another and grantee's conveyance to first grantor's wife, of property of equal value, presumptive evidence; *Morris v. Talcott*, 96 N. Y. 100, holding purchase on credit with knowledge of insolvency and omission to disclose insolvency to vendor not presumptive evidence; *King v. Moon*, 42 Mo. 551, holding vendor's insolvency and fact that vendee did not take possession or exercise acts of ownership, presumptive evidence.

Distinguished in *Grabush v. Goodman*, 16 N. Y. S. R. 910, 1 N. Y. Supp. 864, holding mutual mistake insufficient to sustain action to set aside assignment on ground of fraud.

Burden of proof as to fraud.

Cited in *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, holding where conveyance is to daughter burden of proving undue influence is on party attacking; *Jones v. Jones*, 137 N. Y. 610, 33 N. E. 479, holding that burden is upon party attacking to prove deed prima facie valid, fraudulent; *Rice v. Rice*, 5 Luzerne, Leg. Reg. 207, holding that one throwing aged woman out after conveyance made must show affirmatively lack of fraud; *Wakeman v. Dalley*, 51 N. Y. 27, 10 A. R. 551, holding that burden is upon party alleging fraud to prove representations were made with knowledge of falsity.

Admissibility of evidence as to fraud.

Cited in *Fouty v. Fouty*, 34 Ind. 433, holding parol evidence inadmissible to show deed, absolute on face, to be in trust for grantor's son; *Day v. New England Car-Spring Co.* Fed. Cas. No. 3,688, holding evidence admissible to impeach instrument by showing fraud in procuring same.

Cited in note in 11 E. R. C. 227, on parol evidence to show fraud, undue influence, gross inequality, or duress in procurement of written instrument.

Jurisdiction in case of fraud.

Cited in *Cohen v. Ellis*, 16 Abb. N. C. 320; *Gorman v. McCabe*, 24 R. I. 245, 52 Atl. 989,—holding when acts raise presumption of fraud, complainant entitled to relief in equity; *Champion v. White*, 5 Cow. 509, holding that where fraud is not clearly established, court of law has no jurisdiction; *Smith v. Salomon*, 7 Daly, 216, holding that where facts are established from which jury may determine as to fraud, court of law has jurisdiction.

Cited in reference notes in 27 A. D. 586; 36 A. D. 535,—on concurrent jurisdiction of law and equity in cases of fraud.

Effect of fraud.

Cited in reference note in 34 A. D. 208, on effect of fraud in deed.

Cited in note in 15 A. D. 575, on rescission of contracts made with heirs, reversioners, and expectants in the lifetime of the ancestor.

— On gift.

Cited in *Truman v. Lore*, 14 Ohio St. 144, holding that proof of undue influence will not avoid at law, gift of one legally capable to convey.

— On dower.

Cited in *Malloney v. Horan*, 49 N. Y. 111, 10 A. R. 335, holding that wife joining in fraudulent conveyance, subsequently set aside, does not bar dower claim against subsequent purchaser; *Malony v. Horan*, 12 Abb. Pr. N. S. 289, holding that fraudulent conveyance by husband and wife to another and reconveyance to wife, does not defeat dower; *Den ex dem. Stewart v. Johnson*, 18 N. J. L. 87, holding that wife, having no interest, and no crime charged, may in action between others impeach husband's deed as being fraudulent as to creditors.

Fraudulent conveyances.

Cited in reference notes in 26 A. D. 194, on voluntary conveyances; 17 A. D. 756, on validity of voluntary conveyances, 28 A. D. 206, on validity of fraudulent conveyances as between parties.

Liability of insane person for torts.

Annotation cited in *Jewell v. Colby*, 66 N. H. 400, 24 Atl. 902, holding insane person liable for torts to extent of loss sustained, unless the wrong lies in the intent.

Cited in reference note in 44 A. D. 351, on liability of lunatic for tort.

Cited in note in 42 A. S. R. 753, on liability of incompetent persons.

15 AM. DEC. 369, REYNOLDS v. CLEVELAND, 4 COW. 282.**Partner's liability for acts of other.**

Cited in *Livingston v. Cox*, 6 Pa. 360, holding surviving law partner liable for negligence on contract entered into for firm by deceased partner; *Rose v. Baker*, 13 Barb. 230, holding though partner give individual note for partnership debt, copartner not relieved from liability for indebtedness; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah, 199, 66 Pac. 1058, holding partner liable for money procured for firm purposes by copartner under his own signature, though objecting; *Davis v. Grove*, 2 Robt. 134, holding that agreement between two mercantile houses for purchase upon joint account makes share of each liable for debts; *Lanier v. Chappell*, 2 Fla. 621, to point that contract with guardian for slave's services and note therefor, does not prevent ward suing for services.

Cited in note in 19 E. R. C. 466, on liability of partnership receiving benefit of individual contract of partner.

— Liability of dormant partner.

Cited in *Franklin v. Hardie*, 1 Tex. Civ. App. Cas. (White & W.) 700, holding partner not known to be such liable to person dealing with the firm; *Mann v. Clapp*, 1 Tex. App. Civ. Cas. (White & W.) 249, holding partners all liable though unknown as such and credit is given individual partner; *Duvall v. Wood*, 3 Lans. 489; *Tucker v. Peaslee*, 36 N. H. 167,—holding though partner obtain goods on his credit to give individual note, partnership being undisclosed, dormant partner liable; *Smith v. Smith*, 27 N. H. 244, holding though vendor supposed he was crediting purchaser only, dormant partner liable; *Devine v. Martin*, 15 Tex. 25, holding one proven to have been dormant partner shortly prior to purchase, liable, unless dissolution shown; *Baxter v. Clark*, 26 N. C. (4 Ired. L.) 127, holding denial of existing partnership, not notice to vendor that each partner is liable for own purchases; *Lea v. Guice*, 13 Smedes & M. 656, holding not error to instruct jury that dormant partner is liable for partnership debts, though creditor unaware; *Ward v. Motter*, 2 Rob. (Va.) 536 (dissenting opinion), on right to hold dormant partner where known partner executes specialty for goods purchased; *Jones v. Hoadley*, 115 App. Div. 479, 101 N. Y. Supp. 470 (dissenting opinion), on liability of all members of firm though partnership unknown at time of transaction.

Cited in note in 18 L.R.A.(N.S.) 1082, on liability as partners of members of secret partnerships.

15 AM. DEC. 374, SHUMWAY v. STILLMAN, 4 COW. 292, Reaffirmed on later appeal in 6 Wend 447.**Judgment obtained in another state — Right of action on.**

Cited in *Shepard v. Wright*, 59 How. Pr. 512, holding judgment recovered in

foreign country on service without the country, unenforceable here; *Thomas v. Robinson*, 3 Wend. 267, holding action not maintainable on judgment obtained in justice's court of another state without showing jurisdiction; *Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 61, 10 Fed. 696, holding judgment obtained in another state against foreign corporation by service upon authorized resident agent, enforceable here; *Moulin v. Trenton Mut. Life & F. Ins. Co.* 24 N. J. L. 222, holding judgment obtained against a corporation by service on officer accidentally within state, unenforceable here; *Easterly v. Goodwin*, 35 Conn. 273, holding that judgment rendered without personal service, in which nonresident's property is attached cannot be made basis of action of debt; *Barkman v. Hopkins*, 11 Ark. 157, holding judgment rendered in another state unenforceable here, if obtained without notice or voluntary appearance; *Warren Mfg. Co. v. Etna Ins. Co.* 2 Paine, 501, Fed. Cas. No. 17,206, holding judgment rendered without due notice of suit or service of process is a nullity; *Foster v. Glazener*, 27 Ala. 391, holding summary judgment establishing lost note, rendered under statute of sister state, invalid for want of jurisdiction of person; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280, holding judgment obtained in another state when court had no jurisdiction of person, not binding here; *Price v. Hickok*, 39 Vt. 292, holding judgment on service without the state and attachment of property, does not enable enforcement here; *Noble v. Thompson Oil Co.* 79 Pa. 354, 21 A. R. 66, 2 W. N. C. 325, 33 Phila. Leg. Int. 14, holding judgment *in rem* in foreign attachment void as to property situated in another state; *Steel v. Smith*, 7 Watts & S. 447, holding judgment in foreign attachment effecting to bind nonresidents, unenforceable here; *Love v. Love*, 10 Phila. 453, 30 Phila. Leg. Int. 86, holding that decree of divorce without service against nonresident is not conclusive upon divorcee; *Wilbur v. Abbott*, 60 N. H. 40, holding judgment valid in state where rendered invalid in another state in which it would have been void if rendered there; *Darrach v. Wilson*, 2 Miles (Pa.) 116, holding action of debt not maintainable upon judgment obtained in foreign attachment under act of 1705; *McKim v. Odom*, 12 Me. 94, holding that action of assumpsit will not lie on decree in chancery of another state.

— Conclusiveness of.

Cited in *Gunn v. Peakes*, 36 Minn. 177, 1 A. S. R. 661, 30 N. W. 466; *Rogers v. Odell*, 39 N. H. 452; *Jarvis v. Robinson*, 21 Wis. 524, 94 A. D. 560; *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 A. D. 446,—holding judgment obtained in court of general jurisdiction conclusive without allegation of jurisdiction; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847, to point that an averment showing general jurisdiction renders unnecessary averment of jurisdiction of subject-matter; *Smalley v. Lightall*, 37 Mich. 348, holding justice's docket entry no proof of nature of service to give him jurisdiction to proceed; *Wright v. Marsh*, 2 G. Greene, 94, holding final judgment of partition rendered by court having jurisdiction of subject and parties conclusive in action for recovery; *Ingalls v. Sprague*, 10 Wend. 672, holding record of judgment showing confession by two codebtors conclusive though one confessed for other without authority; *State v. Richmond*, 26 N. H. 232, holding that act of selectmen in laying out road cannot be impeached by one having no interest; *Gray v. Cruise*, 36 Ala. 559, holding that validity of grant of administrator *de bonis non* cannot be attacked collaterally when records show administrator resigned; *Wright v. Douglass*, 10 Barb. 97, holding that where proof of attachment shows nonservice, record of judgment is not conclusive; *Heatherly v. Headley*, 4 Or. 1, holding that if record shows court proceeded, without service, its jurisdiction may be attacked collaterally;

Hoose v. Sherrill, 16 Wend. 33 (dissenting opinion), on right of justice of peace to claim jurisdiction of person on service of wrong writ.

Cited in reference notes in 17 A. D. 368; 21 A. D. 180; 25 A. D. 322; 44 A. D. 344,—on effect of judgments of sister states; 34 A. S. R. 435, on conclusiveness of foreign judgment; 65 A. D. 704, on right to attack foreign judgments by inquiring into jurisdiction of court and its power over parties and things in controversy; 54 A. D. 460, on right to plead *nil debet* to debt on foreign judgment; 50 A. D. 525, on right to inquire into justness of judgment as on plea of *nul tiel record*.

Cited in note in 103 A. S. R. 308, as to when inquiries concerning the jurisdiction of another state are open.

—Sufficiency of evidence of judgment.

Cited in Shumway v. Stillman, 6 Wend. 447, holding record of appearance conclusive against plea of nonappearance not proved; Noyes v. Butler, 6 Barb. 613, holding that record of judgment showing appearance cannot be impeached; Pritchett v. Clark, 3 Harr. (Del.) 517, holding record of judgment obtained in another state, insufficient to plea of no service, notice, or appearance; Middlebrooks v. Springfield F. Ins. Co. 14 Conn. 301, holding that service upon secretary of foreign corporation while temporarily within the state does not give jurisdiction; Davis v. Smith, 5 Ga. 274, 48 A. D. 279, holding that judgment in ejectment rendered elsewhere and eviction, unimpeached, is evidence here of breach of covenant of warranty; Smith v. Central Trust Co. 154 N. Y. 333, 48 N. E. 553, holding where not shown otherwise record of court of general jurisdiction presumptive evidence of jurisdiction; Bimeler v. Dawson, 5 Ill. 536, 39 A. D. 430, holding record of judgment conclusive if not attacked with evidence proving no jurisdiction; Harrison v. Wallis, 44 Misc. 492, 90 N. Y. Supp. 44, to point that it is incumbent upon nonresident to show service by publication was not according to statute.

—Evidence to impeach.

Cited in Eaton v. Hasty, 6 Neb. 419, 29 A. R. 365, holding it error to reject evidence as to want of jurisdiction and release; Hatcher v. Rocheleau, 18 N. Y. 86, holding evidence inadmissible to impeach foreign judgment on the merits, court having jurisdiction of person and subject; Hoffheimer v. Stiefel, 17 Misc. 236, 39 N. Y. Supp. 714, holding that where record shows jurisdiction, evidence to impeach is not admissible under general denial; McCauley v. Hargroves, 48 Ga. 50, 15 A. R. 660, holding evidence admissible to show service in judgment obtained by default was effected without officer's jurisdiction; Hall v. Williams, 6 Pick. 232, 17 A. D. 356, holding that if record shows no jurisdiction over person, judgment cannot be received as *prima facie* evidence; Dalrymple's Estate, 31 Pa. Co. Ct. 177, holding where record does not sufficiently show adjudication of domicile, evidence thereof admissible; Wernwag v. Pawling, 5 Gill & J. 500, 25 A. D. 317, holding record of judgment in another state admissible; Morse v. Presby, 25 N. H. 299, holding evidence that district court of United States had no jurisdiction of bankrupt admissible to plea of discharge; Hunt v. Mayfield, 2 Stew. (Ala.) 124, holding that to plea *nul tiel record* certified copy of valid judgment, though not founded on personal service, is admissible.

—Foreign judgment generally as defense.

Cited in Haggerty v. Amory, 7 Allen, 458, holding plea of discharge in bankruptcy subsequent to recovery of judgment, good defense; Burnham v. Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179, holding foreign judgment not bar to

action here on note, not included therein, though included in writ; *Middlesex Bank v. Butman*, 29 Me. 19, holding judgment elsewhere against nonresident, without service and no property attached, inadmissible against action of assumpsit here.

Distinguished in *Whittier v. Wendell*, 7 N. H. 257, holding unsatisfied foreign judgment without service or appearance, no bar to action here on original demand.

— Judgment in divorce suit as defense.

Cited in *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104, holding foreign divorce obtained upon service here does not prevent dower here; *Re Kimball*, 155 N. Y. 62, 49 N. E. 331; *Kerr v. Kerr*, 41 N. Y. 272,—holding foreign divorce granted without personal service there invalid as defense to rights in husband's estate; *People v. Baker*, 76 N. Y. 78, 32 A. R. 274, holding judgment of divorce obtained in another state without appearance or notice, no defense here to bigamy; *Reed v. Reed*, 52 Mich. 117, 50 A. R. 247, 17 N. W. 720, holding foreign decree of divorce obtained upon false assertion of residence, not binding in action for nonsupport; *Bradshaw v. Heath*, 13 Wend. 407, holding foreign divorce decree, obtained without jurisdiction of divorcee no defense to refusal of dower in second husband's estate.

Cited in note in 12 L.R.A. 862, on extraterritorial effect of decrees of divorce in state court.

— Sufficiency of plea against judgment.

Cited in *Bigger v. Hutchings*, 2 Stew. (Ala.) 445, holding allegation that debtor constantly resided elsewhere and had no notice of suit, sufficient; *Lucas v. Copeland*, 2 Stew. (Ala.) 151, holding plea alleging judgment was fraudulently entered of record by clerk, insufficient; *Anderson v. Anderson*, 8 Ohio, 108, holding plea that judgment was obtained by fraud, unavailable in action thereon here; *Black v. Black*, 4 Bradf. 174, 4 Abb. Pr. 162, holding plea of no service insufficient against foreign decree of divorce, without affirmative proof; *Ritchie v. Carpenter*, 2 Wash. 512, 26 A. S. R. 877, 28 Pac. 380, holding that plea of no jurisdiction must set up facts sufficient to show a want of it; *Starbuck v. Murray*, 5 Wend. 148, 21 A. D. 172, holding plea of no service and no appearance good to averment of appearance; *Rice v. Coutant*, 38 App. Div. 543, 56 N. Y. Supp. 351, holding that want of jurisdiction must be pleaded and is not available under general denial; *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526, holding plea of non jurisdiction insufficient, if facts upon which jurisdiction may be predicated are not positively negatived; *Baltzell v. Nosler*, 1 Iowa, 588, 63 A. D. 466, holding that to sustain demurrer to plea that attorney appeared without authority, is error; *Endicott v. Morgan*, 66 Me. 456, holding plea of no jurisdiction and no notice, good; *Harrod v. Barretto*, 1 Hall, 171; *Strouble v. Malone*, 3 Iowa, 586,—holding plea of nonresidence and nonservice insufficient without allegation of no appearance; *Sharman v. Morton*, 31 Ga. 34, holding pleas of infancy, no consideration and no interest in note upon which judgment was obtained, insufficient; *Welch v. Sykes*, 8 Ill. 197, 44 A. D. 689, holding plea of no jurisdiction bad when record shows appearance by attorney unless shown to be without authority; *Watriss v. Pierce*, 36 N. H. 232, holding that replications traversing no fact alleged and introducing no facts constituting an answer, are bad.

Presumption as to jurisdiction.

Cited in *Red v. Boyd*, 13 Tex. 241, 65 A. D. 61, holding court of general jurisdiction presumed to have had jurisdiction until the contrary appears; *Chemung*

Canal Bank v. Judson, 8 N. Y. 254, to point that it is not necessary to aver jurisdiction of district court as it will be presumed; Dodge v. Coffin, 15 Kan. 277, (dissenting opinion), on right to take judicial notice of jurisdiction of courts of another state, from Constitution thereof; Foot v. Stevens, 17 Wend. 483, holding on appeal from judgment jurisdiction of court of general jurisdiction presumed though not averred; Potter v. Merchants' Bank, 28 N. Y. 641, 86 A. D. 273, holding that when court has jurisdiction to appoint receivers the presumption is that things required authorizing order were done; Bosworth v. Vanderwalker, 53 N. Y. 597, holding that jurisdiction may be established by recitals in record of judgment, unless disproved.

Cited in reference notes in 42 A. S. R. 398, on presumption of jurisdiction in judgments of sister states; 65 A. D. 704, on judgment of court of general jurisdiction as prima facie evidence of jurisdiction.

Cited in notes in 12 L.R.A. 576, on presumption as to validity of judgments of sister state; 103 A. S. R. 322, on jurisdictional presumption as to judgments of courts of sister state.

Authority of attorney to appeal.

Cited in reference notes in 52 A. D. 599, on appearance by attorney; 96 A. D. 624, on presumption as to authority of attorney to appear.

Cited in note in 75 A. D. 149, on collateral attack on judgment on unauthorized appearance of attorney.

15 AM. DEC. 379, PEOPLE v. HERKIMER, 4 COW. 345.

Rights and privileges of public.

Cited in Mayrhofer v. Board of Education, 89 Cal. 110, 23 A. S. R. 451, 26 Pac. 646, holding that mechanics' lien not enforceable against schoolhouse erected by public school district; Skelly v. Westminster School District, 103 Cal. 652, 37 Pac. 643, holding that trustees of school district cannot be garnished in attachment suit by third party against its creditor; Emery County v. Burrenson, 14 Utah, 328, 60 A. S. R. 898, 37 L.R.A. 732, 47 Pac. 91, holding that laws of 1888 cannot be extended to include right to levy execution against county's property; Alabama Girl's Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114, holding action against corporation where judgment must be satisfied from state property, though corporation has title, prohibited; Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co. 110 Wis. 633, 84 A. S. R. 948, 86 N. W. 592, holding that lien may be enforced against such property of quasi public corporation as will not interfere with public convenience; Re Utica, 73 Hun, 256, 26 N. Y. Supp. 564, holding a municipality cannot condemn for street purposes state lands dedicated for public use; United States v. Tetlow, 2 Low. Dec. 159, Fed. Cas. No. 16, 456, holding debtor who would be entitled to discharge if arrested by state court process, entitled also where arrested by United States court process; United States v. Herron, 20 Wall. 251, 22 L. ed. 275, holding that United States bankrupt act does not discharge debt due United States, though only as surety; Re Brandreth, 14 Hun, 585, holding Code section authorizing discharge from record of judgment entered against bankrupt applies to judgments in favor of people.

Cited in reference notes in 18 A. D. 207, on effect of general words in statute to bind sovereign; 66 A. S. R. 35, as to when state is bound by words in statute; 21 A. D. 101, on succession of the people to all rights of the King; 26 A. D. 575, on preference of debts due state in settlement of decedents' estates.

Cited in notes in 26 A. D. 36, on point that state is not bound by statute unless

expressly named therein; 29 L.R.A. 243, on what priority of states in payment from assets of debtor is based.

Distinguished in *People v. Hayes*, 7 How. Pr. 248, to point that people succeeded to rights of the Crown.

Running of limitations against people.

Cited in *People v. Van Rensselaer*, 8 Barb. 189, holding that in action by state to recover lands always vacant defense of adverse title acquired by statute of limitations demurrable; *Smith v. Morgan*, 68 Wis. 358, 32 N. W. 135, to point that as against the state or its grantee title cannot be acquired under school land certificates, believing title valid.

Cited in reference notes in 44 A. D. 135; 6 A. S. R. 649,—on operation of statute of limitations against the state; 52 A. S. R. 313, on statute of limitations in quo warranto proceedings.

Cited in notes in 8 E. R. C. 179, as to whether lapse of time can bar right of state; 20 L. ed. U. S. 535, on running of limitations against state; 101 A. S. R. 152, on application of maxim, *Nullum tempus occurrit regi*, to governmental bodies of states; 101 A. S. R. 166, on effect on maxim, *Nullum tempus occurrit regi*, on statutes expressly applying limitations.

Right of jury to take judicial notice.

Cited in *Lenahan v. People*, 3 Hun, 164, 5 Thomp. & C. 265, 2 Cowen, Crim. Rep. 134, holding jury cannot take judicial notice that street is more deserted at one time than another.

Cited in reference notes in 37 A. D. 84, on what falls within judicial notice; 78 A. D. 691, on judicial notice of public statutes; 27 A. D. 150, on judicial notice of public statutes in same or sister state; 23 A. D. 669, on judicial notice of public statutes by courts of same state.

Cited in note in 89 A. D. 665, on court's judicial notice of public statutes of state within which court sits.

15 AM. DEC. 383, HINCKLEY v. EMERSON, 4 COW. 351.

Liability for injuries inflicted by animals.

Cited in reference notes in 31 A. D. 310, on liability for injuries committed by animals; 81 A. D. 183, on liability of owner of dangerous animal; 41 A. D. 720, on liability of owner for injuries done by ferocious animals; 69 A. D. 103, on liability of owner of mischievous domestic animal running at large; 42 A. D. 249, as to when trespass lies for damages done by animals.

Cited in notes in 16 A. S. R. 631, on liability for injuries by vicious animals; 3 E. R. C. 118, on liability for keeping mischievous animal with knowledge of its propensities.

— Dogs.

Cited in *Van Leuven v. Lyke*, 1 N. Y. 515, 49 A. D. 346, holding owner liable for injuries committed while dog unlawfully in another's close, without proving knowledge of viciousness; *Auchmuty v. Ham*, 1 Denio, 495, holding employer not liable for injuries inflicted by dog of hired man, living at another house on farm; *Meibus v. Dodge*, 38 Wis. 300, 20 A. R. 6, holding that small child meddled with whip lying in sleigh, no defense where owner left known vicious dog unmuzzled; *Loomis v. Terry*, 17 Wend. 496, 31 A. D. 306, holding owner liable though person injured was hunting without license in owner's woods, if bitten in daytime; *Dunlap v. Snyder*, 17 Barb. 561, holding where evidence shows dog attacked several persons on same evening evidence as to quietude inadmissible.

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Cited in reference notes in 81 A. D. 183, on owner's liability for damages done by dog; 52 A. D. 70, on injuries committed by vicious dogs; 32 A. D. 36, on liability of owner for injuries inflicted by dog on stock; 53 A. D. 709, on liability of owner of dangerous dog for injury done by him.

Right to destroy or injure property.

Cited in *Lawton v. Steele*, 6 N. Y. Supp. 15, to point that game law allowing destruction of nets is constitutional; *People v. Campbell*, 4 Park. Crim. Rep. 386, to point that under statute, stealing of dog is larceny and indictment sustainable; *Harrington v. Miles*, 11 Kan. 480, 15 A. R. 355, to point that charging one with stealing a dog is actionable *per se*.

Cited in note in 124 A. S. R. 602, on right of private person to abate public nuisance though not specially injured.

— Animals generally.

Cited in *Aldrich v. Wright*, 53 N. H. 398, 16 A. R. 339, to point that statute prohibiting destruction of minks does not prevent one killing them if destroying property.

Cited in reference note in 32 A. D. 679, on right to kill vicious animals as a nuisance.

Cited in notes in 49 A. D. 260, on liability for killing or maiming trespassing animals; 124 A. S. R. 602, on right of private person to destroy dangerous animals.

— Dogs.

Cited in *Brent v. Kimball*, 60 Ill. 211, 14 A. R. 35, holding that killing of dog that ran upon premises because scared and attempted no injury, is trespass; *Boecher v. Lutz*, 13 Daly, 28, holding killing of dog to prevent injury to another dog attacked, justifiable; *Brown v. Carpenter*, 26 Vt. 638, 62 A. D. 603, holding that large and vicious dog accustomed to bite persons, if allowed to go at large may be killed; *McLesney v. Wilson*, 132 Mich. 252, 93 N. W. 627, 1 A. & E. Ann. Cas. 191, holding that fact that dog that had killed chickens is trespassing does not justify killing; *Nehr v. State*, 35 Neb. 638, 17 L.R.A. 771, 53 N. W. 589, holding dog that persistently assails in threatening manner persons passing along road may be killed by one assailed; *Anderson v. Smith*, 7 Ill. App. 354, on right to kill a dog if it is believed there is danger that valuable hens would be killed; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, to point that statute providing that unassessed dog is not entitled to protection of law is constitutional.

Cited in reference note in 81 A. D. 183, as to when dog may be killed.

Cited in notes in 15 L.R.A. 251, on right to kill dogs; 67 A. S. R. 294, on justification and defenses for killing or injuring another's dog; 40 L.R.A. 511, on right to kill dogs chasing other animals; 67 A. S. R. 295, on killing or worrying sheep as defense in action for death of or injury to dog.

15 AM. DEC. 384, McKEE v. NELSON, 4 COW. 355.

Admissibility of opinions—As to mental capacity.

Cited in *Dower v. Church*, 21 W. Va. 23, holding opinions based upon actual observation as to competency to make a will, admissible; *Clark v. State*, 12 Ohio, 483, 40 A. D. 481; *Hardy v. Merrill*, 56 N. H. 227, 22 A. R. 441,—holding non-expert opinion, based upon observation, as to sanity, admissible; *Territory v. Padilla*, 8 N. M. 510, 46 Pac. 346, holding that nonexpert cannot be asked questions directly calling for opinion as to sanity *Pattee v. Whitcomb*, 72 N. H.

249, 56 Atl. 459, holding that one not qualified by personal acquaintance, cannot give opinion as to testator's susceptibility to beneficiary's influence; *Culver v. Haslain*, 7 Barb. 314, holding nonprofessional opinion of grantor's mental capacity, founded on disclosed known facts and circumstances, admissible; *De Witt v. Barly*, 17 N. Y. 340, holding opinion confined to facts of unprofessional witness as to grantor's mental imbecility founded upon personal observation, admissible; *Dewitt v. Barley*, 9 N. Y. 371 (dissenting opinion), on right of unprofessional witnesses to testify as to mental capacity of grantor; *State v. Pike*, 49 N. H. 399, 6 A. R. 533; *Boardman v. Woodman*, 47 N. H. 120 (dissenting opinion),—on right to reject opinion of nonexpert witnesses as to sanity.

Cited in reference notes in 53 A. D. 101; 58 A. D. 305,—on opinions of witnesses as evidence; 22 A. D. 574, as to when opinions of witnesses will be received.

Cited in note in 19 A. R. 410, on admissibility of opinion of nonexpert.

—As to physical condition.

Cited in *Shelby v. Claggett*, 46 Ohio St. 549, 5 L.R.A. 606, 22 N. E. 407, holding opinion of nonprofessional witness, based upon actual observation as to one's physical condition, admissible; *Fulton v. Metropolitan Street R. Co.* 125 Mo. App. 239, 102 S. W. 47, holding opinion as to effect of injury based upon appearance and activity of injured, admissible.

—As to direction of blow.

Cited in *Com. v. Sturtivant*, 117 Mass. 122, 19 A. R. 401, holding that witness in murder case acquainted with peculiar properties of blood may testify direction from which stain came; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (affirming 4 Utah, 247, 9 Pac. 407), holding opinion of physician making postmortem examination as to direction of blow, inadmissible.

—As to value of property.

Cited in *Tebbetts v. Haskins*, 16 Me. 283, holding in action for materials furnished and labor done, testimony of master builder who examined building admissible; *Clifford v. Richardson*, 18 Vt. 620, holding opinion of competent witnesses as to amount of work mill could have performed, if completed, admissible; *Norton v. Moore*, 3 Head, 480, holding opinion of nonprofessional witness as to soundness of slave based upon observation and knowledge, admissible; *Joy v. Hopkins*, 5 Denio, 84, holding that opinion as to value if property had been as warranted is admissible; *Clark v. Baird*, 9 N. Y. 183, holding opinions of witnesses acquainted with realty in dispute as to value thereof, admissible; *Roberts v. Fleming*, 31 Ala. 683, holding that physician with limited knowledge of value of slaves may state that "medical attention would exceed profit;" *Sydeman v. Beckwith*, 43 Conn. 9, holding opinion as to whether horse is safe and kind, based upon personal knowledge, admissible.

Distinguished in *Robertson v. Stark*, 15 N. H. 109, holding opinion of experienced teamster respecting value of horses, harnesses, and wagons inadmissible, not requiring scientific knowledge.

—As to damages sustained.

Cited in *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289, 12 N. Y. Leg. Obs. 46, holding opinion, preceded by basic facts as to effect of proposed railroad on property and value thereof, admissible; *Butler v. Mehrling*, 15 Ill. 488, in action for damages for detention of horse, opinion based upon speculative profits, inadmissible; *The Clipper v. Logan*, 18 Ohio, 375, holding that an engineer conversant with steamboats may give his opinion as to whether damaged boat can be repaired; *Bissell v. Wert*, 35 Ind. 54, holding opinion as to damages sustained by

reason of unskilful sowing, inadmissible; *Stiles v. Tilford*, 10 Wend. 338, on right to receive evidence as to loss of service incurred after action for damages for seduction commenced.

Disapproved in *Norman v. Wells*, 17 Wend. 136, holding in assessment of damages for breach of covenant, opinion of probable damages inadmissible.

— **Opinions inferred from acts, remarks, and appearances.**

Cited in *Berry v. State*, 10 Ga. 511, holding that in criminal-case opinions as to guilt deduced from remarks made are inadmissible; *Keener v. State*, 18 Ga. 194, 63 A. D. 269, holding opinion as to whether one's tone of voice, language, and manner indicated coming trouble, inadmissible; *Carter v. Carter*, 152 Ill. 434, 28 N. E. 948, holding opinion from detailed noises, sounds, and conversation heard that adultery took place in adjoining room, admissible; *State v. McLaughlin*, 126 N. C. 1080, 35 S. E. 1037, holding question as to whether witness testified same at trial as at preliminary hearing, improper; *State v. McGhee*, 143 N. C. 641, 57 S. E. 158, holding under indictment as accessory opinion from observation as to relation between principal and prisoner, competent; *Hardenburgh v. Cockroft*, 5 Daly, 79, holding admission of opinion contradicting testimony of one present that conversation was heard at certain distance, error; *Eastwood v. People*, 3 Park. Crim. Rep. 25, holding opinion as to whether murderer was intoxicated permissible by one present and acquainted with him; *Gibson v. Williams*, 4 Wend. 320, holding opinion of witness as to who was intended by ambiguous charge of stealing, inadmissible; *Tompkins v. Wadley*, 3 Thomp. & C. 424, holding opinion of witness not intimately acquainted, as to one's affection for another, gathered from his speech, inadmissible; *Horn v. State*, 12 Wyo. 80, 73 Pac. 705, holding that witness may state whether one when making a confession of murder appeared to be sincere; *Hoitt v. Moulton*, 21 N. H. 586, to point that jury may consider that unmarried parties of suitable age corresponded as bearing on promise to marry; *Johnson v. Jenkins*, 24 N. Y. 252, to point that withdrawing from jury evidence that failure to marry proceeded from no want of respect or attachment, error; *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209, to point that witness may state that he did not know grantor whose deed he is purported to have witnessed; *Chellis v. Chapman*, 26 N. Y. S. R. 953, 7 N. Y. Supp. 78, to point that one suing for breach of promise to marry may testify that she became attached, answer alleging nonaffection; *State v. James*, 31 S. C. 218, 9 S. E. 844, on point when opinion as to friendliness between persons, is admissible.

Distinguished in *Murray v. Bethune*, 1 Wend. 191, holding that one cannot testify as to his uncommunicated understanding of agreement between him and another.

Defense to action for breach of promise.

Cited in note in 26 L.R.A. 431, on effect of fraudulent concealment of want of chastity to avoid promise of marriage.

Evidence as to character in action for breach of promise.

Cited in reference notes in 44 A. D. 179, on evidence of plaintiff's character in action for breach of promise; 44 A. D. 444, on evidence of plaintiff's licentious conduct in action for breach of promise.

Cited in notes in 26 A. D. 678, on evidence of plaintiff's want of chastity or immoral conduct in mitigation of damages for breach of promise of marriage; 14 L.R.A. (N.S.) 749, on evidence of specific instances to prove character in action for breach of promise to marry.

When objection is too late.

Cited in *Thompson v. Lee*, 31 Ala. 292, holding that appellate court, in chancery case, will not consider objection not raised before chancellor.

15 AM. DEC. 386, EX PARTE LAWRENCE, 4 COW. 417.

Effect of levy.

Cited in reference notes in 44 A. D. 738, on what constitutes satisfaction of judgment; 30 A. S. R. 246, as to how far levy of execution satisfies judgment; 65 A. D. 628, on levy on personal property sufficient in amount to satisfy execution as *prima facie* satisfaction.

Cited in notes in 58 A. D. 350, on satisfaction of judgments and execution by levy on real or personal property; 58 A. D. 356, on levy producing no satisfaction when property is removed from plaintiff's possession by legal process.

— On right to relevy.

Cited in *Bingaman v. Hyatt, Smedes & M.* Ch. 437, holding that quashing of irregular bond does not entitle to relevy, and sale thereunder conveys no title; *Coleman v. Mansfield*, 1 Miles (Pa.) 56, holding that relevy will not be set aside, where first levy was upon property to which debtor had no title; *Lindley v. Kelley*, 42 Ind. 294, holding that levy cannot be made upon personalty until execution against realty is returned; *Cornelius v. Burford*, 28 Tex. 202, 91 A. D. 309, holding if debtor permit application of personalty levy proceeds to other claims, relevy on realty permissible; *Banta v. McClennan*, 14 N. J. Eq. 120, holding that creditor who applies levy proceeds to other claims cannot enforce judgment against realty against younger mortgage; *Marshall v. Morris*, 13 Ga. 185, holding that execution for several times value of property levied upon, may be relieved though prior levy unaccounted for; *Jackson ex dem. Meritt v. Bowen*, 7 Cow. 13, holding that notice that creditor had personalty levy returned unsatisfied defeats title to land sold under relevy; *Anderson v. Fowler*, 8 Ark. 388, holding that where levy has been made another *ieri facias* cannot sue while levy remains undisposed of; *Voorhees v. Gros*, 3 How. Pr. 262, holding that creditor's voluntary relinquishment of personalty levy extinguishes judgment as to subsequent bona fide purchaser of lands; *Denvrey v. Fox*, 22 Barb. 522, holding that after sufficient levy to satisfy execution levy upon other property at different time may be made; *Wood v. Torrey*, 6 Wend. 562, holding that bona fide purchaser of realty may have perpetual stay of execution where sufficient personalty is levied upon; *Glenny v. Boyd*, 29 Pa. Co. Ct. 522, 35 Pittsb. L. J. N. S. 46, holding that in foreign attachment, alias writ should not issue without court's permission on cause shown; *Denegre v. Haun*, 13 Iowa, 240, to point that revivor of judgment by *scire facias* does not create a new lien that affects title of purchaser; *Carr v. Weld*, 19 N. J. Eq. 319, to point that if debtor give creditor sufficient assets to satisfy judgment satisfaction will be decreed, if applied otherwise; *Alderman v. Share*, 7 Wend. 220, to point that constable, levying under justice's execution, may sell after his term has expired.

Disapproved in *Williams v. Gartrell*, 4 G. Greene, 287, holding levy on personal property not satisfaction between parties although it may be as to third persons; *Chapman v. Fuller*, 7 Barb. 70, holding if want of bidders prevent sale justice's execution may be renewed on last day to retain lien; *Lynch v. Pressley*, 8 Ga. 327, on right to proceed with execution after levy has been released, unsatisfied.

— On creditor's right to redeem.

Cited in *Post v. Arnot*, 2 Denio, 344, holding judgment creditor purchasing at execution sale upon his judgment not entitled to redeem from mortgagee; *People ex rel. Sutliff v. Easton*, 2 Wend. 297, holding judgment debtor purchasing at execution sale not entitled to redeem premises from operation of prior sale; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 A. S. R. 231, 9 L.R.A. 676, 25 N. E. 558, holding that where decree authorizes one sale to satisfy two judgments there can be no redemption though both unsatisfied.

— On action for same debt.

Cited in *Shepard v. Rowe*, 14 Wend. 260, holding levy upon realty, execution not returned, no defense to action on judgment; *Green v. Burke*, 23 Wend. 490, holding prior levy abandoned by constable because under age, no defense to subsequent levy on other property; *Miller v. Smith*, 16 Wend. 425, holding execution and levy, though unreturned good defense to action on judgment years after entry; *Post v. Logan*, 1 N. Y. Leg. Obs. 59, holding that if goods seized are replevin, seizure is no defense to action for rent, pending replevin suit; *Heebner v. Townsend*, 8 Abb. Pr. 234, holding it no defense to enforcement of undertaking that sufficient levy to satisfy judgment, was made on realty; *White v. Graves*, 15 Tex. 183, holding that sufficient levy on principal's land without sale, does not prevent action to revive judgment against surety; *Farmers & M. Bank v. Kingsley*, 2 Dougl. (Mich.) 379, holding plea of sufficient levy upon maker's goods, good in action against indorser of note.

Distinguished in *Gregory v. Stark*, 4 Ill. 611, holding that where there is levy on realty action on appeal bond, for same debt may be stayed; *United States v. Dashiell*, 3 Wall. 688, 18 L. ed. 268, holding that levy on personalty abandoned at debtor's request, does not extinguish judgment and defeat writ of error; *Holbrook v. Champlin*, Hoffm. Ch. 148, holding levy not satisfaction of judgment, where debtor requested restoration of goods and defaulted on security given.

— On title to realty where personalty levy sufficient.

Cited in *Doe ex dem. Reynolds v. Ingersoll*, 11 Smedes & M. 249, 49 A. D. 57, holding that if personalty levy satisfies executions against realty, purchasers under latter, with notice, acquire no title.

— Effect of release.

Cited in *Moss v. Pettingill*, 3 Minn. 217, Gil. 145, holding accommodation indorser discharged, if without his consent, sufficient levy upon property of one liable is released.

— Right to set-off.

Cited in *Kershaw v. Merchants' Bank*, 7 How. (Miss.) 386, 40 A. D. 70, holding that acceptor of inland bill may set off levy, before notice of assignment, against him as payee's surety.

— Priority of.

Cited in *Heizer v. Fisher*, 13 Smedes & M. 672, holding where judgments were rendered prior to limitation acts, levy first made thereafter has priority, regardless of enrolment.

— Right to replevin goods levied upon.

Cited in *Miller v. Adsit*, 16 Wend. 335, holding that receiptor of goods levied upon may replevin same if removed before day of sale.

15 AM. DEC. 267, FARLEY v. CLEVELAND, 4 COW. 432, Affirmed in 9 Cow. 639.

Promise to answer for debt of another.

Cited in *State Bank v. Mettler*, 2 Bosw. 392, holding verbal promise which renders promisors sureties for debt of promisee so that making payment will convert promisors into creditors of promisees within statute; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360, 11 So. 488, holding parol promise by authorized agent of vendee of logs to pay vendor's creditors purchase money, vendor consenting, enforceable; *Meech v. Smith*, 7 Wend. 315, holding unauthorized agent personally liable on parol agreement to transport for credit on principals' demand against third persons; *Mechanics & T. Bank v. Stettheimer*, 116 App. Div. 198, 101 N. Y. Supp. 513, holding director's oral promise to pay corporation's debt, void within statute of frauds; *Emerson v. Slater*, 22 How. 28, 16 L. ed. 360, holding stockholder's agreement, to pay contractor on completion of contract, original undertaking not within statute of frauds; *Logan v. Hodges*, 6 Ala. 699, holding payment not condition precedent where "L" enforces "H's" notes given for "L's" promise to pay "H's" note to another; *Locke v. Humphries*, 60 Ala. 117, holding distributee's note, extended and renewed, for assumed debt for administrator's advances on estate's credit, not within statute of frauds; *King v. Shoemaker*, 1 Pearson (Pa.) 206, holding verbal promise by assignee to pay assignor's debts not within statute of frauds; *Besshears v. Rowe*, 46 Mo. 501, holding undertaking, to pay debt of another, being also to pay one's own debt, not within statute of frauds; *Hill Bros. v. Bank of Seneca*, 100 Mo. App. 230, 73 S. W. 307, holding agreement to pay for threshing wheat, not within statute of frauds because incidentally discharging another's debt; *Lee v. Fontaine*, 10 Ala. 755, 44 A. D. 505, holding new firm's promise, on sufficient consideration to pay predecessors' debts, not within statute of frauds; *Brasée v. Woods*, 35 Tex. 302, holding new partnership's agreement to assume old firm's liabilities, not within statute of frauds; *Schindler v. Euell*, 45 How. Pr. 33, holding agreement of partner with retiring partner to pay firm debts in consideration of receipt of firm assets not within statute of frauds; *Huntington v. Wellington*, 12 Mich. 10, holding verbal guaranty that makers of notes were responsible, not within statute of frauds; *Reaseter v. Waterman*, 151 Ill. 169, 37 N. E. 875, holding "A's" parol promise to procure execution of chattel mortgage by "C," securing note to "B," on "B" signing "C's" note as surety to "A," not within statute of frauds; *Brown v. Curtiss*, 2 N. Y. 225, holding guaranty indorsed on note given for guarantor's own debt, not within statute of frauds; *Todd v. Tobey*, 29 Me. 219, holding one's promise to debtor's guarantors to assume debt, without statute of frauds; *Marquand v. Hipper*, 12 Wend. 520, holding undertaking to become security for silver given to another for manufacturing purpose, valid under statute of frauds; *New York & E. R. Co. v. Gilchrist*, 16 How. Pr. 564, holding promise to pay for transportation of cattle on delivery to third person, original undertaking, without statute of frauds; *Spooner v. Dunn*, 7 Ind. 81, 63 A. D. 414, holding surrender of lien and return of executions on promise of payment, original undertaking, within statute of frauds; *McKenzie v. Jackson*, 4 Ala. 230, holding parol promise, of member of new firm to pay debt of member of old firm, not within statute of frauds; *Mitts v. McMorran*, 64 Mich. 664, 31 N. W. 521, holding promise of assignee of contract securing performance of advances, to pay mechanic from surplus moneys, not within statute of frauds; *Allen v. Thompson*, 10 N. H. 32, holding promise to pay debt if collection intrusted to one is unsuccessful, not within statute of frauds; *Muller v. Riviere*, 59 Tex. 640, 46 A. R. 291, holding wife's promise, to pay husband's debt

on new consideration benefiting her, not within statute of frauds; *Arnold v. Stedman*, 45 Pa. 186, holding vendor's promise to pay mechanics' lien on lienholder stopping proceedings, not within statute of frauds; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872, holding promise to pay another's debt on receipt of fund, not within statute of frauds; *Barnett v. Wing*, 62 Hun, 125, 16 N. Y. Supp. 567, holding oral promise to pay note if one would indorse, not applicable to renewals; *Fullam v. Adams*, 37 Vt. 391, holding verbal promise to pay attorney, as retainer, another's debt due attorney, void under statute; *Weinhauer v. Morrison*, 49 Hun, 498, 2 N. Y. Supp. 544, holding debtor's verbal promise to pay bill of exchange favoring creditor's creditor, unenforceable; *Mallory v. Gillett*, 21 N. Y. 412 (affirming 23 Barb. 610), holding another's promise to pay repairs, on lienor's delivery of boat to owner, void under statute of frauds; *Stern v. Drinker*, 2 E. D. Smith, 401, holding third person's parol promise to pay judgment if levy is abandoned, void under statute of frauds; *Dufolt v. Gorman*, 1 Minn. 301, 66 A. D. 543, Gil. 234, holding verbal promise to pay transportation if consignee did not, within statute of frauds; *Rowe v. Whittier*, 21 Me. 545, holding judgment debtor's parol promise to pay commissions on amount in suit, within statute of frauds; *Nelson v. Boynton*, 3 Met. 396, 37 A. D. 148, holding promise to pay third person's note secured by attachment, in consideration of discontinuing suit, within statute of frauds; *Hite v. Wells*, 17 Ill. 88, holding promise to pay "W." "L's" debt on procurement, by "W" from "L," of "H's" written order to pay, within statute of frauds.

Cited in reference notes in 16 A. D. 268; 23 A. D. 155; 36 A. D. 331,—on oral promise to answer for debt of another; 21 A. D. 556, on parol undertaking to answer for debt or default of another; 26 A. D. 249; 95 A. D. 250,—as to when promise to pay another's debt must be in writing; 25 A. S. R. 346, on liability of one promising to pay another's debt.

Cited in notes in 5 A. D. 323, on oral promise to pay debt of another; 95 A. D. 251, as to what promises to answer for another's debt must be in writing; 95 A. D. 258, on original promise to pay another's debt not being within statute; 6 E. R. C. 296, on distinction between original and collateral promise to answer for debt or default of another within meaning of statute of frauds.

Distinguished in *Cotterill v. Stevens*, 10 Wis. 422, holding promise to pay one's own debt by extinguishing creditor's debt to another, collateral and void under statute; *Utah First Nat. Bank v. Kinner*, 1 Utah, 100, holding promise to pay still subsisting debt of another, within statute of frauds.

— Sufficiency of new consideration.

Cited in *Sackett v. Sackett*, 14 N. Y. S. R. 251, holding son's verbal agreement with father to pay consideration to daughters, valid; *Spann v. Baltzell*, 1 Fla. 338, 46 A. D. 346, holding indorser's promise to pay at maturity in consideration of indorsee accepting depreciated bank notes, enforceable; *Calkins v. Chandler*, 36 Mich. 320, 24 A. R. 593, holding parol promise to withhold money in consideration of extending time of payment of mortgage, valid; *Rogers v. Empire Hardware Co.* 24 Neb. 653, 39 N. W. 844, holding agents' promise to pay another's debt if undisturbed in possession of goods satisfying principal's claim, valid; *Hilton v. Dinsmore*, 21 Me. 410, holding third person's parol promise of payment on debtor giving funds and creditor's forbearance, without statute of frauds; *Sweatman v. Parker*, 49 Miss. 19, holding third person's promise to pay debt on transfer of debtor's notes to such third person, not within statute; *Robinson v. Gilman*, 43 N. H. 485, holding promise to pay third person's debt not within statute of frauds, where, by consideration, debt becomes party's own; *Clay*

v. Tyson, 19 Neb. 530, 26 N. W. 240, holding third person's promise to pay another's debt on creditor's forbearance, not within statute of frauds; Nisbet v. Walker, 4 Ga. 221, on validity of promise to pay money on consideration of withholding lien and consenting to sale; Stoddard v. Graham, 23 How. Pr. 518, holding promise to pay another's debt as book money for exchange of horses, without statute of frauds; Rexford v. Brunell, 1 N. Y. Leg. Obs. 396, holding surety's promise to pay back rent, binding, where assignee of lease refuses to rent unless paid; Connor v. Williams, 2 Robt. 46, holding verbal promise to pay vessel's debts for transfer of interest in vessel, enforceable; Westfall v. Parsons, 16 Barb. 645, holding indorsers promise to pay note on assignment by maker, giving preference, not void under statute of frauds; Prentice v. Wilkinson, 5 Abb. Pr. N. S. 49, holding third person's promise, to pay attorney's fees on condition of discontinuing divorce action, actionable original undertaking; Ferst v. Bank of Waycross, 111 Ga. 229, 36 S. E. 773, holding that third person's promise to assume debt for extension of credit to debtor need not be in writing; Almond v. Hart, 46 App. Div. 431, 61 N. Y. Supp. 849, holding owner's promise to pay contractor's employee, on proceeding with work, not within statute of frauds; W. T. Mersereau Co. v. Washburn, 6 App. Div. 404, 39 N. Y. Supp. 664, holding second mortgagee's promise, to pay contractor, under contract with another, on completion of work, not within statute of frauds; Watson v. Randall, 20 Wend. 201, holding that agreement to forbear to sue debtor must be in writing to be enforceable; Hite v. Wells, 17 Ill. 88, holding "H's" promise to pay "L's" debt to "W" if "W" will continue work for "L," within statute of frauds; Laing v. Lee, 20 N. J. L. 337, holding promise to pay debt for good consideration enforceable, although consideration moves from original debtor instead of third person. First Nat. Bank v. Chalmers, 3 Silv. Ct. App. 1, 24 N. E. 848, 31 N. Y. S. R. 817 (reversing 39 Hun, 468), holding one's promise to pay debt on debtor's conveyance of property to that one, enforceable; Tindal v. Toughberry, 3 Strobh. L. 177, 49 A. D. 637, holding another's promise to pay levy, on delivering mare to owner, original promise not within statute of frauds; Kiernan v. Kratz, 42 Or. 474, 69 Pac. 1027, holding debtor's promise, to pay if paper assigned to extinguish his own debt remains unpaid, not within statute; McLaren v. Hutchinson, 22 Cal. 187, 83 A. D. 59, holding vendee's parol agreement as part payment of consideration to pay vendor's debt to another, not within statute of frauds; Nelson v. Hardy, 7 Ind. 364, holding promise to retain money due debtor and pay debt, for extension and credit, not within statute of frauds; Blunt v. Boyd, 6 N. Y. Leg. Obs. 361, 1 Code Rep. 7, 3 Barb. 209, holding debtor's agreement to pay debt by giving note and paying creditor's debt to another within statute; Barker v. Bucklin, 2 Denio, 45, 43 A. D. 726, holding purchaser's parol promise to pay on indebtedness, price of property sold by debtor, not within statute of frauds; Seaman v. Hasbrouck, 35 Barb. 151, holding grantee's promise to pay specified debts of grantor as purchase money consideration not within statute of frauds; Sanders v. Clason, 13 Minn. 379, Gil. 352, holding promise to pay another's debt as part consideration of sale of stock to promisor, enforceable; Phillips v. Gray, 3 E. D. Smith, 69, holding debtor's parol promise to pay seller, out of indebtedness, for goods delivered to creditor, valid; Thompson v. Cheesman, 15 Utah, 43, 48 Pac. 477, holding grantee's promise, on conveyance, to pay grantor's mortgage, not within statute; Prime v. Koehler, 77 N. Y. 91, holding promise by purchaser of mortgaged premises mortgage unassumed, to pay back interest, on forbearance to foreclose, not within statute; Wait v. Wait, 28 Vt. 350, holding parol promise, on conveyance of farm, to promisor to pay for erecting

barn thereon for grantor, enforceable; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322, holding promise, of one purchasing property sold another on credit, to pay original grantor, as part consideration, not within statute.

Cited in note in 95 A. D. 262, 263, on consideration in new promise to take case out of statute of frauds.

Distinguished in *Emerick v. Sanders*, 1 Wis. 77, holding verbal promise to pay debtor's creditor by one holding debtor's property to pay debts, void; *Noyes v. Humphreys*, 11 Gratt. 636, holding landlord's verbal promise to pay contractor, hired by tenant, on continuing work, collateral and void; *Durham v. Arledge*, 1 Strobb. L. 5, 47 A. D. 544, holding verbal promise to pay if one will not enforce execution against son, not original undertaking and unenforceable; *Fairchild v. Feltman*, 32 Hun, 398, holding debtor's parol promise to diminish debt by extinguishing creditor's debt to another, unenforceable without consideration.

— Source of new consideration.

Cited in *First Nat. Bank v. Chalmers*, 3 Silv. Ct. App. 1, 24 N. E. 848, holding valid promise to pay debt of third person must have good consideration moving to promisor from debtor or creditor; *Kaufman v. United States Nat. Bank*, 31 Neb. 661, 48 N. W. 738; *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. 379,—holding promise to another, benefiting third, enforceable by third person though consideration does not move directly from him.

— Discharge of original debtor.

Cited in *Mulcrone v. American Lumber Co.* 55 Mich. 622, 22 N. W. 67, holding agreement to pay third person's debt on that person's discharge from original indebtedness, without statute of frauds; *Laing v. Lee*, 20 N. J. L. 337, holding promisor liable on promise to pay another's debt for good consideration, although original debtor remains liable; *Ludwick v. Watson*, 3 Or. 256, holding promise to pay another's debt, on original consideration benefiting promisor indefeasible because of original debtor's subsisting liability.

Distinguished in *Home Nat. Bank v. Waterman*, 30 Ill. App. 535, holding that original debt must be surrendered and some benefit move between promisor and promisee to make promise to pay another's debt original.

— Promise to indemnify.

Cited in *Alger v. Scoville*, 1 Gray, 391, holding indemnity promise against note indorsements as part of parol contract to exchange, without statute of frauds; *Rogers v. Kneeland*, 13 Wend. 114, holding third person's promise, on principal's request, to indemnify factor, defending suit for breach of warranty within statute of frauds; *Chapin v. Lapham*, 20 Pick. 467, holding parol indemnity promise, for assisting son, to one paying son's note as surety, without statute of frauds; *Lightle v. Berning*, 15 Nev. 389, holding undertaking, executed to sheriff agreeing to satisfy any possible judgment, without statute of frauds; *Tighe v. Morrison*, 41 Hun, 1, holding promise to indemnify surety, enabling promisor to get money from estate, not within statute of frauds; *Jones v. Bacon*, 72 Hun, 506, 25 N. Y. Supp. 212, holding indemnity promise to indorser of third party's note, original undertaking, not within statute of frauds; *Easter v. White*, 12 Ohio St. 219, holding verbal promise to indemnify one for becoming surety of another in replevin, void under statute of frauds; *Bissig v. Britton*, 59 Mo. 204, 21 A. R. 379, 7 Legal Gaz. 161, holding promise, to hold surety on replevin bond harmless, within statute of frauds.

Distinguished in *Kingsley v. Balcome*, 4 Barb. 131, holding verbal promise,

without consideration, to indemnify promisee as bail for another, void under statute of frauds.

— Sufficiency of writing.

Cited in *Jones v. Palmer*, 1 Dougl. (Mich.) 379, holding guaranty of payment indorsed on debtor's note to creditor, not within statute of frauds; *Sheldon v. Butler*, 24 Minn. 513, holding written guaranty to collect third person's note, on unexpressed consideration to discharge guarantee's obligation against guarantor, enforceable.

Right of third person to sue on promise.

Cited in *Fonner v. Smith*, 31 Neb. 107, 28 A. S. R. 510, 11 L.R.A. 528, 47 N. W. 632, holding check drawn on funds still in bank enforceable by holder, on bank's refusal to pay; *Barnes v. Hekla F. Ins. Co.* 56 Minn. 38, 45 A. S. R. 438, 57 N. W. 314, holding promise in reinsurance contract to pay policy holders' losses enforceable against reinsurer by policy holders; *Keedle v. Flack*, 27 Neb. 836, 44 N. W. 34, holding that mortgagee may enforce mortgage debt against purchaser assuming mortgage as part consideration; *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, holding grantee's promise, on conveyance, to assume payment of trust deed securing note as part consideration, enforceable; *Joslin v. New Jersey Car Spring Co.* 36 N. J. L. 141, holding written promise to assume all liabilities of another enforceable by creditor of latter; *Judson v. Gray*, 17 How. Pr. 289, holding referee's action against attorney maintainable where note is given on attorney's promise to advance fees; *Lawrence v. Fox*, 20 N. Y. 268, holding promise to pay own debt, by extinguishing another's to third person not privy to consideration, enforceable; *Delaware & H. Canal Co. v. Westchester County Bank*, 4 Denio, 97, holding third person's promise to collect debtor's bill of exchange and pay debtor's creditor, enforceable by creditor; *Vrooman v. Turner*, 69 N. Y. 280, 25 A. R. 195, holding grantee who assumes mortgage as part consideration, not liable for deficiency on foreclosure where grantor was not liable for payment of mortgage; *Dolph v. White*, 12 N. Y. 296, holding assignee of lease not liable on note, which he agreed to pay in consideration of the assignment where he afterward transferred the lease to another; *Hale v. Boardman*, 27 Barb. 82, holding promise to pay residue of proceeds of grain to third person to extinguish another's debt, enforceable; *Ellwood v. Monk*, 5 Wend. 235, holding promise to pay debt on debtor's transfer of property, enforceable by creditor; *Clark v. Howard*, 150 N. Y. 232, 44 N. E. 695, holding promise by transferee of property to pay debt of transferrer enforceable by creditor; *Cailleux v. Hall*, 1 E. D. Smith, 5, holding third persons to whom purchaser agrees to pay purchase price at request of vendor in satisfaction of debt of latter may maintain action although not owners of goods sold; *Hutchings v. Miner*, 46 N. Y. 456, 7 A. R. 369, holding promise to pay debt from life policy left with promisor, when collected, enforceable by creditor; *Johnston v. United States*, 13 Ct. Cl. 217 (dissenting opinion), on third person's right to recover after vendor of article revokes authority to pay third person; *Sonsitby v. Keeley*, 2 McCrary, 103, 7 Fed. 447, 11 Fed. 578, on right to enforce vendee's promise, for purchase consideration, to pay vendor's debt to third person; *Barnes v. Perine*, 15 Barb. 249, holding that trustees can recover on subscription paper where, unexpressed consideration is shown to be erection of church.

Cited in notes in 71 A. S. R. 200; 25 L.R.A. 270,—on right of third party to sue on contract made for his benefit; 25 L.R.A. 264, on right of third party to sue on contract made for his benefit as affected by statute of frauds; 25 L.R.A.

259, on doctrine of consideration as applied to third person's right to sue on contract made for his benefit; 25 L.R.A. 263, on necessity that there be an actual benefit to enable third party to sue on contract.

Distinguished in *Bigelow v. Davis*, 16 Barb. 561, on recovery for money had and received where person promised to deliver to creditor, money given by debtor; *Meech v. Ensign*, 49 Conn. 191, 44 A. R. 225, holding promise of grantee, purchasing mortgagor's equity of redemption, to pay mortgage, not enforceable by mortgagee.

Evidence as to consideration.

Cited in *Rose v. Rose*, 7 Barb. 174, on admissibility of other considerations than those enumerated in deed.

Deed of freehold to commence in the future.

Cited in note in 55 A. D. 414, on invalidity of deed of freehold to commence *in futuro*.

15 AM. DEC. 394, *BARNES v. GRAHAM*, 4 COW. 452.

Necessity and sufficiency of tender.

Cited in *Lush v. Druse*, 4 Wend. 313, holding that lessee must seek lessor where rent is payable at place to be appointed and no place is appointed; *Morey v. Enke*, 5 Minn. 392, Gil. 316, holding that defaulting promisor liable on laboring contract where promisee not sought when no place designated; *Stevenson v. Burgin*, 22 Phila. Leg. Int. 116, holding tender of greater amount of articles purchased than bargained for, bad.

Cited in reference notes in 22 A. D. 225; 26 A. D. 265,—on sufficiency and necessity of tender; 26 A. D. 546, on what constitutes a sufficient tender.

Cited in note in 77 A. D. 479, on place of tender.

— **Of ponderous articles.**

Cited in *Livingston v. Miller*, 11 N. Y. 80, holding lessor's action on rent payable in wheat at specified time sustainable without proving that place was designated; *Sheldon v. Skinner*, 4 Wend. 525, 21 A. D. 161, holding that receiver, of hogs to fatten on shares must tender at place received where no place designated; *Coffin v. Reynolds*, 21 Minn. 456, holding chattel mortgage, securing payment of note in wood discharged only by payment or tender; *La-Farge v. Rickert*, 5 Wend. 187, 21 A. D. 209, holding that under contract to deliver portable articles, times specified, place not designated, law fixes place of delivery; *Wyman v. Winslow*, 11 Me. 398, 26 A. D. 542, holding readiness to deliver lumber without setting apart and designation, no defense on promise; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104, holding that under contract to deliver specified articles, one's failure to fulfil discharges other; *Smith v. Loomis*, 7 Conn. 110, holding insufficient to vest title in promisee where promisor had articles set apart and designated enabling distinguishment; *Johnson v. Baird*, 3 Blackf. 182, holding promisor's readiness to deliver articles, good defense to action on promise; *Esmay v. Fanning*, 9 Barb. 176, 5 How. Pr. 228, holding that bailee must return carriage at bailor's residence where both reside in same city.

Cited in reference note in 26 A. D. 546, on time and place of tender of specific articles.

Distinguished in *Armstrong v. Tait*, 8 Ala. 635, 42 A. D. 656, holding parties' readiness to deliver shucks whenever other would remove them good defense to promise.

15 AM. DEC. 395, DAN v. BROWN, 4 COW. 483.**Proof of execution of instrument.**

Cited in *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95, upholding proof of chattel mortgage by only witness within jurisdiction supplemented by evidence of mortgagor; *Hall v. Luther*, 13 Wend. 491, holding bond admissible, on proof by subscribing witness remembering transaction but not all formalities, presuming all acknowledged.

— Wills generally.

Cited in *Lawrence v. Norton*, 45 Barb. 448, 30 How. Pr. 232, holding extrinsic evidence admissible to prove will where two witnesses are deceased and other remembers only handwriting; *Rider v. Legg*, 51 Barb. 260, holding that signatures of two subscribing witnesses where all dead, without proving testatrix's signature, may establish will; *Butler v. Benson*, 1 Barb. 526, holding that law presumes will properly executed where witnesses dead or from lapse of time cannot remember.

Cited in reference notes in 35 A. S. R. 868, on proof of execution of will; 85 A. S. R. 153, on necessity of attesting witnesses to will.

Cited in notes in 40 A. D. 232, on proof of will by subscribing witnesses; 77 A. S. R. 471, on number of witnesses required for proof of will; 21 A. D. 335, on evidence necessary to prove due execution of will; 15 A. D. 129, on sufficiency of acknowledgment of signature to will in witnesses' presence; 77 A. S. R. 474, on weight and effect of testimony of subscribing witness on probate of will; 38 L.R.A. 443, on witness as to execution of lost or destroyed will; 110 A. S. R. 463, on effect of inability of subscribing witness to recollect facts as to execution of lost or destroyed will.

— Proof of will by one subscribing witness only.

Cited in *Caw v. Robertson*, 5 N. Y. 125, to point that only one subscribing witness need be examined to prove will; *Weir v. Fitzgerald*, 2 Bradf. 42, holding proof of proper execution of will by one subscribing witness, sufficient; *Jackson ex dem. Kellogg v. Vickory*, 1 Wend. 406, 19 A. D. 522, holding subscribing witness, not remembering whether others, living within state, complied with formalities insufficient to prove will; *Upton v. Bernstein*, 76 Hun, 516, 27 N. Y. Supp. 1078, holding one subscribing witness sufficient to prove will's execution; *Chapman v. Rodgers*, 12 Hun, 342 (dissenting opinion), on proving will by one subscribing witness only.

Cited in reference note in 34 A. D. 139, on what may be proved by one of the subscribing witnesses.

Cited in notes in 19 A. D. 529; 51 A. D. 575,—on proof of will by one witness.

Revocation of will.

Cited in *Re Hopkins*, 73 App. Div. 559, 77 N. Y. Supp. 178, holding will found with vertical lines through signature, valid, without evidence of revocation; *Re Alger*, 38 Misc. 143, 77 N. Y. Supp. 166, holding codicil, sufficiently canceled where testator marked clause and stated under signature reason for cancellation; *Kent v. Mahaffey*, 10 Ohio St. 204, holding will not revoked where testator incorrectly thought will burned as directed; *Youse v. Forman*, 5 Bush. 337, holding that will with signature cut off, parol evidence showing intention to revoke, was revoked; *Graham v. Burch*, 47 Minn. 171, 28 A. S. R. 339, 49 N. W. 697, holding will, which testator thought he had destroyed by burning, rescued by person, not revoked; *McPherson v. Clark*, 3 Bradf. 92, holding that insertion

in will of "sons" after cancelation of "daughters," not re-executed and attested, inoperative; *Riggs v. Palmer*, 115 N. Y. 506, 12 A. S. R. 819, 5 L.R.A. 340, 22 N. E. 188, 23 Abb. N. C. 452 (dissenting opinion), on validity of will as to beneficiary murdering testator to prevent revocation; *Gardner v. Gardner*, 65 N. H. 230, 8 L.R.A. 383, 19 Atl. 651, holding will, not revoked by testator's attempted but unsuccessful alteration; *Re Akers*, 74 App. Div. 461, 77 N. Y. Supp. 643, holding that testator's marginal writing "this will and codicil is revoked" and signing does not revoke; *Colligan v. McKernan*, 2 Dem. 421, 5 N. Y. Civ. Proc. Rep. 198, holding parol evidence admissible to show execution of later will and that it contained revocation clause; *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 A. D. 239, holding fact that testator recognized instrument as will at time of destroying it not conclusive evidence against mental incapacity to revoke it.

Cited in reference notes in 20 A. D. 488, on revocation of will; 34 A. D. 139; 35 A. D. 176,—on what amounts to revocation of will.

Cited in note in 12 A. D. 377, on necessity for revoking act in effecting revocation of will.

— Presumption of revocation.

Cited in *Re Wood*, 2 Connoly, 44, 11 N. Y. Supp. 157, 32 N. Y. S. R. 286, holding will found with erased signature restored not presumptively revoked but valid until proved otherwise; *Bulkley v. Redmond*, 2 Bradf. 281, holding will, last possessed by testator, not found after decease, after search, presumptively destroyed *animo revocandi*; *Betts v. Jackson*, 6 Wend. 173 (reversing 6 Cow. 377, and 9 Cow. 208), holding that will executed and supposed existing, not found after death is presumed destroyed *animo revocandi*.

Cited in note in 38 L.R.A. 436, on rebutting presumption as to revocation of missing will.

Probate of lost will.

Cited in notes in 84 A. D. 630, 631, on probate of lost or destroyed wills; 110 A. S. R. 455, on necessity of instituting search for missing will.

Proof of contents of lost will.

Cited in *Harris v. Harris*, 26 N. Y. 433; *Re Page*, 118 Ill. 576, 59 A. R. 395, 8 N. E. 852,—holding that single witness may prove contents of lost will; *Fetherly v. Waggoner*, 11 Wend. 599, holding parol evidence admissible to show contents where existence, execution, and loss of will are proved; *Gaines v. Henner*, 24 How. 553, 16 L. ed. 770, holding secondary proof admissible to prove lost will; *Skeggs v. Horton*, 82 Ala. 352, 2 So. 110, holding evidence of witness remembering contents having heard will read admissible to establish lost will.

Cited in notes in 38 L.R.A. 447, on sufficiency of evidence of contents of lost or destroyed will; 38 L.R.A. 450, on number of witnesses as to contents of lost or destroyed will; 110 A. S. R. 460, on effect of number of witnesses testifying to execution or contents of lost or destroyed will.

Admissibility against one person of admissions or declarations of another.

Cited in *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280, holding one declaration of party in suit not evidence against coparty unless partners; *Graham v. Smart*, 42 Wash. 205, 84 Pac. 824, holding admissions in probate proceedings inadmissible against persons not parties to such proceedings; *Pier v. Duff*, 63 Pa. 59, holding that declarations, of one authorized to sell, not in actual possession, inadmissible to affect principal; *Lane v. Doty*, 4 Barb. 530, holding that note revived by principal debtor after sureties' death does not affect statutes of

limitations as to representatives; *Brush v. Holland*, 3 Bradf. 240, holding declarations of testator's widow inadmissible as party to will against others; *Pettit v. Jennings*, 2 Rob. (Va.) 676, holding answer of obligee and assignor inadmissible against assignee in action against latter by former.

Cited in reference notes in 24 A. D. 395, on admissibility of declarations of third persons; 27 A. D. 406, on admissions or declarations of one of parties in community of interest or design.

Cited in notes in 51 A. D. 521, on effect of admissions by one of several joint obligors as to others; 21 A. D. 361, on admissibility of grantor's subsequent declaration to impeach deed.

— Of testator.

Cited in *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 A. D. 239, holding testator's declarations connected with destruction of instrument admissible to identify lost will; *Boylan v. Meeker*, 28 N. J. L. 274, holding testator's declarations after execution manifesting ignorance of will's existence, inadmissible to show no will made; *Grant v. Grant*, 1 Sandf. Ch. 235, holding testator's declarations incompetent to prove existence or execution of will; *Re Kennedy*, 167 N. Y. 163, 60 N. E. 442 (affirming 53 App. Div. 105, 65 N. Y. Supp. 879), holding testatrix's declarations inadmissible to prove will's existence or nonrevocation; *Hatch v. Sigman*, 1 Dem. 519, holding declarations of testator and of third person incompetent to establish will presumptively destroyed; *Hamersley v. Lockman*, 2 Duer, 524, holding testator's declarations incompetent evidence of will's existence, loss or destruction; *Hoitt v. Hoitt*, 63 N. H. 475, 56 A. R. 530, 3 Atl. 604, holding testator's declarations that he understood will revoked inadmissible on question of revocation; *Lane v. Hill*, 68 N. H. 275, 73 A. S. R. 591, 44 Atl. 393, holding evidence of testator's declarations as to execution of another will admissible where execution shown; *Waterman v. Whitney*, 11 N. Y. 157, 62 A. D. 71, holding no declarations of testator on revocation competent except those accompanying revocation act.

Cited in reference notes in 26 A. D. 61; 51 A. D. 594,—as to when testator's declarations are admissible; 90 A. D. 331, on admissibility of declarations to show revocation of will; 49 A. D. 175, on declarations of testator to prove execution, existence, or revocation of will; 43 A. D. 614, on effect of declarations of testator.

Cited in notes in 62 A. D. 80, as to when declarations of testator are admissible to impeach or invalidate will; 3 A. D. 395; 28 A. S. R. 361,—on admissibility of declarations of testator to prove revocation of will; 38 L.R.A. 438, on admissibility of declarations to overcome presumption as to revocation of missing will.

Distinguished in *Re Marsh*, 45 Hun, 107, holding testator's declarations admissible in establishing lost will; *Collagan v. Burns*, 57 Me. 449, holding testator's declarations admissible to negative intentional cancelation of torn will.

— Of legatee.

Cited in *Thompson v. Thompson*, 13 Ohio St. 356; *Hauberger v. Root*, 6 Watts & S. 431,—holding admissions of one devisee as to testator's mental incapacity or undue influence inadmissible against others; *Re Baird*, 47 Hun. 77, holding legatee's admissions inadmissible against other legatees interested under will; *Roberts v. Trawick*, 13 Ala. 68, holding legatee's declarations of testator's insanity to prejudice of others, inadmissible to invalidate will; *LaBar v. Vanderbilt*, 3 Redf. 384, holding legatee's declarations as to testator's capacity

inadmissible against other legatees not jointly interested; *Re Myer*, 184 N. Y. 54, 34 N. Y. Civ. Proc. Rep. 329, 76 N. E. 920, holding admissions of executor and legatee incompetent against other legatees not jointly interested with him; *Schierbaum v Schemme*, 157 Mo. 1, 80 A. S. R. 604, 57 S. W. 526, holding admissions by one devisee inadmissible against another devisee under same will; *Forney v. Ferrell*, 4 W. Va. 729, holding devisee's declarations inadmissible against codevisees; *Walker v. Jones*, 23 Ala. 448, holding declarations of husband of one legatee as to testator's insanity inadmissible to invalidate will; *Shailer v. Bumstead*, 99 Mass. 112, holding executor's declarations subsequent to will inadmissible to prove undue influence.

Distinguished in *Armstrong v. Farrar*, 8 Mo. 627, holding declarations of one devisee as to testator's mind at execution, admissible against other devisees.

— Of tenant in common.

Cited in *Keegan v. Kinnaird*, 12 Ill. App. 484, holding admissions or declarations of one tenant in common not admissible against another; *Barson v. Mulligan*, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75, holding that tenant in common may bind his own interest though not that of cotenants; *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433, holding that settlement with one cotenant, without other's consent, in cotenants' trespass suit, does not bind other; *Fitzgerald v. Brennan*, 57 Conn. 511, 18 Atl. 743, holding that husband's admissions as tenant by curtesy, concerning title, cannot affect wife's interest; *Corning v. Troy Iron & Nail Factory*, 39 Barb. 311, holding consent of one tenant to divert stream does not bind other cotenants; *McLellan v. Cox*, 36 Me. 95, 58 A. D. 736, holding declarations of one of several part owners of boat inadmissible against others in assumpsit; *Re Kennedy*, 167 N. Y. 163, 60 N. E. 442 (affirming 53 App. Div. 1051), holding admissions of nephew inadmissible against sister, as tenants in common, under will.

15 AM. DEC. 401, *SPAWN v. VEEDER*, 4 COW. 503.

Right to amend pleading or bill of particulars.

Cited in *Chapman v. Webb*, 6 How. Pr. 390, holding amendment of complaint allowable upon payment of costs of motion; *Barth v. Walther*, 4 Duer, 228; *Chadbourne v. Delaware, L. & W. R. Co.* 6 Daly, 215,—holding variance between proof and bill of particulars, immaterial, under evidence of greater damages without objection.

Cited in reference notes in 16 A. D. 409, as to when amendments are not allowed; 120 A. S. R. 343, on right to amend bill of particulars.

15 AM. DEC. 402, *BURT v. STERNBURGH*, 4 COW. 559.

Conclusiveness of judgment or verdict — Of verdict.

Cited in *Kidd v. Laird*, 15 Cal. 161, 76 A. D. 472, holding that general verdict will in effect be limited to issues which controlled action of jury; *White v. Coatsworth*, 6 N. Y. 137, holding jury's verdict on removal of tenant conclusive on same question in replevin by tenant against landlord.

— Of judgment generally.

Cited in *Foster v. Wells*, 4 Tex. 101, holding former recovery pleadable in bar and parol evidence admissible to explain judgment and its determination; *Treadwell v. Stebbins*, 6 Bosw. 538, holding judgment on one of two notes given for same consideration, admissible in evidence as to issues affecting both, in suit on other note; *Baker v. Rand*, 13 Barb. 152, holding that former judgment

bars second suit in guaranty, where proof relied on warranted recovery in first; *Harris v. Harris*, 36 Barb. 88, holding former judgment establishing will conclusive as to partition action involving establishment of same will; *Knott v. Stephens*, 5 Or. 235, holding judgment in suit by one obligee not bar to subsequent suit to enforce rights of both obligees; *Aurora v. West*, 7 Wall, 82, 19 L. ed. 42, holding bar to subsequent action on bond former judgments involving same parties and cause; *Barras v. Bidwell*, 3 Woods, 5, Fed. Cas. No. 1,039, holding fraudulent recovery not good plea in action on judgment of other state, unless good in state where judgment rendered; *Gaines v. Hennen*, 24 How. 553, 16 L. ed. 770, holding suit not involving same matter or parties, no defense to subsequent suit as *res judicata*; *Greely v. Smith*, 1 Woodb. & M. 181, Fed. Cas. No. 5,749, holding that parties must appear to be same in judgment pleaded as bar; *Whitaker v. Johnson County*, 12 Iowa, 595, holding that judgment on bond coupons bars action between same parties on other coupons to same bond; *Boyer v. Schofield*, 2 Keyes, 628, holding justice's judgment conclusive between parties in subsequent supreme court action involving same issues; *Demarest v. Daig*, 11 Abb. Pr. 9, holding referee's decision, on settlement receiver's accounts, when made order of court, conclusive as *res judicata*; *Conery v. New Orleans Waterworks Co.* 41 La. Ann. 910, 7 So. 8 (dissenting opinion), on operation of *res judicata*, as conclusive estoppel to all issues determined in former controversy; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195 (dissenting opinion), on admissibility of judgment involving same parties, title, but different cause, as bar to subsequent action on bond; *Embury v. Conner*, 3 N. Y. 511, 53 A. D. 325, holding that parties cannot again litigate fact in issue determined by court with requisite jurisdiction; *Young v. Rummell*, 2 Hill, 478, 38 A. D. 594, holding former recovery for same cause admissible under general pleadings in assumpsit; *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892, holding parol evidence admissible to show matter litigated in prior suit where judgment relied on as bar; *Miles v. Caldwell*, 2 Wall. 35, 17 L. ed. 755, holding parol proof admissible to explain questions determined in trial pleaded as estoppel, when issue vague; *Davidson v. Shipman*, 6 Ala. 27, holding parol evidence inadmissible to show that matter not in issue was submitted to jury; *Driscoll v. Damp*, 16 Wis. 106, holding identity of two actions provable by justice's minutes and that first bars second; *Yates v. Yates*, 81 N. C. 397, holding doubtful issues in former action, pleaded as estoppel to subsequent action provable by parol; *Royce v. Burt*, 42 Bart. 655, holding determination of doubtful issue, in judgment establishing property right pleaded in estoppel, provable by parol; *Wilbur v. Brown*, 3 Denio, 356, holding plaintiff in action for diverting water entitled to recover only according to his allegations and proofs.

Cited in reference notes in 15 A. D. 259, on estoppel by judgment; 18 A. D. 157; 21 A. D. 327; 23 A. D. 449,—on *res judicata* as estoppel; 24 A. D. 615, as to when former judgment is a bar; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded; 44 A. D. 763, on conclusiveness of former recovery in tort.

Cited in notes in 7 L.R.A. 578, on doctrine of *res judicata*; 1 L.R.A. 573, on conclusiveness of judgments; 26 A. D. 609, as to when former judgment is a bar or estoppel; 42 L. ed. U. S. 358, on parol evidence as to judgments.

Distinguished in *Miller v. Manice*, 6 Hill, 114, holding former judgment, when received under general issue in assumpsit, as conclusive as if specifically pleaded.

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— What matters concluded generally.

Cited in *Weidner v. Lund*, 105 Ill. App. 454, holding judgment conclusive only as to matters which must necessarily have been adjudicated; *Lorillard v. Clyde*, 122 N. Y. 41, 19 A. S. R. 470, 25 N. E. 292, holding judgment on the merits conclusive not only as to matters proved and submitted for decision but also as to matters directly in issue which might have been litigated; *Bowyer v. Schofield*, 1 Abb. App. Dec. 177, holding justice's decision on right to build and maintain dams, conclusive on parties; *Doty v. Brown*, 4 N. Y. 71, 53 A. D. 350, holding former judgment conclusive of fraud in replevin and parol evidence of ruling admissible; *Tuska v. O'Brien*, 68 N. Y. 446, holding that former decree awarding fund for property sold was good plea in bar and determined title; *Calkins v. Allerton*, 3 Barb. 171, holding in trover, former recovery against third person, admissible against privy and conclusive as to title; *Perkins v. Walker*, 19 Vt. 144, holding in slander by charging stealing of cloth, judgment for same cloth concludes title and bars truth as defense; *Birckhead v. Brown*, 5 Sandf. 134, holding that prior judgment, determining principal question as to recovery, bars action not identical involving only question of law; *Hoisington v. Brakey*, 31 Kan. 560, 3 Pac. 353, holding that judgment in replevin bars subsequent action identical, except involving different animals; *Chase v. Walker*, 26 Me. 555, holding in action on deed as fraudulent, prior judgment between same parties, concerning same deed, conclusive; *Chamberlain v. Carlisle*, 26 N. H. 540, holding judgment on note involving undetermined usury issue, no bar to subsequent action for usury; *Young v. Brehe*, 19 Nev. 379, 3 A. S. R. 892, 12 Pac. 564, holding that record of defense defeated in action on note bars same defense in subsequent action; *Oneida C. P. Judges v. People*, 18 Wend. 79 (dissenting opinion), on admissibility of former decision as estoppel and parol proof that deed was pronounced fraudulent; *Kelly v. Public Works*, 25 Gratt. 755, holding parol proof of judgment only for commissions admissible where commission suit pleaded as bar to percentage suit; *Towns v. Nims*, 5 N. H. 259, 20 A. D. 578, holding judgment, for month's labor against defense of contract for one year no estoppel to action for recovery on contract for year; *Rake v. Pope*, 7 Ala. 161, holding that recovery was defeated in action for two former instalments, good in action for last instalment, plea; *Collins v. Butler*, 14 Cal. 223, holding that defendant in action of trespass by firm cannot set off against judgment recovered a claim against one partner.

— Matters as to real property.

Cited in *Dawley v. Brown*, 79 N. Y. 390, holding pendency of former action on title no bar to action where title not in same party; *Providence v. Butterworth*, 10 R. L. 184, holding former judgment no bar where trespassed portion in second not included in close of first suit; *Small v. Leonard*, 26 Vt. 209, holding justice's judgment in trespass, vacated and not affirmed on appeal, not conclusive as to title; *Hurd v. McClellan*, 1 Colo. App. 327, 29 Pac. 181, holding that party in possession concealing title will be estopped to assert title against judgment awarding property adversely; *Greenup v. Crooks*, 50 Ind. 410, holding that judgment enforcing mechanics' liens subject to mortgage bars lienor's claim of priority over mortgage; *Hodge v. Shaw*, 85 Iowa, 137, 39 A. S. R. 290, 52 N. W. 8, holding that prior judgment for damages for obstructing easement bars subsequent action for same cause; *Henderson v. Kenner*, 1 Rich. L. 474, holding decision in action of trespass under general issue, not conclusive as to title but rebuttable by parol; *Boyle v. Wallace*, 81 Ala. 352, 8 So. 194, holding

single recovery in ejectment no bar to personal action, where title and parties are the same; *Mason v. Kellogg*, 38 Mich. 132, holding judgment in ejectment affirmatively showing breach of warranty, *prima facie*, not conclusive evidence against covenantor; *Hunt v. O'Neill*, 44 N. J. L. 584, holding that judgment in ejectment will not conclude defeated party as to subsequently accruing title or possession; *Williams v. Hacker*, 16 Colo. 113, 26 Pac. 143, holding former recovery conclusive evidence in subsequent ejectment action; *Doe ex dem. McCall v. Carpenter*, 18 How. 297, 15 L. ed. 389, holding former proceedings in partition, not involving same matter, no defense in ejectment action; *Hargus v. Goodman*, 12 Ind. 629, holding recovery in trespass action touching, not determining title, no bar to ejectment action; *Wood v. Jackson*, 8 Wend. 9, 22 A. D. 603, holding in ejectment, former judgment admissible too show estoppel and by parol that deed was pronounced invalid.

Cited in reference note in 32 A. S. R. 770, on conclusiveness of judgment in trespass *quare clausum fregit*.

Distinguished in *Coles v. Carter*, 6 Cow. 691, holding former recovery not admissible evidence under general issue in action of trespass; *Caperton v. Schmidt*, 26 Cal. 479, 85 A. D. 187, holding that in action to recover real estate one may aver former possession and ouster; *Hailey v. Ano*, 136 N. Y. 589, 32 A. S. R. 764, 32 N. E. 1068, holding subsequent judgment not conclusive as to purchaser of conveyance pending trespass action where title in issue.

—Judgment on demurrer.

Cited in *Spicer v. United States*, 5 Ct. Cl. 34, holding that judgment upon demurrer does not bar second suit unless decision was upon merits.

15 AM. DEC. 405, JACKSON EX DEM. STEWART v. TOWN, 4 COW. 599.

Title and rights of purchaser at sheriff's sale.

Cited in *Snyder v. Martin*, 17 W. Va. 276, 41 A. R. 670, holding that judgment creditor acquires no better right to estate than debtor had when judgment recovered; *Land v. Hopkins*, 7 Ala. 116, holding that purchaser at sheriff's sale under prior judgment could dispossess debtor's subsequent vendee; *Parker v. Pierce*, 16 Iowa, 227, as to whether purchaser at execution sale takes estate charged with equities and secret trusts against judgment debtor; *Vannice v. Bergen*, 16 Iowa, 555, 85 A. D. 531 (dissenting opinion), on right of purchaser at sheriff's sale without notice to take land purchased discharged of all liens; *Brewster v. Striker*, 1 E. D. Smith, 321, 7 N. Y. Leg. Obs. 140 (dissenting opinion), on purchaser at sheriff's sale coming into same possession that debtor had; *Hall v. Samson*, 19 How. Pr. 481, holding that chattel mortgagor, until default, has interest subject to sale on execution.

Cited in reference notes in 44 A. D. 708, as to what purchaser under execution must show to recover in ejectment; 44 A. D. 59, on right of defendant in execution in possession to defend in ejectment brought by purchaser by showing title in third person.

Distinguished in *You v. Flinn*, 34 Ala. 409, holding that purchaser at sheriff's sale cannot maintain ejectment where execution defendant took title in son's name.

Contradiction of sheriff's deed.

Cited in *Jackson ex dem. Webb v. Roberts*, 11 Wend. 422, holding that parol proof of sale under one execution cannot contradict sheriff's deed showing sale

under all; *Kellogg v. Kellogg*, 6 Barb. 116, as to admissibility of evidence of ownership of premises by certain person who died long before sheriff's sale under which party claims; *Jackson ex dem. Witherell v. Jones*, 9 Cow. 182, holding that tenant cannot deny title in execution debtor from whom he leased.

Relation of possession to title.

Cited in *Jackson ex dem. Cary v. Parker*, 9 Cow. 73, holding that one in possession under contract for purchase has interest subject to judgment and execution; *Hagaman v. Jackson*, 1 Wend. 502, holding that sheriff's sale against claimant without possession, will not pass title to purchaser; *Kellogg v. Kellogg*, 6 Barb. 116, holding proof by purchaser at sheriff's sale, of title acquired from debtor continuing in possession, sufficient in ejectment; *Alexander v. Gilliam*, 39 Tex. 227, holding that prior occupancy will sustain action of trespass to try title against wrongdoer; *Wilson v. Palmer*, 18 Tex. 592, holding prior occupancy sufficient title to recover in ejectment against wrongdoer; *Illinois & St. L. R. & Coal Co. v. Cobb*, 94 Ill. 55, holding that one in actual possession need not prove title in trespass.

Cited in notes in 60 A. D. 601, on possession as evidence of title; 60 A. D. 602, on sufficiency of proof of prior possession less than statutory period to sustain ejectment.

Validity of deed as against creditors.

Cited in *Fowler v. Stoneum*, 11 Tex. 478, 62 A. D. 490, holding grantor, with actual notice, bound by deed made to defraud subsequent purchasers; *Goff v. Alexander*, 20 Misc. 498, 45 N. Y. Supp. 737, holding mother's transfer to daughter, not excessive, for supporting infant, not fraudulent; *Dunlap v. Hawkins*, 59 N. Y. 342, holding presumption of fraud on one's paying consideration for grant to another, not conclusive; *Babcock v. Eckler*, 24 N. Y. 623, holding husband's transfer to wife, where sufficient to secure indebtedness is retained, not presumptively fraudulent.

— Voluntary deed.

Cited in *Hutchison v. Kelly*, 1 Rob. (Va.) 123, 39 A. D. 250, holding voluntary deed for purpose of avoiding liability void as to creditors; *Seward v. Jackson*, 8 Cow. 406, holding conveyance in consideration of blood and affection, though by debtor, prima facie, not conclusively fraudulent; *Hunter v. Waite*, 3 Gratt. 26, holding voluntary deed by person indebted and embarrassed, void as to creditors; *Perkins v. Perkins*, 1 Tenn. Ch. 537, holding husband's voluntary settlement upon wife and children not void *per se* against creditors; *Laird v. Scott*, 5 Heisk. 314, holding bona fide voluntary conveyance not originally fraudulent, valid against subsequent purchaser; *Shaw v. Tracy*, 83 Mo. 224, holding voluntary conveyance with fraudulent intent, void as to creditors and purchasers both prior and subsequent; *Bertrand v. Elder*, 23 Ark. 494, holding gift to wife by husband indebted and embarrassed, though not insolvent, fraudulent as to prior creditors; *Fleming v. Townsend*, 6 Ga. 103, 50 A. D. 318, holding voluntary conveyance void against subsequent bona fide purchaser for value, without notice; *Carson v. Foley*, 1 Iowa, 524, holding that voluntary conveyance not fraudulent *per se* as to existing creditors; *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740, holding voluntary conveyance with fraudulent intent not void as to subsequent purchaser with notice; *Pomeroy v. Bailey*, 43 N. H. 118, holding bona fide voluntary conveyance in consideration of affection, by one unembarrassed and solvent, good as against creditors; *Carter v. Grimshaw*, 49 N. H. 100, holding voluntary conveyance made in meditation of future fraudulent indebtedness, defeasible.

Cited in reference notes in 26 A. D. 194, on voluntary conveyances; 17 A. D. 755, on validity of voluntary conveyances; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers.

Cited in note in 14 A. D. 708, on validity of voluntary conveyance as to subsequent purchasers.

Operation of registry laws.

Cited in *Fort v. Burch*, 6 Barb. 60, holding that registry acts are remedial and must be liberally and beneficially construed; *Beal v. Warren*, 2 Gray, 447, holding voluntary bona fide recorded conveyance, not affecting creditors, good, against subsequent purchaser for valuable consideration; *Steele v. Mansell*, 6 Rich. L. 437, holding that conveyance recorded four years from delivery prevails over subsequent conveyance recorded six months from delivery; *Peck v. Mallams*, 10 N. Y. 509, on sufficiency of registry when containing such statement of mortgage as purchaser's safety requires; *Greenleaf v. Edes*, 2 Minn. 264, Gil. 226, holding bona fide purchaser's unrecorded deed for valuable consideration protected against subsequent attachment; *Hopping v. Burnam*, 2 G. Greene, 39, holding that deed for land first filed for record, though subsequently dated will prevail.

Cited in reference note in 82 A. D. 613, as to how far purchaser is protected by registration laws.

Cited in note in 5 L.R.A. 285, on construction of registry act as to notice.

Distinguished in *Hill v. Paul*, 8 Mo. 479, holding that judgment obtained after execution of mortgage, but before it is recorded, prevails over it.

—As to purchaser at judicial sale.

Cited in *Tuttle v. Jackson*, 6 Wend. 213, 21 A. D. 306, holding that unrecorded deed of person in actual possession prevails over subsequent sheriff's deed though recorded; *Jackson ex dem. Merrick v. Post*, 15 Wend. 588 (affirming 9 Cow. 120), holding that sheriff's deed recorded previous to prior deed of debtor in execution prevails unless purchaser had actual notice; *Hunter v. Watson*, 12 Cal. 363, 73 A. D. 543, holding judgment creditor, purchasing at his own sale without notice, bona fide purchaser, within registration act; *Den ex dem. Read v. Richman*, 13 N. J. L. 43, holding purchaser at sheriff's sale is purchaser within protection of registry act.

Cited in reference note in 51 A. S. R. 36, on effect of prior unrecorded deed on title of purchaser at execution sale.

Distinguished in *Scribner v. Lockwood*, 9 Ohio, 184, holding that sheriff's deed prevails over prior deed recorded after sale is confirmed but before sheriff's deed is made; *Jackson ex dem. Lansing v. Chamberlain*, 8 Wend. 620, holding that recorded deed to innocent purchaser at sheriff's sale prevails over prior deed from debtor subsequently recorded.

15 AM. DEC. 412, *FELLOWS v. FELLOWS*, 4 COW. 682.

Multifariousness.

Cited in reference notes in 30 A. S. R. 774; 70 A. S. R. 872; 82 A. S. R. 224,—on multifariousness of bill; 56 A. D. 451, on what constitutes multifariousness; 37 A. D. 559; 77 A. D. 449,—on rules for determining multifariousness; 49 A. D. 170, on effect of multifariousness in bill.

Joinder of causes.

Cited in *People ex rel. Pierce v. Morrill*, 26 Cal. 336, holding bill not multifarious where parties are commonly interested, issues are simple and multiplicity of suit may be avoided; *Lindley v. Russell*, 16 Mo. App. 217, holding bill in

equity not multifarious unless distinct and independent matters are united therein; *Richtmyer v. Richtmyer*, 50 Barb. 55, holding one action proper to close real and personal property trust created by different instruments; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55, holding no misjoinder of causes of action in bill involving cancelation of deed and accounting, where common decision settles parties' rights; *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 730, holding multifarious, bill enjoining prosecution of several different parties and for damage for diverting stream; *Gamewell Fire-Alarm Teleg. Co. v. Chillicothe*, 7 Fed. 351, holding bill in equity alleging three distinct patents used in party's infringing machine not multifarious on demurrer; *Richards v. Pierce*, 52 Me. 560, holding bill to redeem from first mortgage and to cancel second mortgage not multifarious if parties interested are all the same; *Bolman v. Lohman*, 74 Ala. 507, holding bill to foreclose two mortgages on same property, claimant subrogated to prior mortgage security, not multifarious; *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981, holding complaint alleging right to accounting for fund and failure to account, not multifarious; *Latting v. Latting*, 4 Sandf. Ch. 31, holding bill against administrator for rents and profits and waste, multifarious; *Boyd v. Hoyt*, 5 Paige, 65, holding bill charging improper transfer against two and waste against another, multifarious.

Cited in reference notes in 39 A. D. 532; 50 A. D. 510,—on joinder of causes of action; 65 A. D. 73, on joinder of causes and parties.

Cited in note in 28 A. D. 424, on joinder of distinct causes of suit in equity.

— Creditors' bills.

Cited in *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651, holding creditor's bill to subject debtor's conveyance to payment of debts if found fraudulent, not multifarious; *Nulton v. Isaacs*, 30 Gratt. 726, holding judgment creditors' bill charging deed to be fraudulent and for settlement of account if consideration must be shown, not multifarious; *Reed v. Stryker*, 4 Abb. App. Dec. 26, 12 Abb. Pr. 47, (reversing 6 Abb. Pr. 109), holding creditor's complaint charging fraudulent assignee personally and to set aside other fraudulent conveyances not multifarious; *Lamson v. Mix*, Fed. Cas. No. 8,034, holding judgment creditors' bill to enjoin payment to debtors of judgment in their favor, unsustainable; *Jones v. Paul*, 9 Mo. 293, holding bill to declare deed a mortgage and set aside same deed as fraudulent, multifarious; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20, holding no misjoinder in equitable petition to cancel transfer where interest and litigation, common to parties.

Joinder of parties defendant.

Cited in *Meyers v. Scott*, 20 N. Y. S. R. 35, 2 N. Y. Supp. 753, holding persons having interest proper parties to action on bonds; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157, holding that one, having real controversy with opposing parties, common litigation and decision, is proper party; *Newcomb v. Horton*, 18 Wis. 566, holding that judgment owners must be made parties in action to restrain tax for their payment; *Emery v. Erskine*, 66 Barb. 9, holding that water-right owners in severalty may unite against another several owner, to restrain excessive use; *Carroll v. Roosevelt*, 4 Edw. Ch. 211, holding bill against several mortgagees and common mortgagor, on validity of mortgagor's title, not multifarious; *Bunnel v. Stoddard*, Fed. Cas. No. 2,135, holding trust by different parties, jointly wronged, under common title, enforceable in one suit against trustee and confederate; *McLean v. Lafayette Bank*, 3 McLean, 415, Fed. Cas. No. 8,886, holding that assignee has right to file chancery bill against different mort-

gages to test validity of mortgages; *Donelson v. Posey*, 13 Ala. 752, holding bill not multifarious, making parties, two trustees, under different deeds of same property, where litigation common; *Keppel v. Lehigh Coal & Nav. Co.* 21 Pa. Co. Ct. 101, holding bill against two corporations and partnership, independent of each other for injunction and proportionate damages, multifarious; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, 7 Abb. Pr. 41 (reversing 1 Abb. Pr. 417), holding complaint against several holders of spuriously issued stock, not multifarious; *Ingersoll v. Kirby*, Walk. Ch. (Mich.) 65, holding bill not multifarious because against parties, one of whom has part interest, where litigated matter is entire; *Grady v. Maloso*, 92 Wis. 666, 66 N. W. 808, holding that partition action by owner in common lies against all having interest in land; *Douglas County v. Walbridge*, 38 Wis. 179, holding supervisor's bill against several with transactions connected with point in issue, not multifarious; *Johnson v. Brown*, 2 Humph. 327, 37 A. D. 556, holding bill to satisfy judgment from different deeds, securing creditors, multifarious where creditors unconnected; *Stevens v. South Ogden Land, Bldg. & Improv. Co.* 14 Utah, 232, 47 Pac. 81, holding conspirators and affected persons, proper parties, where fraudulent conspiracy is common litigated point; *Garner v. Harmony Mills*, 6 Abb. N. C. 212, 56 How. Pr. 452, holding that single action to protect trust, lies against several unconnected persons concerned in same fraud; *Garner v. Thorn*, 56 How. Pr. 452, holding no misjoinder in action to protect trust against several unconnected persons concerned in same fraud; *Wade v. Rusher*, 4 Bosw. 537, holding third person grantee of fraudulent conveyance, necessary party to partner's action for accounting against partner; *Andrews v. Pratt*, 44 Cal. 309, holding several persons concerned in fraudulent acts proper parties in suit annulling acts, though gains by acts are several; *Leavens v. Butler*, 8 Port. (Ala.) 380, holding that legatee may sue for legacy and make all whose rights will be affected, parties; *Randle v. Boyd*, 73 Ala. 282, holding tax-sale purchaser after accrual of complainant's lien, proper party to bill to enforce vendor's lien for unpaid purchase money; *Good v. Queen's Run Fire Brick Co.* 32 Pa. Co. Ct. 419, holding no misjoinder in bill against two separate concerns connected with injury from which relief is demanded; *Fish v. Berkey*, 10 Minn. 199, Gil. 161, holding that where conveyances are made to several by agreement, all are parties to grantor's action for accounting; *Griggs v. Griggs*, 66 Barb. 287, holding no misjoinder in supervisor's action against commissioners jointly for town money received; *Bobb v. Bobb*, 8 Mo. App. 257, holding bill charging with fraud several persons not appearing to be parties to one fraudulent scheme or having common interest, multifarious.

Annotation cited in *Love v. Keowne*, 58 Tex. 191, holding action by heirs against administrators and two sets of sureties for conversion, accounting discovery and general relief, not multifarious.

Cited in reference notes in 28 A. D. 424; 29 A. D. 277; 32 A. D. 695; 38 A. D. 124; 40 A. D. 107; 43 A. D. 778; 65 A. D. 109,—on joinder of defendants in equity; 99 A. D. 225, on right of one unnecessarily made party to bill to demur.

— Creditors' bills.

Referred to as leading case in *Bauknight v. Sloan*, 17 Fla. 284, holding creditors' bill, making parties, several grantees, claiming different portions of fraudulent grantor's property, not multifarious.

Cited in *Wright v. Shelton*, Smedes & M. Ch. 399, holding judgment creditor's bill against debtor and fraudulent grantees, not multifarious; *Chase v. Searles*, 45 N. H. 511, holding judgment creditors' bill to discover assets, against debtor and grantees of fraudulent conveyances, not multifarious; *Free v. Buckingham*,

57 N. H. 96, holding bill to set aside two fraudulent deeds, against grantees and those claiming under deeds, not multifarious; Conley v. Buck, 100 Ga. 187, 28 S. E. 97, holding judgment creditor's petition against debtor and others conspiring to defeat collection of judgment, not multifarious; Allen v. Montgomery R. Co. 11 Ala. 437, holding judgment creditors' bill to reach corporation's assets, against stockholders, trustees, and fraudulent purchasers, not multifarious; Steiner Land & Lumber Co. v. King, 118 Ala. 546, 24 So. 35, holding bill against fraudulent conveyances by separate debtors to several grantees, all commonly combined to defraud, not multifarious; Hinds v. Hinds, 80 Ala. 225, holding bill against fraudulent grantees claiming under several conveyances executed with common intent, not multifarious; Way v. Bragaw, 16 N. J. Eq. 213, 84 A. D. 147, holding bill to satisfy law judgment, remove fraudulent conveyances, and reach equitable interests not subjects of law execution, not multifarious; Richards v. Pierce, 52 Me. 560, holding creditors' bill against debtor, assignee, and another to cancel one mortgage as fraudulent and redeem another, not multifarious; North v. Bradley, 9 Minn. 183, Gil. 169, holding causes of action not improperly united in action by creditors to subject to payment of their debts, land paid for by debtor and conveyed to his wife and also land fraudulently conveyed to another and reconveyed by latter; Pullman v. Stebbins, 51 Fed. 10, holding bill against separate, fraudulent conveyances to different parties, purposely to defraud creditor, not multifarious; Hughes v. Tennison, 3 Tenn. Ch. 641, holding creditors' bill against debtor's several grantees to cancel deeds as fraudulent and subject them to payment of debts not multifarious; Almond v. Wilson, 75 Va. 613, holding judgment creditors' bill to reach debtor's fraudulent conveyances, making grantees parties, not multifarious; Winslow v. Dousman, 18 Wis. 457, holding creditor's bill not demurrable for misjoinder if defendants have common interest in the point in issue; Com. v. Drake, 81 Va. 305; Wood v. Sidney Sash, Blind & Furniture Co. 92 Hun, 22, 37 N. Y. Supp. 885,—holding creditor's complaint against several unconnected transferees concerned in same fraudulent scheme, not multifarious; Bradner v. Holland, 33 Hun, 288, holding judgment creditors' bill against debtors jointly to reach legacies due debtors, good on demurrer; Mahler v. Schmidt, 43 Hun, 512, holding no misjoinder in action against judgment debtor, fraudulent grantee, and fraudulent mortgagees; Miller v. Hall, 8 Jones & S. 262, holding judgment debtor necessary party in action to recover fraudulently conveyed property; Lawrence v. Bank of the Republic, 35 N. Y. 320, 31 How. Pr. 502, holding judgment creditor necessary party to creditor's suit against fraudulent assignment for creditor's benefit; Watts v. Wilcox, 20 N. Y. Civ. Proc. Rep. 166, 13 N. Y. Supp. 492, 37 N. Y. S. R. 194, holding that grantees in severalty under common plan to defraud, are all necessary parties in action to set aside deeds; Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196, holding creditors' bill, making single controversy, unsustainable, unless all against whom bill directed were parties; Conley v. Buck, 100 Ga. 187, 28 S. E. 97, holding no misjoinder in judgment creditor's petition against debtor and others commonly combined to defraud; Trego v. Skinner, 42 Md. 426, holding debtor and grantees of fraudulent conveyances, proper parties to creditors' bill to reach debtor's property; Hammond v. Hudson River Iron & Mach. Co. 20 Barb. 378, holding alleged fraudulent assignees in action to reach debtor's property necessary parties.

Cited in reference note in 90 A. D. 292, on joinder of distinct fraudulent grantees as defendants in creditors' bill as rendering bill multifarious.

—Bill by receiver, assignee in bankruptcy, etc.

Cited in *Iddings v. Bruen*, 4 Sandf. Ch. 223, holding unconnected parties having common interest in issue, necessary parties to receiver's bill to reach debtor's assets; *Platt v. Preston*, Fed. Cas. No. 11,219, holding bill of assignee in bankruptcy to set aside general assignment as fraudulent, not multifarious; *Jones v. Slauson*, 33 Fed. 632, holding assignee's bill, in bankruptcy, against several parties to set aside various fraudulent transfers, not multifarious; *Spaulding v. McGovern*, Fed. Cas. No. 13,217, holding assignee's bill against bankrupt, wife and third party for fraudulent transfer, not multifarious; *Potts v. Hahn*, 32 Fed. 660, holding bill of bankrupt's assignee against several parties commonly connected with fraudulent conveyances, not multifarious; *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60, holding receiver's bill against shareholders participating unequally in dividends sought, not multifarious; *Carter v. Hobbs*, 92 Fed. 594, holding trustee's petition against bankrupt and creditor to set aside fraudulent mortgage, chattel mortgage, and lease, not multifarious; *Hamlin v. Wright*, 23 Wis. 491, holding that receiver may maintain action against separate fraudulent grantees jointly to set aside conveyances; *Norcross v. Nathan*, 99 Fed. 414, holding trustee's complaint against bankrupt and two others not multifarious where acts have common interest and fraud.

Purchase by personal representative.

Cited in *McCrary v. Foster*, 1 Iowa, 271, holding executrix using money of estate to redeem land holds as trustee.

Cited in reference notes in 56 A. D. 93, as to whether administrator or executor may purchase property of estate for his own benefit; 42 A. D. 542, on voidability of purchase by executor of property of estate; 33 A. D. 581, on power of administratrix to avoid purchase made at her own sale.

Joinder of parties plaintiff.

Cited in *Loomis v. Brown*, 16 Barb. 325, holding that in action for damage on injunction bond, all may join, though one's claim differs from others; *Comstock v. Rayford*, 1 Smedes & M. 423, 40 A. D. 102, holding bill by unconnected parties having common interest centering in point in issue, not multifarious; *McCready v. Hart*, 20 Phila. Leg. Int. 149, holding bill of several unconnected persons against insurance company where there is common interest against common liability, not multifarious; *Mix v. Hotchkiss*, 14 Conn. 32, holding bill in equity by several mortgagees to foreclose claiming one general right, not multifarious; *Simar v. Canaday*, 53 N. Y. 298, 13 A. R. 523, holding that husband and wife conveying husband's land through grantee's fraud, may unite in one action; *Morton v. Weil*, 33 Barb. 30, 11 Abb. Pr. 421, holding that several judgment creditors may unite in action against fraudulent lienors and assignees to reach debtor's property; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801, holding bondholder's single equitable suit not maintainable where each has remedy at law; *Scott v. Calvit*, 3 How. (Miss.) 148, holding that heir cannot join administrator in original bill for relief and for an account of personal estate, for rents and profits of land, or for the recovery of land; *Fleming v. Mershon*, 36 Iowa, 413, holding common or general interest in result necessary to entitle one to sue in behalf of others not named.

Cited in reference notes in 28 A. D. 113; 71 A. D. 311,—on joinder of plaintiffs in equity; 34 A. S. R. 776, on parties plaintiff in suit to set aside fraudulent conveyances.

Distinguished in *Wood v. Perry*, 1 Barb. 114, holding that distinct claimants,

on separate and independent contracts, cannot in same bill enforce claims against another.

Avoiding multiplicity of suits.

Cited in reference notes in 11 A. S. R. 355; 22 A. S. R. 358,—on interference of equity to prevent multiplicity of suits; 32 A. D. 695, on bill of peace to prevent multiplicity of suits.

Necessity of answering.

Cited in *Putnam v. Sweet*, 1 Chand. (Wis.) 286, 2 Pinney (Wis.) 302 (dissenting opinion), on necessity of answer denying specially charged combination accompanying demurrer to bill for multifariousness.

Admission by not answering over.

Cited in *Miller v. Davidson*, 8 Ill. 518, 44 A. D. 715, holding that one, declining to answer over, where demurrer overruled, admits bill and cannot afterwards deny allegations.

Resulting trust.

Cited in *McCrory v. Foster*, 1 Iowa, 271, holding land redeemed by executrix with money belonging to estate held in trust.

Cited in note in 2 L.R.A. 482, on rights of *cestui que trust* in lands purchased by trustees with trust funds.

15 AM. DEC. 431, DEPAU v. OCEAN INS. CO. 5 COW. 63.

Abandonment by assured.

Cited in *Pezant v. National Ins. Co.* 15 Wend. 453, holding assured could not abandon as for technical total loss vessel arriving at destination in repairable shape; *Child v. Sun Mut. Ins. Co.* 2 Sandf. 76, holding abandonment made on erroneous information but not accepted not binding on owner where no technical total loss; *Allen v. Commercial Ins. Co.* 1 Gray, 154, on right to abandon vessel to underwriters without discharging lien created by bottomry bond for necessary recruits; *Taber v. China Mut. Ins. Co.* 131 Mass. 239, holding that assured may abandon and recover for constructive total loss although damage caused by successive perils; *Ruckman v. Merchants' Louisville Ins. Co.* 5 Duer, 342, holding sale of vessel unless an act of barratry or justified by necessity creates total loss.

Cited in reference notes in 19 A. D. 288, as to when abandonment can be made; 33 A. D. 733, on necessity of making abandonment within reasonable and convenient time after loss.

Necessary expenses; right to sell or hypothecate for.

Cited in *American Ins. Co. v. Coster*, 3 Paige, 323, holding master in foreign port, in case of necessity, may sell part or hypothecate whole of cargo for repairs; *Buchanan v. Ocean Ins. Co.* 6 Cow. 318, on right of master to sell or hypothecate vessel for purpose of making repairs.

Maritime lien.

Cited in note in 70 L.R.A. 375, on what contracts will support maritime lien for general average.

General average adjustment; conclusiveness.

Cited in *Lewis v. Williams*, 1 Hall, 429, on conclusiveness of adjustment of general average at Mobile, for loss to New York shippers; *Peters v. Warren Ins. Co.* 3 Sumn. 389, 1 Law Rep. 281, Fed. Cas. No. 11,035; *Peters v. Warren Ins. Co.* 1 Story, 463, Fed. Cas. No. 11,034,—holding items included and sums apportioned and paid as general average in foreign port conclusive on underwriters:

Thornton v. United States Ins. Co. 12 Me. 150, holding adjustment of general average in foreign port not conclusive on owner in action on insurance policy.

Cited in note in 14 E. R. C. 430, an adjustment of general average at port of discharge.

15 AM. DEC. 433, JACKSON EX DEM. SWARTWOUT v. JOHNSON, 5 COW. 74.

Purchase of realty in third person's possession.

Cited in **Chalmers v. Wright**, 5 Robt. 713, on title which possessor of land must claim in order to avoid deed of owner out of possession; **Whitney v. Wright**, 15 Wend. 171, holding possession under executory contract for purchase of land renders void deed executed under adverse title; **Christie v. Gage**, 71 N. Y. 189, holding possession under conveyance in fee from life tenant adverse to reversion under champerty act.

Cited in reference notes in 58 A. D. 761, on maintenance; 29 A. D. 121, on champerty and maintenance.

Adverse possession; what constitutes.

Cited in **Davis v. Bownar**, 55 Miss. 671 (dissenting opinion), on effect of acquisition of title in making possession adverse where person holding not in privity with owner; **Roggencamp v. Converse**, 15 Neb. 105, 17 N. W. 361, holding possession not adverse where it is such as admits existence of higher title; **Fleming v. Barnum**, 100 N. Y. 1, 2 N. E. 905, holding possession does not begin to be adverse against person entitled after prior estate during its continuance; **Towle v. Palmer**, 1 Robt. 437, 1 Abb. Pr. N. S. 81 (dissenting opinion), on existence of adverse possession where it appears title claimed admits existence of higher title; **Robinson v. Kime**, 70 N. Y. 147; **Stevens v. Rhineland**, 5 Robt. 285,—holding that possession to be adverse must be exclusive and a claim to entire ownership; **Patten v. New York Elev. R. Co.** 3 Abb. N. C. 306, holding adverse possession cannot give rise to claim of title to vault in street beyond limits of deed.

Cited in reference notes in 64 A. D. 175, on taking possession of land in adverse possession; 36 A. D. 683, on claim of title in adverse possession; 36 A. D. 242, on necessity of claim to entire title in adverse possession.

Cited in note in 15 L.R.A. (N.S.) 1209, on claim of right as essential element in adverse possession.

—Vendor and purchaser.

Cited in **Hart v. Bostwick**, 14 Fla. 162; **Re Department of Public Works**, 73 N. Y. 560; **Schneller v. Plankinton**, 12 N. D. 561, 98 N. W. 77; **Ormond v. Martin**, 37 Ala. 598,—holding possession under agreement for future conveyance not adverse until person entitled to conveyance under contract; **Vrooman v. Shepherd**, 14 Barb. 441; **Coogler v. Rogers**, 25 Fla. 853, 7 So. 391,—holding possession under contract to purchase adverse except as to party contracting to convey; **Kellogg v. Kellogg**, 6 Barb. 116; **Miller v. Larson**, 17 Wis. 624; **Rutledge v. Rutledge**, 22 Ill. App. 357,—holding purchaser of land under executory contract estopped from disputing vendor's title in action for possession; **Green v. Deitrich**, 114 Ill. 636, 3 N. E. 800, holding purchaser of land in possession under contract may buy out-standing title and assert same against vendor; **Allen v. Smith**, 6 Blackf. 527, holding possession of purchaser of land under land contract not sufficiently adverse to invalidate conveyance by owner; **Fosgate v. Herkimer Mfg. & Hydraulic Co.** 12 Barb. 352, holding purchaser at execution sale of rights of vendee in land

contract cannot hold adversely to vendor; *Howard v. Howard*, 17 Barb. 663, holding possession in expectation of deed, by son, with consent of father, of latter's land not adverse; *Dobson v. Culpepper*, 23 Gratt. 352, holding vendee in land contract may defend possession against vendor where vendor conveys to another.

Cited in reference notes in 31 A. D. 607, on adverse possession by purchaser from vendee in possession under executory contract to purchase; 65 A. D. 633, on possession under bond for deed or contract of purchase as not adverse to vendor; 24 A. S. R. 937, as to when possession under bond for deed or contract of sale, is adverse.

— As to tenants in common.

Cited in *Howard v. Carpenter*, 23 Md. 10, holding possession under contract signed by husband of tenant in common not available against deed by both tenants; *Jackson ex dem. Krom v. Brink*, 5 Cow. 483, holding that possession of tenant in common may become adverse by some notorious act and claim of title.

— As to remaindermen.

Cited in *Austin v. Brown*, 37 W. Va. 633, 17 S. E. 207; *Moore v. Childress*, 58 Ark. 510, 25 S. W. 833,—holding possession of life tenant or his grantee not adverse to remainderman during existence of life estate; *Laing v. Evans*, 64 Neb. 654, 90 N. W. 246, on right of heirs to enter or maintain ejectment during continuance of tenancy by curtesy; *Jackson ex dem. McCrea v. Mancius*, 2 Wend. 357, holding grantee from tenant by curtesy of lot and alley acquiring title to alley cannot set up a title against heirs; *Bennett v. Garlock*, 79 N. Y. 302, 35 A. R. 517, holding adverse possession against trustees holding legal title bars person entitled to remainder; *Fogal v. Pirro*, 10 Bosw. 100, 17 Abb. Pr. 113, holding statute does not run against ejectment by remainderman until determination of precedent estate where mortgagee in possession under termor; *Koltenbrock v. Cracraft*, 36 Ohio St. 584, holding statute does not run against heirs of wife until termination of estate by curtesy; *Templeton v. Twitty*, 88 Tenn. 595, 14 S. W. 435, holding statute does not begin to run against remainderman until termination of life estate; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, holding statute does not run against wife's reversion until life estate terminated where husband conveys by deed; *Bradstreet v. Pratt*, 17 Wend. 44, holding *feme covert* not bound by acquiescence of husband in erroneous boundary line; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508, holding that statute runs against heirs of wife from husband's death where husband sold joint land before and conveyed same after wife's death.

Cited in reference note in 11 A. S. R. 173, on adverse possession of grantee in fee of tenant by the curtesy.

Cited in note in 19 L.R.A. 842, 848, on adverse possession against remaindermen and owners of future estates.

— Color of title.

Cited in *Bradstreet v. Clarke*, 12 Wend. 602, holding conveyance by trustee professing to convey whole and absolute title, good foundation for adverse title; *Briggs v. Prosser*, 14 Wend. 227, holding contract for purchase of land after performance by vendee, sufficient foundation for adverse possession; *Wilklow v. Lane*, 37 Barb. 244, holding lease granting privilege of diverting water by person who had conveyed by deed, foundation for adverse claim; *De St. Laurent v. Gescheidt*, 18 App. Div. 121, 45 N. Y. Supp. 730, holding possession claiming under alleged deed not recorded and burned up some evidence of claim of title.

Cited in notes in 15 L.R.A.(N.S.) 1236, on necessity of color of title by purchasers; 18 A. D. 490, on contract to convey as color of title.

Time required to obtain title by adverse possession.

Cited in *Chandler v. Neighbors*, 44 Ark. 479, holding right of action for land barred where seven years elapsed since right accrued, three being without disability; *Ogle v. Hignet*, 161 Mo. 47, 61 S. W. 596; *Gray v. Yates*, 67 Mo. 601,—holding ten years' adverse possession bars ejectment by one attaining majority more than three years before ten years expires; *Watson v. New York C. R. Co.* 6 Abb. Pr. N. S. 91, 1 Sheldon, 159, holding purchaser at execution sale not barred from commencing action until twenty years after delivery of deed; *Jackson ex dem. Williams v. Miller*, 6 Cow. 751, holding prior possession unavailable in cross ejectment unless it be for time sufficient for title.

Burden of proving possession adverse.

Cited in *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540, holding burden of proving facts necessary to constitute adverse possession is upon person asserting it.

When statute of limitations runs.

Cited in *Hamilton v. Wright*, 30 Iowa, 480, holding statute runs from time party entering land without color of title acquires and asserts title; *McCorry v. King*, 3 Humph. 267, 39 A. D. 165; *Hope v. Norfolk & W. R. Co.* 79 Va. 283; *Gibson v. Jayne*, 37 Miss. 164,—holding statute does not run against person entitled to property in remainder until determination of particular estate; *Anderson v. Northrop*, 30 Fla. 612, 12 So. 318, holding statute of limitations will not run against remaindermen in favor of life tenant in absence of actual knowledge of latter's hostile claim; *Landes v. Perkins*, 12 Mo. 238, holding statute does not run against United States in favor of one not having entire title; *Tillotson v. Doe*, 5 Ala. 407, 39 A. D. 330, holding statute begins to run against landlord from time he has notice tenant disclaims holding under him; *Irwin v. Garretson*, 1 Cin. Sup. Ct. Rep. 533, holding running of statute not interrupted by death of party where cause of action accrued in lifetime.

Cited in reference notes in 22 A. D. 759; 25 A. D. 717,—as to when statute of limitations will begin to run.

Cited in notes in 14 A. S. R. 635, on running of limitations against reversioners and remaindermen; 39 A. D. 175, on running of statute of limitations against remaindermen during continuance of particular estate.

—Effect of disability.

Cited in *Scallon v. Manhattan R. Co.* 185 N. Y. 359, 78 N. E. 284, 7 A. & E. Ann. Cas. 168, holding adverse possession commencing in lifetime of ancestor continues to run against infant heir; *Steele v. Gellatly*, 41 Ill. 39, holding statute does not commence to run against right of dower until person entitled becomes discover; *Harris v. Ross*, 86 Mo. 89, 56 A. R. 411, holding heir of minor married woman making deed has full statutory period after majority to disaffirm; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115, holding daughter of minor heir of minor grantor cannot disaffirm after three years from grantor's death; *Foster v. Marshall*, 22 N. H. 491, holding wife has twenty years to commence action after death of tenant by curtesy if latter disseised; *Clark v. Clement*, 33 N. H. 563, on presumption of payment from lapse of time, where disability of infancy exists; *Wallace v. Fletcher*, 30 N. H. 434, holding disability not existing when adverse enjoyment commenced nor when twenty years expired will not defeat presumption of deed; *Willson v. Betts*, 4 Denio, 201, holding *feme covert* barred by twenty years' adverse possession if disability ceased more than ten years before action; *Henry v. Carson*, 59 Pa. 297, holding person under disabilities and his heirs have ten years after disability removed to bring action.

Cited in note in 36 A. D. 78, on running of limitations where all parties are under disabilities or several exist in one party.

— Cumulative disabilities.

Cited in *Nutter v. De Rochemont*, 46 N. H. 80, holding time to commence action not extended where plaintiff infant at accrual and afterwards *feme covert*; *Jackson ex dem. Erwin v. Moore*, 6 Cow. 706; *Dodge v. Gallatin*, 130 N. Y. 117, 29 N. E. 107; *Randall v. Raab*, 2 Abb. Pr. 307,—holding law gives ten years after disability removed where fee vests in one then under disability; *Davis v. Coblens*, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. Rep. 932, holding cumulative disability of heir of woman dying during disability of coverture cannot arrest running of statutes.

Cited in reference note in 43 A. D. 320, on effect upon statute of limitation, of successive or cumulative disabilities.

— Effect of absence from state.

Cited in *Brown v. Bicknell*, 1 Pinney (Wis.) 226, 39 A. D. 299, *Burnett (Wis.)* 65, holding note not barred where maker outside jurisdiction at maturity unless six years elapsed after return to jurisdiction.

Nature and existence of tenancy by curtesy.

Cited in *Graham v. Luddington*, 19 Hun, 246, holding seisin in fact by wife necessary to create tenancy by curtesy, where wife claims by descent; *Tayloe v. Gould*, 10 Barb. 388, holding husband not entitled to curtesy unless wife seised in fact, as distinguished from seisin in law; *Zeust v. Staffan*, 16 App. D. C. 141, holding seisin and birth of issue not required to be concurrent to vest estate by curtesy; *Stewart v. Ross*, 50 Miss. 776, on right to tenancy by curtesy by birth of issue at any time during coverture; *Adair v. Lott*, 3 Hill, 182, holding actual seisin to enable husband to claim curtesy not necessary where wife takes by deed; *Hunter v. Whitworth*, 9 Ala. 965, holding husband takes by curtesy in lands of which wife was seised where parents intermarry after illegitimate birth; *Baker v. Oakwood*, 49 Hun, 416, 3 N. Y. Supp. 570, holding that estate by curtesy cannot be acquired during an adverse possession; *McDaniel v. Grace*, 15 Ark. 465, holding husband would not take by curtesy where land held adversely until after death of wife; *Todd v. Oviatt*, 58 Conn. 174, 7 L.R.A. 693, 19 Atl. 440, holding husband not tenant by curtesy in lands in which wife had only remainder undetermined during coverture; *Ferguson v. Tweedy*, 43 N. Y. 543, holding husband not tenant by curtesy of wife's reversion or remainder unless particular estate terminates during coverture; *Collins v. Russell*, 96 App. Div. 136, 89 N. Y. Supp. 414, holding tenancy by curtesy does not arise where wife's estate subject to life estate undetermined at her death; *Billings v. Baker*, 28 Barb. 343, holding acts of 1848, and 1849 abrogated the existence of prospective tenancy by curtesy; *Carr v. Anderson*, 6 App. Div. 6, 39 N. Y. Supp. 746, holding actual entry on lands devised to wife necessary in order to create tenancy by curtesy; *Watkins v. Thornton*, 11 Ohio St. 367; *Borland v. Marshall*, 2 Ohio St. 308,—holding husband may have curtesy though wife never seised, and though lands be held adversely; *Guion v. Anderson*, 8 Humph. 298, holding constructive possession of land not adversely held sufficient seisin in wife to give husband curtesy; *Ward v. Fuller*, 15 Pick. 185, on necessity of actual entry upon land for purpose of constituting seisin enabling maintenance of writ of right.

Cited in reference notes in 31 A. D. 248; 90 A. D. 322; 17 A. S. R. 124; 36 A. S. R. 432; 46 A. S. R. 154; 82 A. S. R. 885,—as to when tenancy by curtesy exists; 103 A. S. R. 590, on requisites to tenant's curtesy, 90 A. D. 322 on suffi-

ciency of constructive seisin of wife to give rise to tenancy by curtesy; 67 A. D. 302, on necessity for actual seisin in wife to constitute husband tenant by curtesy.

Cited in notes in 112 A. S. R. 572, on definition of tenancy by the curtesy; 112 A. S. R. 574, on distinction between curtesy initiate and curtesy consummate; 11 L.R.A. 827, on necessity for seisin in wife to right of estate by curtesy; 12 A. S. R. 83, on interest of husband in wife's real estate after her death, as dependent upon birth of child.

To what lands curtesy applies.

Cited in *Wells v. Thompson*, 13 Ala. 793, 48 A. D. 76, holding curtesy applies to waste uncultivated lands of wife not held adversely.

Nature of possession.

Cited in *Churchill v. Onderdonk*, 59 N. Y. 134, on distinction between actual and constructive entry or possession.

15 AM. DEC. 451, JACKSON EX DEM. VAN SCHAICK v. DAVIS, 5 COW. 123.

Best and secondary evidence.

Cited in reference notes in 66 A. S. R. 615, on best and secondary evidence; 22 A. D. 449; 26 A. D. 343,—as to when secondary evidence is admissible.

Necessity of objections on trial.

Cited in *Harmon v. Thornton*, 3 Ill. 351; *Clauser v. Stone*, 29 Ill. 114, 81 A. D. 299; *Cheney v. Beals*, 47 Barb. 523; *Gillham v. State Bank*, 3 Ill. 245, 35 A. D. 105,—holding objection curable by other proof not taken at trial not ground for new trial; *Ansonia Brass Co. v. Conner*, 62 How. Pr. 272 (dissenting opinion), on effect of failure to make objections at trial on right to new trial; *C. H. Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075, holding objections to depositions by stockholders in support of corporate claim against deceased person interposable at trial; *Gregory v. Dodge*, 14 Wend. 593, holding objection to competency of witness on ground of interest must be taken before closing of the proofs.

Cited in reference notes in 35 A. D. 107, on necessity of raising objections on trial; 34 A. D. 279, on waiver of objection to evidence not made at the trial.

Cited in note in 27 A. D. 487, on raising on appeal objections not taken at the trial.

Ancient deed as evidence.

Cited in *Hoopes v. Auburn Waterworks Co.* 37 Hun, 568, holding record of deed by corporation admissible as ancient deed, possession for thirty years being shown; *Townsend v. Downer*, 32 Vt. 183, on existence of presumption of grant from possession and lapse of time.

Cited in reference notes in 39 A. D. 686, on ancient deeds as evidence; 53 A. D. 222; 69 A. D. 504,—as to when ancient deeds may be given in evidence without proof of execution; 54 A. D. 357, on reading ancient deed in evidence without proof of execution.

Cited in notes in 3 A. D. 490, on admissibility of ancient deed; 11 E. R. C. 513, on proof of ancient deeds; 35 L.R.A. 341, on necessity of calling subscribing witnesses to prove ancient documents; 9 A. S. R. 303, as to whether possession under ancient deed is essential to its admissibility.

Admissions and declarations as to title.

Cited in *DeLancey v. Ganong*, 9 N. Y. 9, holding declarations of tenant denying landlord's title and assertions of ownership, do not render possession adverse; *Munro v. Merchant*, 26 Barb. 383, on presumption of title from admissions or acquiescence on part of person claiming adversely.

Cited in reference note in 52 A. D. 164, on declarations as to title.

— Of former owner.

Cited in *Hardy v. De Leon*, 5 Tex. 211, holding acknowledgment of title in another once made cannot afterwards be disputed; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. 757, holding declarations by grantor before conveying admissible in ejectment by his grantees if adverse to them; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. 836, holding declarations of person in possession of property as to title, admissible against him; *Pike v. Hayes*, 14 N. H. 19, 40 A. D. 171, holding declarations by deceased owner during ownership relating to boundary, evidence against person claiming through him; *Corbin v. Jackson*, 14 Wend. 619, 28 A. D. 550 (dissenting opinion), on admissibility of declarations of grantor while holding title in reference to title; *Hewlett v. Cock*, 7 Wend. 371, holding declarations of grantor of land in possession as binding on grantees as if made by latter; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536, holding declarations of deceased owner of land inadmissible to prove he had title or to prove possessions; *Hines v. Soule*, 14 Vt. 99, holding admissions of "L" against his title to oxen that they were "R's" not evidence against sheriff attaching them as "L's;" *Glanton v. Griggs*, 5 Ga. 424, holding declarations by prior owner of note before due admissible against subsequent owner with notice of defects.

Cited in reference notes in 77 A. D. 345, on admissibility of declarations of person in possession of land against his own title; 30 A. D. 596, on admissibility of declarations and admissions of person deceased made while in possession of land as to boundary.

Cited in notes in 40 A. D. 240, on admissibility of declarations of former owner or possessor against those claiming under him; 42 A. D. 632, as to when declarations of vendor are evidence against vendee to show fraud.

Parol disclaimer of title to land.

Cited in *Delaplain v. Grubb*, 44 W. Va. 612, 67 A. S. R. 788, 30 S. E. 201; *Williamson v. Jones*, 43 W. Va. 562, 64 A. S. R. 891, 38 L.R.A. 694, 27 S. E. 410,— on effect of oral disclaimer of right by one holding legal title to land; *McNeele v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508, holding married woman not barred by expressing satisfaction of exchange of joint lands by husband.

Relation of landlord and tenant and its effect.

Cited in *Williams v. Michigan C. R. Co.* 133 Mich. 448, 103 A. S. R. 458, 95 N. W. 708, holding provision in lease that on re-entry subleases shall be lessor's does not bind subtenant to lessor; *Worthington v. Lee*, 61 Md. 530, holding deed by tenant professing to pass fee, conveyance only of unexpired term; *Perkins v. The Prospect*, Fed. Cas. No. 10,985, on obligation of assignee of lease to fulfil all of its terms.

Cited in reference notes in 15 A. S. R. 719, on relation between landlord and subtenant; 61 A. D. 542, on continuance of relation of landlord and tenant after once established; 39 A. D. 73, on party entering under tenant or by his permission standing in like situation; 24 A. D. 489, on attachment of relation of tenant to all succeeding to tenant's possession; 20 A. D. 155, on tenant's attornment to a stranger.

Cited in notes in 17 A. D. 520, on what constitutes a lease; 45 A. D. 456, on rights of assignee of lessee; 15 E. R. C. 541, on liability of lessee for holding over of sublessee after expiration of lease.

— When relation exists.

Cited in *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682; *Lee v. Payne*, 4 Mich. 106,—holding assignee of lease for unexpired term stands in relation of tenant to original lessor.

— Presumption of continuance of tenancy.

Cited in *Carlisle v. McCall*, 1 Hilt. 399 (dissenting opinion), on presumption of continuation of relation of landlord and tenant when once established; *Tilghman v. Little*, 13 Ill. 239, holding plaintiff in ejectment not obliged to establish legal title, party in possession being his tenant; *Lyon v. Odell*, 65 N. Y. 28, holding nonpayment of rent for more than twenty years does not raise presumption of release from covenant; *Cole v. Patterson*, 25 Wend. 456, holding nonpayment of rent for twenty-four years insufficient as basis for presumption of release from rent; *Central Bank v. Heydorn*, 48 N. Y. 260, holding no presumption of release from rent arises from absence of proof of payment for sixty-three years; *Lyon v. Chase*, 51 Barb. 13, holding presumption of release of right to rent arises from lapse of time and nonpayment on perpetual lease; *Tyler v. Heidorn*, 46 Barb. 439; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357 (affirming 39 Hun, 262),—holding no presumption affecting existence of lease arises from nonpayment or failure to demand rent.

— Estoppel of tenant to dispute landlord's title.

Cited in *Lane v. Osment*, 9 Yerg. 86; *Ikard v. Minter*, 4 Ind. Terr. 214, 69 S. W. 852,—holding tenants and privies cannot dispute title of landlord; *Stout v. Merrill*, 35 Iowa, 47, holding tenant of tax-title owner cannot buy and set up against landlord interest of minor having right to redeem; *Funk v. Kincaid*, 5 Md. 404, holding defendant in ejectment holding as tenant cannot deny title of grantee of landlord's title; *Byrne v. Buson*, 1 Dougl. (Mich.) 179, holding that tenant cannot during tenancy make valid attornment to third person without landlord's consent; *Niles v. Ransford*, 1 Mich. 338, 51 A. D. 95, holding lessee of mortgagor may show his interest as assignee of mortgage to protect possession; *Randolph v. Carlton*, 8 Ala. 606; *Den ex dem. Howell v. Ashmore*, 22 N. J. L. 261; *Chaffin v. Brockmeyer*, 33 Mo. App. 92,—holding tenant may show landlord's estate has expired by its own limitations since making lease; *Dodge v. Lambert*, 2 Bosw. 570, holding assignee of lessee cannot show as against landlord latter has no beneficial interest in premises; *Jackson ex dem. Witherell v. Jones*, 9 Cow. 182, holding tenant under judgment debtor estopped in ejectment as against purchaser on execution sale; *Pope v. Harkins*, 16 Ala. 321, holding tenant estopped from denying landlord's title and interposing outstanding title which has never been asserted against him; *Hoag v. Hoag*, 35 N. Y. 469, holding tenant may show outstanding title in trustee in insolvency proceedings against landlord; *O'Donnell v. McIntyre*, 37 Hun, 623, holding tenant cannot attorn to person holding tax title as against landlord during continuance of lease; *Chase v. Dearborn*, 21 Wis. 58, as to whether tenant can set up expiration of landlord's title in summary proceedings; *Grundin v. Carter*, 99 Mass. 15, holding tenant canceling lease and afterwards assenting to assignment of undertenant's lease could not sue assignee on lease; *Miller v. Williams*, 15 Gratt. 213, holding tenant may show landlord's title has been alienated from him by judgment and operation of law; *Wild v. Serpell*, 10 Gratt. 405, holding tenant who sur-

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renders possession at end of term not concluded from contesting title of landlord.

Cited in reference note in 38 A. S. R. 194, on tenant's estoppel to deny landlord's title.

Cited in note in 89 A. S. R. 108, on persons estopped to deny landlord's title.

— Disseisin by tenant.

Cited in *Towle v. Ayer*, 8 N. H. 57, holding landlord may consider himself disseised where possession wrongful or made wrongful by act or claim of disseisor; *Jackson ex dem. Van Schaick v. Vincent*, 4 Wend. 633, holding that tenant forfeits term by refusal to pay rent, denying landlord's title and accepting hostile title.

Cited in reference note in 58 A. D. 233, on conveyance in fee by tenant being no disseisin of lessor except at latter's election.

Cited in note in 89 A. S. R. 91, on ouster and disseisin of landlord by tenants.

— Adverse possession by tenant.

Cited in *Spalding v. Grigg*, 4 Ga. 75, holding permissive possession may become adverse by clear proof of claim and acquiescence by landlord; *Campbell v. Shipley*, 41 Md. 81, holding no presumption of adverse possession by tenant arises from nonpayment of rent; *Myers v. Silljacks*, 58 Md. 319, holding no presumption of adverse possession arises from failure of landlord to demand rent under lease; *Sutton v. Casselleggi*, 5 Mo. App. 111, holding disclaimer of landlord's title of which landlord is uninformed does not make tenant's possession adverse; *Whiting v. Edmunds*, 94 N. Y. 309; *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800; *Emerick v. Tavener*, 9 Gratt. 220, 58 A. D. 217; *Jackson ex dem. Webber v. Harsen*, 7 Cow. 323, 17 A. D. 517,—holding conveyance in fee by tenant cannot operate as basis of an adverse possession; *Sands v. Hughes*, 53 N. Y. 287, holding adverse possession may be originated during running of assessment lease by conveyance in fee by lessee; *Christie v. Gage*, 71 N. Y. 189, holding grantee in fee of tenant for life holds adversely to reversioner on death of life tenant; *Crooked Lake Nav. Co. v. Keuka Nav. Co.* 37 Hun, 9, holding assignee of lease does not hold adversely to landlord's title; *Thompson v. Clark*, 7 Pa. 62, holding possession by vendee of tenant with apparent legal title and without notice of tenancy, adverse; *Tripe v. Marcy*, 39 N. H. 439, on presumption of payment of mortgage debt arising from possession for twenty years.

Cited in reference notes in 27 A. D. 466; 41 A. D. 253,—on adverse possession by tenant; 32 A. D. 85; 39 A. D. 334,—on tenant's adverse possession and title acquired thereby; 40 A. D. 599, as to when statute of limitations begins to run against landlord.

Cited in notes in 53 L.R.A. 945, on power of tenant to initiate an adverse possession during term for years; 53 L.R.A. 934, on right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy; 53 L.R.A. 950, on initiation of adverse possession by tenant in case of nondemand and nonpayment of rent; 53 L.R.A. 946, on requisites of initiation of adverse possession by tenant and kind and amount of proof necessary; 53 L.R.A. 951, on initiation of adverse possession by successors of tenant.

15 AM. DEC. 462, CRITTENDEN v. WILSON, 5 COW. 165.

Exemption by legislative act—From damages generally.

Cited in *Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 317, 27 L.

ed. 739, 2 Sup. Ct. Rep. 719, holding legislative authorization does not affect claims of private citizen for damages for special inconvenience or discomfort; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139, holding corporate authorization to maintain canal does not render corporation exempt from damages for consequential injuries; *Hooker v. New Haven & N. Co.* 15 Conn. 312, holding action on case lies against corporation authorized to maintain canal for consequential damages resulting from leakage; *Rutz v. St. Louis*, 3 McCrary, 261, 10 Fed. 338, holding no action lies by uninjured opposite riparian owners in another state where city with authority builds dike into river; *Tinsman v. Belvidere D. R. Co.* 26 N. J. L. 148, 69 A. D. 565, holding no presumption exists that corporation empowered to erect public improvements is exempt from liability for consequential injuries; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246, holding corporation for manufacture of gas liable to adjoining owner for injury from disagreeable odors; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 A. R. 407, on effect of legislative authority to erect bridge where it necessarily affects public easements; *Robinson v. New York & E. R. Co.* 27 Barb. 512, holding authority to construct railway does not give right to remove bank of stream, overflowing plaintiff's land; *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 A. S. R. 819, 41 S. E. 400, holding erection of boom so close to mill as to impede flow, renders owner liable for damages; *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79, holding corporation liable for injury done by its servants if under like circumstances individual liable.

Distinguished in *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 A. D. 477, (dissenting opinion), on right to damages for consequential injuries to land caused by maintenance of canal.

Cited in note in 1 L.R.A. (N.S.) 111, on effect of direct grant of power on liability for private nuisance.

—From damages from building of dam.

Cited in *Lee v. Pembroke Iron Co.* 57 Me. 481, 2 A. R. 59, holding owner of dam across tide waters erected under legislative grant, liable to mill owner injuriously affected; *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105, holding charter authority to erect dam no defense to action by town for backing water on bridge; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 A. D. 201,—holding charter authority to build dam on corporation's land no justification for overflowing land of others; *Sinnickson v. Johnson*, 17 N. J. L. 129, 34 A. D. 184, holding statutory authority to erect dam providing no remedy for damages no justification for overflowing land of others; *Clark v. Syracuse*, 13 Barb. 33, holding only effect of act permitting erection of dam across creek formerly declared highway was exemption from indictment; *Calking v. Baldwin*, 4 Wend. 667, 21 A. D. 168, holding individual not liable for injuries caused by construction of dam authorized for improvement of navigation, act providing remedy.

Cited in notes in 57 A. D. 692, on dams in navigable streams; 59 L.R.A. 880, on statutory action for damming back water of stream; 16 E. R. C. 585, on liability of individual maintaining dam under statutory authority.

—From criminal liability.

Cited in *State v. Webb's River Improv. Co.* 97 Me. 559, 55 Atl. 495, holding no indictment lies against corporation for nuisance where dam maintained by charter authority overflows highway; *First Baptist Church v. Utica & S. R. Co.*

6 Barb. 313, holding railroad maintained under legislative authority not liable to indictment for nuisance for making noise; *Susquehanna, C. & B. Turnp. Co. v. People*, 15 Wend. 267; *Waterford & W. Turnp. v. People*, 9 Barb. 161,—holding turnpike company liable to indictment for not repairing road, though specific penalty provided; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435, on the right of state legislature to authorize structures impeding navigation in purely internal streams.

Legislative grant of right of eminent domain.

Cited in *Boston & P. R. Co. v. New York & N. E. R. Co.* 13 R. I. 260 (dissenting opinion), on power of legislature to grant right of eminent domain to an individual.

Cited in reference note in 42 A. D. 315, on legislative control over navigation on public rivers.

Cited in notes in 2 L.R.A. 680, on right of sovereign to delegate power of eminent domain; 59 L.R.A. 823, on legislative authority to dam back water of stream; 59 L.R.A. 47, on extent of sovereign's right as against subjects to obstruct or destroy navigation.

Cumulative remedies.

Cited in *Burt v. State*, 39 Ala. 617 (dissenting opinion), on effect of statute in affirmance of common law or repeal of same, on the common law; *Fort v. Burch*, 6 Barb. 60, on effect of revised statutes upon common-law rules of evidence in relation to proof of records; *Taylor v. Metropolitan Elev. R. Co.* 18 Jones & S. 311; *United States v. De Visser*, 10 Fed. 642,—on right to common-law remedy unless such right negated in terms of statute or by necessary implication; *Reynolds v. Mynard*, How. App. Cas. 620; *Gleason v. Youmans*, 9 Abb. N. C. 107; *Allen v. Ackley*, 4 How. Pr. 5,—on effect of statute giving remedy for matter actionable at common law on common-law remedy; *Thackeray v. Eldigan*, 21 R. I. 481, 44 Atl. 689, holding statutory remedy for waste, cumulative; *Brewster v. J. & J. Rogers Co.* 169 N. Y. 73, 58 L.R.A. 495, 62 N. E. 164, holding statutory remedy for damages caused by increasing flow in navigable river to float logs, cumulative; *Brown v. Beatty*, 34 Miss. 227, 69 A. D. 389, holding statutory remedy exclusive where legislature prescribes mode of assessment and payment of damages caused by internal improvements; *Denslow v. New Haven & N. Co.* 16 Conn. 98, holding common-law remedy lies for diverting water where commissioners authorized to assess damages fail to act; *Doe ex dem. Carr v. Georgia R. & Bkg. Co.* 1 Ga. 524, holding that summary mode of assessing damages for land taken, given railroad company, no negative words appearing, is cumulative; *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 732, 18 N. W. 903, holding statute providing penalty for excessive charges by carrier does not affect common-law right to recover; *Selden v. Delaware & H. Canal Co.* 24 Barb. 362, holding owner of land inundated by enlargement of canal not confined to remedy provided by company's charter; *Leonard v. Clinton*, 26 Hun, 288, holding right of judgment creditor to sue for fraudulent conveyance not affected by debtor's general assignment; *McKee v. Delaware & H. Canal Co.* 52 Hun, 52, 4 N. Y. Supp. 753, holding summary mode of assessing damages for land for railway purposes provided by laws of 1823, cumulative; *Rheinstrom v. Green*, 7 Legal Gaz. 254, 4 Luzerne Legal Reg. 219, holding remedies cumulative where statute gives remedy in case actionable at common law without excluding latter.

Cited in reference notes in 48 A. D. 73, on cumulative remedies; 28 A. D. 527, on cumulative nature of statutes affirmative of common law; 28 A. D. 527, on

statutory remedy as being merely cumulative; 41 A. S. R. 695, as to whether statutory remedy is exclusive or concurrent.

Cited in notes in 124 A. S. R. 597, as to whether common-law right of private person to abate public nuisance without suit is abrogated by statute; 5 L.R.A. 668, on construction of adopted statute as part of the law.

15 AM. DEC. 464, MALCOLM v. ROGERS, 5 COW. 188.

Joinder of tenants in common.

Cited in *Hasbrouck v. Bunce*, 62 N. Y. 475, holding that joint action in ejectment cannot be maintained by less than whole number of tenants in common; *Fisher v. Hall*, 41 N. Y. 416, on right of tenants in common representing less than the aggregate common interest to maintain ejectment; *Errett v. Crane*, Fed. Cas. No. 4,523, on right of tenants in common to join as defendants; *Cole v. Irvine*, 6 Hill, 634, on right to maintain ejectment founded on joint demise by tenants in common; *Porter v. Bleiler*, 17 Barb. 149, holding tenants in common may join in action for use and occupation.

Cited in reference notes in 43 A. D. 259; 50 A. D. 708,—on joinder of cotenants; 53 A. D. 419, on joinder of tenants in common in actions by, against, or between them; 58 A. D. 659, on suit against tenants in common for common estate.

Cohairs as tenants in common.

Cited in reference note in 18 A. D. 503, on cohairs as tenants in common.

Construction of statutes.

Cited in *Van Shaack v. Robbins*, 36 Iowa, 201, holding word "void" in statute against fraud on part of purchaser at tax sale, construed as "voidable."

— **Mandatory or directory provisions generally.**

Cited in *Milford v. Orono*, 60 Me. 529; *State Prison v. Lathrop*, 1 Mich. 438; *Lucas v. Ensign*, 4 N. Y. Legal Obs. 142; *Henderson v. United States*, 4 Ct. Cl. 75,—on construction of ordinarily permissive words in statute as being imperative where public interests require such construction; *Gilmore v. Utica*, 121 N. Y. 561, 24 N. E. 1009, holding provision in charter authorizing city to require railroad to repave between tracks, not mandatory; *Paine v. Fesco*, 18 Phila. 637, 43 Phila. Leg. Int. 226, 17 W. N. C. 502, 4 Kulp. 25, 1 Pa. Co. Ct. 562, holding act of 1873 ordaining certain days to be legal holidays directory only; *Com. ex rel. Hamilton v. Pittsburgh*, 34 Pa. 496, holding grant of power to assess and collect taxes imposes duty of exercising that power; *People ex rel. Saunders v. Erie County*, 1 Sheldon, 517, holding statute authorizing payment by county of attorney's disbursements in murder trial, mandatory; *Davis v. Duffie*, 8 Bosw. 617, holding that statute providing for appointment of trustees for debtor imprisoned for crime does not provide exclusive remedy against him.

— **Meaning of word "may."**

Cited in *Baldwin v. New York*, 2 Keyes, 387 (dissenting opinion), on construction of word "may" when used in statute; *Schuyler County v. Mercer County*, 9 Ill. 20; *Gillinwater v. Mississippi & A. R. Co.* 13 Ill. 1; *Lovell v. Wheaton*, 11 Minn. 92, Gil. 57; *Nave v. Nave*, 7 Ind. 122,—holding word "may" means "must" only where public or third persons have claim *de jure* that power be exercised; *Amason v. Nash*, 24 Ala. 279; *Rock Island County v. United States*, 4 Wall. 435, 18 L. ed. 419,—holding word "may" in statute mandatory in public or individual rights require it; *Mason v. Fearson*, 9 How. 248, 13 L. ed. 125, construing statutory provision that city "may" or that it "shall be lawful" for it to sell lots for taxes as peremptory; *Sifford v. Morrison*, 63 Md. 14, holding orphans'

court bound to order counter security by executor on application word "may" in statute being peremptory; *Leavenworth & D. R. Co. v. Platte County Court*, 42 Mo. 171, holding words "may cause election to ascertain sense of taxpayers as to stock subscription" means "must;" *Steines v. Franklin County*, 48 Mo. 167, 8 A. R. 87, holding words, in statute relating to county roads "may submit amount of expenditures to voters" means "must;" *Blake v. Portsmouth & C. R. Co.* 39 N. H. 435, holding words in statute "may continued to be body corporate . . . prosecuting and defending suits" means "must;" *New York & E. R. Co. v. Coburn*, 6 How. Pr. 223, holding word "may" in railroad act of 1850, relating to new hearing on appeal not imperative; *Buffalo Pl. Road Co. v. Highway Comrs.* 10 How. Pr. 237, holding word "may" in plank road act of 1853 relating to assessment by commissioners not imperative; *Medbury v. Swan*, 46 N. Y. 200, holding word "may" in section 177 of Code relating to right to serve supplemental pleading permissive; *Phelps v. Hawley*, 52 N. Y. 23, holding word "may" in statute relating to maintenance of bridge by county, mandatory; *Long Island R. Co. v. Conklin*, 32 Barb. 381, holding words "may be entitled to" in description of land in deed meant "shall be entitled to;" *People ex rel. Comstock v. Syracuse*, 59 Hun, 258, 12 N. Y. Supp. 890, holding statutory provision, relating to tax levy, that certain amount "may" be levied for specific purpose, permissive; *Phoenix v. Reynolds*, 13 Phila. 522, 34 Phila. Leg. Int. 59, 6 Luzerne Legal Reg. 21, holding that statutory provision that municipality "may" elect two branches of councils is permissive; *Equitable Life Assur. Soc. v. Host*, 124 Wis. 657, 102 N. W. 579, 4 A. & E. Ann. Cas. 413, holding act of 1898 providing insurance companies "may" distribute surplus, permissive.

Cited in reference notes in 30 A. S. R. 775, on meaning of word "may" in statute; 43 A. D. 706; 48 A. S. R. 237,—as to when "may" means "shall" in statutes.

Cited in notes in 6 L.R.A. 162, on construction of word "may" in statutes; 10 L.R.A. 499, on construction of words "may" and "shall" in statutes; 12 L.R.A. 355, on construction of words "may," "shall," and "must" in statutes; 5 L.R.A. (N.S.) 344, as to when "may" in constitutional or statutory provision is deemed mandatory.

—Meaning of word "shall."

Cited in *Quinn v. Wallace*, 6 Whart. 452, on obligation of landlord to sell goods distrained under statute saying he "shall" or "may" sell; *People ex rel. Wehle v. Conner*, 8 Hun, 533, holding statutory provision that upon proof of misconduct of sheriff "the court shall" order bond prosecuted, permissive; *New York v. Furze*, 1 N. Y. Legal Obs. 246, 3 Hill, 612, holding statute saying it "shall be lawful for mayor . . . to cause sewers to be made" mandatory; *Rogers v. Wing*, 5 How. Pr. 50, holding word "shall" in statute granting new trial as of right in ejectment, mandatory; *Martin v. Brooklyn*, 1 Hill, 545, holding word "shall" in act of 1827 relating to reports by commissioners laying out streets, not mandatory; *Benighorne v. Felt*, 1 Pa. Co. Ct. 496, holding word "shall" in act of 1842 directing suit against nonresident by short summons, not compulsory.

15 AM. DEC. 468, JACKSON EX DEM. BOGERT v. KING, 5 COW. 237.
Records as evidence.

Cited in *Collins v. German-American Mut. Life Asso.* 112 Mo. App. 209, 86 S. W. 891, holding baptismal church register kept by priest in Ireland admissible to show facts therein recited; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp.

72, holding records of baptism to show pedigree not excluded, if ancient, because handwriting of rector not proved; *Maxwell v. Chapman*, 8 Barb. 579, holding that registers of marriage kept by rector of church evidence of marriage and time it occurred; *Murray v. Supreme Hive*, L. M. 112 Tenn. 664, 80 S. W. 827, holding inscription on tombstones and family portraits admissible for purpose of showing pedigree; *Young v. Shulenberg*, 165 N. Y. 385, 80 A. S. R. 730, 59 N. E. 135, 31 N. Y. Civ. Proc. 368; *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780,—holding that in ejectment pedigree may be shown by recitals in deed over sixty years old; *Sandberg v. State*, 113 Wis. 578, 89 N. W. 504, on necessity of evidence other than record of baptism to establish identity of person.

Cited in reference notes in 36 A. D. 148, on register of birth as evidence; 89 A. S. R. 23, on admissibility in evidence of entries in family records and papers; 55 A. D. 705, on entries in family register as evidence of ages of children.

— Copy of records.

Cited in *Forsaith v. Clark*, 21 N. H. 409, holding copy of town charter recorded in town records and certified, admissible to prove charter; *Jennings v. Newman*, 52 How. Pr. 282, holding copy of notice required by mechanics' lien law to be filed, certified by deputy clerk, admissible; *Jacobi v. Order of Germania*, 73 Hun. 602, 26 N. Y. Supp. 318, holding exemplified copy of records of marriage kept by rector of church, admissible in evidence; *Nolan v. Nolan*, 35 App. Div. 339, 54 N. Y. Supp. 975, on admissibility of certified copy of record of death in foreign state; *Hartshorn v. Metropolitan L. Ins. Co.* 55 App. Div. 471, 67 N. Y. Supp. 13, holding record of baptism showing identity of names, prima facie evidence of identity of person and birth; *Winter v. United States*, Hempst. 344, Fed. Cas. No. 17,895, on admissibility in evidence of copy of deed required to be enrolled.

Declarations as evidence of pedigree.

Cited in *Alston v. Alston*, 114 Iowa, 29, 86 N. W. 55, holding declarations of adopted parents of illegitimate child admissible as to child's relationship and paternity.

Cited in reference notes in 80 A. S. R. 735, on evidence of pedigree; 77 A. D. 328, on admissibility of hearsay evidence upon matters of pedigree; 27 A. D. 487, on reputation as proof of relationship or pedigree; 33 A. D. 522, on proof of pedigree by general reputation.

Cited in note in 91 A. D. 528, on proof of death.

Presumption of identity of persons from identity of names.

Cited in *Hatcher v. Rocheleau*, 18 N. Y. 86; *Whiting v. Ivey*, 3 La. Ann. 649,—holding proof furnished by foreign judgment record prima facie sufficient against person of same name denying identity; *Bryan v. Kales*, 3 Ariz. 423, 31 Pac. 517, holding presumption of identity of person from identity of names does not arise where "A" sues "A" administrator; *Mahaney v. Mutual Reserve Fund Life Asso.* 69 Hun. 12, 23 N. Y. Supp. 213; *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 209; *Mott v. Smith*, 16 Cal. 533,—on presumption of identity of persons from identity of names in deed; *Clark v. Pearson*, 53 Ga. 496, holding record of administration on estate of "A" prima facie proof of "A's" death in action by "A;" *Flournoy v. Warden*, 17 Mo. 435, holding proof of execution of deed by person of same name prima facie evidence of identity of grantor; *Kimball v. Davis*, 19 Wend. 437, holding identity of patentee and grantor of same name established prima facie by identity of names; *Jackson ex dem. Woodruff v. Cody*, 9 Cow. 140, holding plaintiff's deed prima facie superior where defendant has subsequent deed from person of same name; *Leland v. Eckert*, 81 Tex. 226, 16 S. W. 897, holding identity

by similarity of names shown where same person uses name "Colin De Bland" and "Colin Bland;" *Kelly v. Valney*, 5 Clark (Pa.) 300, holding it evidence of identity where attorney demanded payment of note by letter and person called in response.

Cited in reference note in 84 A. D. 619, on presumption of identity of person from identity of name.

Cited in note in 17 L.R.A. 824, on presumption of identity of person from identity of name.

15 AM. DEC. 473, JACKSON EX DEM. HOOKER v. YOUNG, 5 COW. 269.

Directory or mandatory statutes.

Cited in *People ex rel. Lefever v. Ulster County*, 34 N. Y. 268, holding statute giving remedy for undervaluation by commissioners directory and any justice may certify verdict of jury; *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. 704, holding statutory directions that elections shall be subject to inquiry on petition, directory as to form; *People v. Cook*, 8 N. Y. 67, 59 A. D. 451 (affirming 14 Barb. 259), holding statutes directing mode of conducting elections, directory; *Jackson ex dem. Hunter v. Page*, 4 Wend. 585, holding variance in description of premises sold between sheriff's certificate and deed does not affect title; *State Prison v. Lathrop*, 1 Mich. 438, holding statute requiring state-prison agent to give notice for sealed proposals for letting convicts, mandatory; *Carpenter v. Willet*, 1 Keyes, 510, on necessity of stating in judgment that defendant is subject to arrest where body execution issues; *People ex rel. Barnes v. Gardner*, 24 N. Y. 583, holding statute requiring canal board upon reversing or modifying award of appraisers to state ground, imperative; *Hill v. Draper*, 10 Barb. 454 (dissenting opinion), on necessity of publication of notice to sell reserved lots by surveyor general under act of 1790.

— As to filing of instruments generally.

Cited in *Veazie v. Mayo*, 45 Me. 560, holding provision requiring filing of assent of mayor and aldermen to construction of railway across street, directory; *Taylor v. Gladwin*, 40 Mich. 232, holding sheriff's neglect to file certificate of sale cannot affect title unless debtor or innocent parties misled; *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808, holding sheriff's mistakes in making certificate of sale immaterial as between purchaser and party claiming title; *Hayes v. Hanson*, 12 N. H. 284, holding statute requiring filing and recording of oath of assessors directory, and assessment valid without compliance; *Converse v. Porter*, 45 N. H. 385, holding town clerk's failure to record certificate of location of schoolhouse will not affect its validity; *Randall v. Conway*, 63 N. H. 513, 3 Atl. 635, holding neglect to record certificate of laying out highway no defense to action for injury on highway; *Consolidated Ice Co. v. New York*, 53 App. Div. 260, 65 N. Y. Supp. 912, holding provision requiring map of street to be filed directory, and filing in wrong office immaterial; *Davis v. Evans*, 174 Mo. 307, 73 S. W. 512, holding certificate of sale for taxes and recording same under ordinance necessary to validity of sale.

— As to time of performing act generally.

Cited in *St. Louis County Court v. Sparks*, 10 Mo. 117, 45 A. D. 355, holding statute specifying time officer must perform act directory unless act or statute shows power limited thereby; *Sackett v. State*, 74 Ind. 486, holding statute relating to time of election of trustees of school, directory only; *Wampler v. State*, 148 Ind. 557, 38 L.R.A. 829, 47 N. E. 1068, holding statute providing town trustees

shall meet biennially and appoint county superintendent, directory merely; *Hill v. Wolfe*, 28 Iowa, 577, holding statute requiring supervisors at regular meeting to add to assessment property omitted, directory as to time; *Re Taylor*, 25 Abb. N. C. 146, 11 N. Y. Supp. 189, holding act of 1890 requiring oath by police directory and oath may be taken after time designated; *Rawson v. Van Riper*, 1 Thomp. & C. 370, holding statute requiring school trustees to make assessment within thirty days after tax voted, directory; *People v. Allen*, 6 Wend. 486, holding order for court martial in July valid though law required that it be issued before June; *Re Clark*, 168 N. Y. 427, 61 N. E. 769, 32 N. Y. Civ. Proc. Rep. 226, holding surrogate may reject referee's report after expiration of ninety days, statute fixing time being directory; *Stevenson v. New York*, 1 Hun, 51, 3 Thomp. & C. 133, holding statutory directions as to time of proceeding to open street, directory and later proceedings valid.

Cited in note in 12 L.R.A. 358, as to whether statute fixing time for doing an act is directory or mandatory.

— As to time of filing instrument.

Cited in *Woolridge v. McKenna*, 8 Fed. 650, holding statute requiring filing of transcript of record of state court on first day of succeeding term, directory; *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701, holding mortgage sale by advertisement not invalid because officer failed to file duplicate certificate within ten days.

15 AM. DEC. 474, *GLOBE INS. CO. v. LANSING*, 5 COW. 380.

Recovery of deficiency.

Cited in *Small v. Herkimer Mfg. & Hydraulic Co.* 2 N. Y. 330 (reversing 21 Wend. 273), holding forfeiture of stock for nonpayment of calls bars action on subscription; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 A. D. 344, holding action lies on stock subscription although charter declares stock forfeited on failure to pay.

Cited in note in 73 A. S. R. 565, on right of person whose debt is secured by trust deed or other lien to maintain action at law to recover judgment on the debt.

— On foreclosure of mortgage.

Cited in *Porter v. Pillsbury*, 36 Me. 278; *Hunt v. Lewin*, 4 Stew. & P. (Ala.) 138,—holding balance of mortgage debt remaining after foreclosure recoverable at law; *Belmont v. Cornen*, 48 Conn. 338, holding amount received under foreclosure where property located determines amount to be credited on bond; *Bliss v. Weil*, 14 Wis. 36, 80 A. D. 766, holding action lies for subsequent instalment where whole property was required to pay prior instalment; *Green v. Cross*, 45 N. H. 574, holding mortgage debt discharged where mortgage foreclosed by possession on part of premises of value of debt; *Spencer v. Herford*, 4 Wend. 381, holding release of equity of redemption payment *pro tanto* of bond if of less value than debt.

Cited in reference notes in 43 A. S. R. 839, on judgment for deficiency on foreclosure of mortgage; 72 A. D. 163, on recovery of balance due after foreclosure in equity in suit on bond at law.

Cited in notes in 4 L.R.A. 206, on action at law for deficiency after foreclosure of mortgage; 103 A. S. R. 55, on necessity that sale under power in mortgage be for reasonable price where deficiency judgment is sought.

— Of land contract.

Cited in *Herkimer Mfg. & Hydraulic Co. v. Small*, 21 Wend. 273; *Savage v. Stone*, 1 Utah, 35,—holding action lies for difference between contract, price of

premises, and amount received on resale; *Haley v. Bennett*, 5 Port. (Ala.) 452, on right of vendor in contract for sale of land to obtain deficiency judgment in chancery.

How deficiency on foreclosure determined.

Cited in *Snyder v. Blair*, 33 N. J. Eq. 208, holding amount received on mortgage sale fixes value of premises for purpose of ascertaining deficiency; *Frank v. Davis*, 135 N. Y. 275, 17 L.R.A. 306, 31 N. E. 1100, 29 Abb. N. C. 294, 22 N. Y. Civ. Proc. Rep. 426, holding deficiency may be determined in foreclosure of prior mortgage surplus taking place of property.

15 AM. DEC. 475, HUNT v. PEAKE, 5 COW. 475.

Liability of infants on contract.

Cited in *Fant v. Cathcart*, 8 Ala. 725, holding bill single given by infant for other than necessities voidable but may be ratified after majority.

Cited in reference note in 36 A. D. 297, on validity of infants' contracts.

Cited in notes in 21 A. D. 86, on validity and ratification of infants' contracts; 57 L.R.A. 684, on liability of infant for torts arising from contract.

— On promise to marry.

Cited in *Hamilton v. Lomax*, 26 Barb. 615, 6 Abb. Pr. 142; *Fiebel v. Obersky*, 13 Abb. Pr. N. S. 403n; *McConkey v. Barnes*, 42 Ill. App. 511,—holding infant not liable on his executory contract to marry; *Wise v. Schloesser*, 111 Iowa, 16, 82 N. W. 439, holding judgment for breach of promise rendered against minor without defense, erroneous; *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503, holding female minor though above eighteen not liable for breach of executory contract to marry; *Rush v. Wick*, 31 Ohio St. 521, 27 A. R. S. 523, holding infancy when pleaded valid defense in action for breach of marriage promise; *Leichtweiss v. Treskow*, 21 Hun, 487, holding an infant not liable for breach of promise although because of the promise connection occurred; *Willard v. Stone*, 7 Cow. 22, 17 A. D. 496, holding promise to marry by infant good consideration for a corresponding promise; *Hoitt v. Moulton*, 21 N. H. 586, on liability of person of full age upon contract with minor; *Crozier v. People*, 1 Park. Crim. Rep. 453, on infancy as a defense to indictment for seduction under promise of marriage.

Cited in notes in 18 A. S. R. 627, 628, on infant's contract to marry; 63 A. D. 534, on validity of infant's contract of marriage; 40 A. S. R. 174, on infancy as defense to breach of promise suit.

Liability of other party on contract with person under disability.

Cited in *Hill v. Roderick*, 2 Clark (Pa.) 161, 3 Pa. L. J. 418, holding if guardian settles boundary for an adult and infant, adult bound, where infant acquiescing; *Atwell v. Jenkins*, 163 Mass. 362, 47 A. S. R. 463, 28 L.R.A. 694, 40 N. E. 178, holding insanity of one party does not give to the other the right to avoid contract.

Cited in note in 18 A. S. R. 696, on who may take advantage of infancy.

15 AM. DEC. 477, MACKIE v. CAIRNS, 5 COW. 547.

Validity of judgments or conveyances in fraud of creditors.

Cited in *Tunnell v. Jefferson*, 5 Harr. (Del.) 206, holding judgment bond given by guardian to sureties as indemnity valid as against subsequent judgment creditors; *Henriques v. Hone*, 2 Edw. Ch. 120, holding instruments brought within statute against fraudulent conveyances voidable only as against creditors not absolutely void; *Jackson ex dem. Cary v. Parker*, 9 Cow. 73, holding sale of

land by one indebted in consideration of support of family void as to creditors; *Cook v. Bennett*, 60 Hun, 8, 14 N. Y. Supp. 683, holding agreement that mortgagor may deal with property as his own on making annual payments, void against creditors; *Livesay v. Beard*, 22 W. Va. 585, holding under deed fraudulent on face no valid act can be done to prejudice unsecured creditor; *Weed v. Pierce*, 9 Cow. 722, holding judgment creditor may maintain bill against person debtor loaned to for purpose of covering up; *Ward v. Enders*, 29 Ill. 519, holding conveyance void as to creditors should be set aside as against such creditors and privies; *First Nat. Bank v. Kennedy*, 91 Ala. 470, 8 So. 652; holding conveyance tainted with actual fraud cannot be permitted to stand as security for party participating in fraud; *Vanbuskirk v. Hartford F. Ins. Co.* 14 Conn. valid elsewhere; *Holmes v. Harshberger*, 31 W. Va. 516, 7 S. E. 452, holding vendor's lien void as to creditors where he gave deed to vendee's wife to defraud them.

Cited in reference notes in 28 A. D. 206, on validity of fraudulent conveyances as between parties; 89 A. S. R. 777, on voidability of transfers in fraud of creditors; 16 A. S. R. 260; on invalidity of judgments confessed by assignor; 30 A. D. 722, on voidability of judgment given to delay or defraud creditors; 29 A. D. 136, 260; 78 A. S. R. 801,—on invalidity of judgment given to delay or defraud creditors; 42 A. D. 331, on right to impeach judgment for fraud or collusion.

Cited in notes in 23 A. S. R. 118, on collateral attacks upon judgments for fraud or collusion; 3 A. S. R. 732, on enforcement of promissory note given for lands conveyed in fraud of creditors.

Distinguished in *First Nat. Bank v. Central Nat. Bank*, 124 N. Y. 552, 27 N. E. 247, holding knowledge of creditor receiving payment, of the fraudulent intent of assignor does not prejudice him; *Lansing v. Woodworth*, 1 Sandf. 43, 2 N. Y. Leg. Obs. 250, holding judgment confessed to secure existing and future accommodation indorsements, valid.

—As against or trustee for creditors.

Cited in *Reagan v. First Nat. Bank*, 157 Ind. 623, 61 N. E. 575, holding mortgage by corporation securing certain creditors and preferred stockholders void as against trustee for creditors; *Pillsbury v. Kington*, 33 N. J. Eq. 287, 36 A. R. 556, holding assignee for creditors may sue to set aside conveyances by assignor in fraud of creditors.

Fraudulent assignment for creditors.

Cited in *Willey v. Reynolds*, 2 Ind. Terr. 350, 51 S. W. 972, holding omission of assignor to state amount due each preferred creditor will not render assignment void; *Robins v. Embry*, *Smedes & M.* Ch. 207, holding assignment by bank requiring payment of expenses of president for management, not void on face; *Hollister v. Loud*, 2 Mich. 309, holding assignment valid though assignor and assignee acted in anticipation of immediate issuing of attachment; *Burrows v. Alter*, 7 Mo. 424, holding creditor voluntarily becoming party to assignment, with knowledge of facts, cannot question its validity; *Varnum v. Camp*, 13 N. J. L. 326, 25 A. D. 476, holding foreign assignment though valid where made cannot dispose of moveables here in manner prohibited by law; *Crook v. Rindskopf*, 34 Hun, 457; *O'Neil v. Salmon*, 25 How. Pr. 246,—holding partnership assignment, providing for payment of individual debts *pro rata* latter being unequal, void; *Burdick v. Post*, 12 Barb. 168, holding assignment for creditors void which provides assignee may sell on credit; *Hone v. Woolsey*,

2 Edw. Ch. 289, holding new assignment valid where trustees reassigned to assignor because original assignment invalid; *Dana v. Lull*, 17 Vt. 390, holding assignment for specified creditors not providing for disposition of surplus, void as to other creditors; *Worthen v. Griffith*, 59 Ark. 562, 43 A. S. R. 50, 28 S. W. 286, holding corporation assignment with preferences not void because judgment was confessed intending property to be sold by receiver; *Storm v. Davenport*, 1 Sandf. Ch. 135, holding mortgage transferred in trust for creditor on eve of general assignment did not pass by assignment.

Cited in reference notes in 27 A. D. 207, on validity of assignment for benefit of creditors; 42 A. D. 592, as to when assignment for creditors is void; 2 A. S. R. 25, on effect of provision for attorney's fee in assignment for creditors; 74 A. D. 515, on necessity that assignment for creditors include all of debtor's property.

Cited in note in 58 A. S. R. 97, on effect of fraud on assignment for benefit of creditors.

— Requirement that creditors release claims.

Cited in *Jones v. Dougherty*, 10 Ga. 273, on validity of assignment of part of property for creditors releasing and surplus to other creditors; *Grover v. Wake-man*, 11 Wend. 187, 25 A. D. 624, holding assignment with preferences dependent on execution of release of all claims, void; *Hastings v. Belknap*, 1 Denio, 190, holding assignment not void where trustees bound themselves to debtor to procure release from all except certain creditors.

— Preferences.

Cited in *Roberts v. Vietor*, 130 N. Y. 585, 29 N. E. 1025, holding preference largely in excess of actual indebtedness renders assignment void; *Wilson v. Forsyth*, 24 Barb. 105, holding assignment with preferences and not embracing all debtor's property not void for those reasons; *Hahn v. Salmon*, 10 Sawy. 183, 20 Fed. 801, holding confession of judgment followed by assignment for creditors one transaction and void as giving preference.

Cited in note in 12 L.R.A. 808, as to what preferences, in assignments for benefit of creditors, are valid.

— Reservations by assignor.

Cited in *Atkinson v. Jordan*, 5 Ohio, 293, 24 A. D. 281; *Claffin v. Iseman*, 23 S. C. 416,—holding assignment giving preference to releasing creditors and directing return of surplus, void as against nonconsenting creditors; *Hoffman v. Mack-all*, 5 Ohio St. 124, 64 A. D. 637; *Wright v. Linn*, 16 Tex. 34; *Seward v. Jackson*, 8 Cow. 406,—on effect of reservations by grantor for his own benefit, contained in instrument of conveyance; *M'Clurg v. Lecky*, 3 Penr. & W. 83, 23 A. D. 64, holding assignment in trust for benefit of assignor or family, void as to creditors; *Curtis v. Leavitt*, 15 N. Y. 9, on validity of conveyance of debtor's property in trust where some use or advantage reserved to debtor; *Richards v. Hazard*, 1 Stew. & P. (Ala.) 139, holding assignment for creditors by which assignor appropriates to himself certain amount for his support, void; *Young v. Heermans*, 66 N. Y. 374, holding transfer by debtor of his property in trust for life then to pay his debts, fraudulent; *Van Wyck v. Seward*, 18 Wend. 375 (dissenting opinion), on validity of conveyance where insolvent grantor stipulates for support of family; *McLean v. Button*, 19 Barb. 450, holding conveyance of personality in consideration of support of grantor and family void as against subsequent creditors; *Sommerville v. Horton*, 4 Yerg. 541, 26 A. D. 242, holding deed of trust grantor retaining possession, void where only use of property is in its

consumption; *Bishop v. Halsey*, 13 How. Pr. 154, holding assignment for two creditors, silent as to whether there are others not mentioning surplus, not presumptively void; *Goodrich v. Downs*, 6 Hill, 438, holding assignment for four creditors making no provision for others and directing return of surplus, void; *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 2 N. Y. Leg. Obs. 70, holding assignment void where made with intent to reserve surplus after payment of debts; *D'Ivernois v. Leavitt*, 23 Barb. 63, holding judgment confessed to assignee who is also creditor and still claiming under assignment, fraudulent and void; *Berry v. Riley*, 2 Barb. 307, holding assignment for benefit of creditors consenting, grantor reserving control for six months, and surplus, void; *Judson v. Gardner*, 4 N. Y. Leg. Obs. 424, holding assignment by partnership which creates trust for benefit of member before payment of creditors, void; *Elias v. Farley*, 3 Keyes, 398, 5 Abb. Pr. N. S. 39, holding assignment void when preference made in such form that a benefit results to assignor; *Coolidge v. Melvin*, 42 N. H. 510, holding conveyance by insolvent, for but part consideration advanced, in trust for grantor and family void; *Haven v. Richardson*, 5 N. H. 113, holding neither stipulations for release by parties to deed nor of reservation of surplus conclusive of fraud; *Brown v. Knox*, 6 Mo. 302, holding assignment with stipulation that creditors should, within given time execute release, void; *Green v. Trieber*, 3 Md. 11, holding assignment with preferences providing for retention of possession of property by assignor until sale, void; *Pierson v. Manning*, 2 Mich. 445, holding assignment with preferences requiring reservation of land until personalty exhausted, unless assignor consents to sale, void; *Green v. Branch Bank*, 33 Ala. 643, holding trust deed, executed before Code, for creditors and for support of family, not fraudulent on face; *Grimshaw v. Walker*, 12 Ala. 101, holding assignment, with preferences, surplus going to creditors executing release within four months, balance to assignor, void.

Cited in notes in 21 A. D. 432, on assignment reserving benefit to grantor; 36 A. D. 293, on effect of reservation for debtor's benefit in deed of assignment for creditors; 38 A. D. 263, on effect on assignment of partial reservation for assignor's benefit; 25 A. D. 655, on effect of reservation in assignment for creditors for benefit of assignor or his family; 23 A. D. 71, on invalidity of assignment for creditors containing reservation for benefit of debtor's family; 48 A. D. 724, on vitiation of deed of assignment by reservation of benefit to debtor.

Distinguished in *Canal Bank v. Cox*, 6 Me. 395, holding assignment reserving necessary furniture and means of paying small debts and family expenses, valid; *Beck v. Burdett*, 1 Paige, 305, 19 A. D. 436, holding that mere hypothetical reservation of surplus will not render assignment invalid where only supposedly sufficient property assigned; *Winteringham v. Lafoy*, 7 Cow. 735, holding assignment providing for reassignment after all debts paid, not fraudulent as to creditors; *Conkling v. Carson*, 11 Ill. 503, holding assignment not void because it provides for returning surplus to assignor.

Right to prefer creditors.

Cited in *Wilder v. Winne*, 6 Cow. 284, holding debtor in failing circumstances may prefer one creditor to another by confessing judgment or otherwise; *Wilder v. Fonday*, 4 Wend. 100, on right of failing debtor to prefer one creditor to another; *Waterbury v. Sturtevant*, 18 Wend. 353, holding debtor after verdict and before judgment may prefer another creditor by conveying land preventing lien of judgment; *Waples-Platter Co. v. Low*, 4 C. C. A. 205, 10 U. S. App. 704, 54

Fed. 93, holding preference of \$1,500 for debt of \$500 intending subsequently to direct application of difference conclusively fraudulent.

Cited in reference notes in 25 A. D. 490, on preference to creditors; 25 A. D. 439, 655; 26 A. D. 247; 41 A. D. 91,—on right of debtor to prefer one creditor to another; 24 A. D. 293, on right to prefer creditors in assignment; 28 A. D. 219; 44 A. D. 229,—on right of debtor to prefer one creditor or class of creditors if done in good faith.

Cited in note in 26 A. D. 584, on preferences to creditors.

— **Right of corporation.**

Cited in *Ex parte Conway*, 4 Ark. 302, holding corporation unless restrained by charter may make assignment for single creditor to exclusion of others; *Weyeth Hardware & Mfg. Co. v. James-Spencer-Bateman Co.* 15 Utah, 110, 47 Pac. 604, holding corporation has same power as individual to prefer creditors in absence of statutory restriction.

— **Validity of bond.**

Cited in reference notes in 58 A. S. R. 657, on validity of official bonds; 37 A. D. 571, on effect of noncompliance with statute in official bonds.

— **Transactions void in part.**

Cited in *Fackler v. Ford*, 1 Kan. Dasser's ed. 21 Appx., holding contract in part repugnant to law may be enforced as to that part not repugnant; *Albert v. Winn*, 7 Gill, 446, holding conveyance good in part and bad in part as against provisions of statute, wholly void; *Mittnacht v. Kelly*, 3 Abb. App. Dec. 301, 5 Abb. Pr. N. S. 442, 46 How. Pr. 457, 3 Keyes, 407, holding chattel mortgage void as to stock in trade because of fluctuating lien, void as to horse included; *Barton v. Port Jackson & U. N. Pl. Road Co.* 17 Barb. 397, on validity of contract based upon two considerations one of them being unlawful; *De Beerski v. Paige*, 36 N. Y. 537 (affirming 47 Barb. 172), holding that if part of an entire contract is void under statute of frauds the whole is void; *Fiedler v. Day*, 2 Sandf. 594, holding assignment void in respect of principal preferred debt, void *in toto*, though other debts valid; *Grover v. Wakeman*, 11 Wend. 187, 25 A. D. 624, holding that assignment void in part as to creditor's is wholly void; *Curtiss v. Leavitt*, 15 N. Y. 9, on effect of statute against trusts for grantor of personalty where transaction void only in part; *Tickner v. Wiswall*, 9 Ala. 305, holding conveyance fraudulent as to part, void as to whole as against creditors; *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816, holding deed from husband void where wife participates in attempt to add fictitious to valid consideration; *Pepper v. Haight*, 20 Barb. 429, holding mortgage void where part consideration therefor is sale of premises held adversely by third person; *Landman v. Wilson*, 29 W. Va. 702, 2 S. E. 203, holding deed wholly void as against creditors if fraudulent as to any provision therein; *Beach v. Walker*, 6 Conn. 190, holding illegal charges by officer in making levy on land rendered whole levy void; *Goodman v. Newell*, 13 Conn. 75, 33 A. D. 378, holding ouster from one of three pieces of land in same deed, does not render whole conveyance void; *Lippincott v. Shaw Carriage Co.* 25 Fed. 577, holding priority of judgments on notes for which mortgage security given not affected because mortgage declared invalid.

— **Usurious transactions.**

Cited in *Seymour v. Strong*, 4 Hill, 255, on effect of usury in part of transaction upon whole transaction; *Rapelye v. Anderson*, 4 Hill, 472 (dissenting opinion), on effect of usury in part of one transaction upon whole transaction.

Costs in action of equitable nature.

Cited in *Cunningham v. Freeborn*, 11 Wend. 240 (dissenting opinion), on allowance of costs on dismissal of creditors' bill when circumstances would induce suspicion; *Re Wright*, 16 Fed. 482, holding costs arising from reasonable defense to claim against vessel by part owner chargeable against vessel.

Distinguished in *Murray v. Blatchford*, 2 Wend. 221, on right to allow costs on reversal of decree.

Court decisions as authority.

Cited in *Butler v. Van Wyck*, 1 Hill, 438 (dissenting opinion), on binding effect of decision of highest court as a precedent.

15 AM. DEC. 507, DOE EX DEM. TATEM v. PAINE, 11 N. C. (4 HAWKS) 64.

Determination of boundary lines.

Cited in *Magee v. Doe*, 22 Ala. 699, holding that question as to what are boundary lines question of law when they are fixed by grant; *Doe ex dem. Marshall v. Fisher*, 46 N. C. (1 Jones, L.) 111; *Whittelsey v. Kellogg*, 28 Mo. 404,—holding that jury should determine where boundaries called for in deed are and court should determine what boundaries control; *Clark v. Wagoner*, 70 N. C. 706, holding court cannot determine location of corner where evidence tends to show it located at particular place; *Spruill v. Davenport*, 46 N. C. (1 Jones, L.) 203, holding instruction to seek location by running courses erroneous where swamp called for in one of three localities; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524,—on relative weight of natural monuments, artificial marks, adjacent boundaries, and courses and distances in construing deed; *Mizell v. Simmons*, 79 N. C. 182 (dissenting opinion), on natural objects as prevailing over courses and distances in construction of deeds; *Riley v. Griffin*, 16 Ga. 141, 60 A. D. 726, on courses and distances as pointers and guides to ascertain natural objects of boundaries; *Strickland v. Draughan*, 88 N. C. 315, holding line must be extended to natural object and distance disregarded where deed calls for it; *Lamar v. Minter*, 13 Ala. 31, on admissibility of parol evidence to limit, enlarge, or explain the terms of a deed.

Cited in reference notes in 28 A. D. 584, on what are boundaries as a question of law; 28 A. D. 584, on natural objects prevailing over courses and distances; 39 A. S. R. 825, on monuments and natural objects prevailing over courses and distances; 88 A. D. 701, on marked trees on line actually run and marked as controlling line which courses, distances, or description indicate.

Cited in notes in 22 A. D. 642, on boundaries; 30 A. D. 740, as to flexibility of rule that monuments control; 30 A. D. 737; 31 A. D. 154,—on superiority of monuments over courses and distances.

Effect when objections not raised on trial.

Cited in *Beattie v. Abercrombie*, 18 Ala. 9, holding objection to secondary evidence comes too late when made for first time on appeal.

15 AM. DEC. 510, WILSON v. MYERS, 11 N. C. (4 HAWKS) 73.

Entry of judgment or order nunc pro tunc.

Cited in *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106, holding *nunc pro tunc* order appointing father guardian *ad litem* after trial and before judgment unauthorized; *Mitchell v. Schoonover*, 16 Or. 211, 8 A. S. R. 282, 17 Pac. 867,

holding party entitled to order entering judgment *nunc pro tunc* after death of adversary where court caused delay.

Cited in reference notes in 35 A. D. 526, on entry of judgment *nunc pro tunc*; 37 A. D. 690, on effect of *nunc pro tunc* entry or amendment of judgments or order.

Cited in note in 4 A. S. R. 829, as to when entry of judgment *nunc pro tunc* is proper.

Effect of new remedy on cause of action.

Cited in *Butner v. Keelhn*, 51 N. C. (6 Jones, L.) 60, on effect of statute giving new remedy upon an act that was a tort at common law; *Mills v. United States*, 12 L.R.A. 673, 46 Fed. 738, holding claim against United States for damage to rice fields by construction of dam sounds in tort.

Discharge of judgment for statutory damages.

Cited in *Gillet v. Jones*, 18 N. C. (1 Dev. & B. L.) 339, on right to discharge judgment where damages for erection of mill have been assessed but injury ceases.

Damming back water.

Cited in note in 59 L.R.A. 861, on who are liable for damming back water of stream.

15 AM. DEC. 512, TAYLOR v. SHUFFORD, 11 N. C. (4 HAWKS) 116. Rebutter.

Cited in *Bell v. Adams*, 81 N. C. 118, holding "B's" heirs rebutted where "B" as tenant in common gave warranty deed, and afterwards inherited from cotenant; *Southerland v. Stout*, 68 N. C. 446, holding heir rebutted by warranty deed of father having but life estate unless heir connected with reversion.

Estoppel by deed.

Cited in *Weeks v. Wilkins*, 139 N. C. 215, 51 S. E. 909, on estoppel of bargainor in deed of bargain and sale from showing he was not seised; *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785, on estoppel of devisee by deed containing covenants of seisin, quiet enjoyment and against encumbrances.

Cited in notes in 23 A. D. 673, as to estoppel from deeds of bargain and sale; 16 A. D. 754, on notice by recitals in deeds.

— As to after-acquired title.

Cited in *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655, holding title of fraudulent grantor, afterwards bankrupt, purchased from trustee in bankruptcy inures to original grantee; *Buchanan v. Harrington*, 141 N. C. 39, 53 S. E. 478, holding entire estate in grantee where tenant in common gave warranty deed of whole afterwards inheriting from cotenant; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154, holding warranty deed estops grantor from asserting against grantee any title former may afterwards acquire; *Walker v. Taylor*, 144 N. C. 175, 56 S. E. 877, holding party claiming inheritance by survivorship under will estopped from denying title of her grantee.

Cited in reference note in 31 A. D. 62, on estoppel of grantor to claim land by subsequently acquired title.

Cited in note in 58 A. D. 584, as to when subsequently acquired title by grantor vests in grantee.

Estoppel of state or its assignee.

Cited in *Chicago, St. P. M. & O. R. Co. v. Douglas County*, 134 Wis. 197,

14 L.R.A. (N.S.) 1074, 114 N. W. 511, holding state not estopped from taxing land because it made wrongful claim of ownership of it; *Carolina Nat. Bank v. State*, 60 S. C. 465, 85 A. S. R. 865, 38 S. E. 629, holding state not estopped from showing superintendent of penitentiary unauthorized to indorse note for state's credit; *State v. Williams*, 94 N. C. 891, on estoppel of state from showing facts on subsequent indictment different from those established on former indictment.

Cited in reference note in 85 A. S. R. 870, on estoppel of state.

—Of assignee.

Cited in *Wallace v. Maxwell*, 32 N. C. (10 Ired. L.) 110, 51 A. D. 380, holding state not bound by estoppel nor is the assignee of the state bound; *Roberts v. Cannon*, 20 N. C. 398 (4 Dev. & B. L. 256), holding grantee from state not estopped to deny what the state was at liberty to deny; *Tolson v. Mainor*, 85 N. C. 235, holding defendant in ejectment deriving title from state may show prior grant to third party.

Evidence admissible on question of boundary.

Cited in *Adams v. Stanyan*, 24 N. H. 405, holding surveys and plans made under acts of Congress or by authority of state legislatures competent evidence of boundaries; *Hartzog v. Hubbard*, 19 N. C. (2 Dev. & B. L.) 241, holding declarations of deceased surveyor admissible in evidence in questions of boundary; *Stroud v. Springfield*, 28 Tex. 649, holding common reputation in neighborhood admissible with regard to ancient boundaries if formed before action commenced; *Huffman v. Walker*, 83 N. C. 411, holding that location of boundaries mentioned in deed may be established by parol proof and by reputation; *Gibson v. Poor*, 21 N. H. 440, 53 A. D. 216, holding that in settling disputed line between lots corresponding undisputed line between adjacent lots admissible.

Mode of fixing boundary.

Cited in reference note in 90 A. D. 592, on whether survey is presumed to have been made by magnetic instead of true meridian.

15 AM. DEC. 519, *BARDEN v. McKINNIE*, 11 N. C. (4 HAWKS) 279.
Sufficiency of levy.

Cited in *Green v. Burke*, 23 Wend. 490, holding that indorsing levy on execution in presence of debtor and in view of colts levied constitutes valid levy.

Title acquired by levy.

Cited in *Badham v. Cox*, 33 N. C. (11 Ired. L.) 456, holding title acquired after return of *fi. fa.* not subject to sale under *venditioni exponas* issued thereon.

Cited in reference note in 58 A. D. 59, on levy of execution upon land not devesting judgment debtor of title thereto.

Cited in note in 58 A. D. 360, on special property in sheriff under levy on personality.

Proper time to make levy and sale.

Cited in *Waldrop v. Friedman*, 90 Ala. 157, 24 A. S. R. 775, 7 So. 510, holding levy upon land made after expiration of time allowed by law therefor void; *Green v. Burke*, 23 Wend. 490, to point that sheriff is without power to make levy after return day; *Maynard v. Moore*, 76 N. C. 158, to point that entry of levy on land made under *fi. fa.* retained until after return day invalid; *Seawell v. Bank of Cape Fear*, 14 N. C. (3 Dev. L.) 279, 22 A. D. 722, holding sale

by sheriff made shortly after return day void though levy indorsed at proper time; *Morgan v. Doe*, 15 Ala. 190; *Hightower v. Handlin*, 27 Ark. 20; *Love v. Gates*, 24 N. C. (2 Ired. L.) 14,—holding that sheriff cannot sell land after return day without authority of new writ; *Young v. Smith*, 23 Tex. 598, 76 A. D. 81, holding sale under *venditioni exponas* issued upon a previously returned levy valid; *Samuel v. Zachery*, 26 N. C. (4 Ired. L.) 377, holding *venditioni exponas* to sell lands tested after defendant's death void without sci. fa. against heirs; *Tarkinton v. Alexander*, 19 N. C. (2 Dev. & B. L.) 87, holding writ directed "to the sheriff" to sell land levied upon by his predecessor does not authorize sale by "late sheriff."

Annotation cited in *Waldrop v. Friedman*, 90 Ala. 157, 24 A. S. R. 775, 7 So. 510, upon same point.

Cited in reference note in 54 A. D. 176, on validity of sale of property after return day of execution.

Cited in notes in 76 A. D. 84, 85, 87, on officer's power after return day of writ, by *venditioni exponas* or otherwise, to sell property; 61 L.R.A. 383, on effect of death of sole judgment debtor after levy, but before sale.

Distinguished in *Smith v. Spencer*, 25 N. C. (3 Ired. L.) 256, holding that *venditioni exponas* may issue at a term subsequent to return of levy upon land; *Doe ex dem. Tayloe v. Gaskins*, 12 N. C. (1 Dev. L.) 295, holding that sheriff may validly sell the land on the return day.

15 AM. DEC. 523, MOORE v. MOORE, 11 N. C. (4 HAWKS) 358.

Contribution between joint debtors.

Cited in *Van Petten v. Richardson*, 68 Mo. 379, holding debtor entitled to recover at law from codebtor amount paid in excess of his share, with costs; *Shoemaker v. Wood*, 9 Kulp, 436, holding that action for contribution may be maintained by joint debtor paying debt before suit; *Sherling v. Long*, 122 Ga. 797, 50 S. E. 935, holding limitations accrue against right of contribution from time original debt discharged; *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911, refusing contribution as against one who successfully defended action by creditor against him as one of the sureties.

Cited in reference notes in 29 A. D. 72, on doctrine of contribution; 26 A. D. 266; 27 A. D. 612,—on contribution between cosureties; 40 A. D. 430, on right to contribution among cosureties; 59 A. D. 634, on basis of contribution among cosureties; 26 A. D. 203, on foundation in equity of doctrine of contribution.

Cited in note in 98 A. S. R. 33, on foundation of right to contribution not based on express promise.

Right to share in indemnity taken by cosurety.

Cited in *Seibert v. Thompson*, 8 Kan. 65, holding that securities taken by one surety for his indemnity inure to benefit of cosurety; *Fagan v. Jacocks*, 15 N. C. (4 Dev. L.) 263, holding that indemnity subsequently taken by one inures to benefit of his cosureties; *Hall v. Robinson*, 30 N. C. (8 Ired. L.) 56, to same point; *Miller v. Sawyer*, 30 Vt. 412, holding surety subsequently receiving indemnifying note bound to account to cosurety for proceeds thereof; *Cannon v. Connaway*, 5 Del. Ch. 559, holding sureties entitled to share in indemnity taken by cosurety, he not disclosing such taking; *Long v. Barnett*, 38 N. C. (3 Ired. Eq.) 631, holding that indemnity taken by surety inures to benefit of cosurety, unless contrary agreement proved; *McDowell County v. Nichols*, 131 N. C. 501, 92 A. S. R. 785, 42 S. E. 938, holding that one about to become surety may stipulate for separate

security, though cosureties ignorant thereof; *Leggett v. McClelland*, 39 Ohio St. 624, denying that where principal's wife mortgaged her separate estate to secure one surety same inured to cosurety's benefit.

Cited in reference notes in 71 A. S. R. 906, on right of cosurety to indemnity; 27 A. D. 720, on collateral security to indorser inuring to benefit of creditor.

Cited in note in 43 A. D. 563, 565, on right of surety as to indemnity held by cosurety.

Distinguished in *Moore v. Moberly*, 7 B. Mon. 299, holding that all sureties should participate in mortgage given one who is surety separately in some cases and jointly in others.

15 AM. DEC. 526, *BELL v. BLOUNT*, 11 N. C. (4 HAWKS) 384.

Injunction against nuisance.

Cited in *Columbus v. Rodgers*, 10 Ala. 37, holding that injunction will lie to restrain an interference with plaintiff's franchise to collect tolls; *Phoenix v. Emigration Comrs.* 1 Abb. Pr. 466, refusing to restrain erection of immigrant depot; *Moyamensing Twp. v. Long*, 1 Pars. Sel. Eq. Cas. 143, enjoining completion of building encroaching on public street; *Clark v. Lawrence*, 59 N. C. (6 Jones, Eq.) 83, 78 A. D. 241, holding that equity will restrain use of cemetery upon proof that same is a nuisance; *Privett v. Whitaker*, 73 N. C. 554, holding that one cannot complete wooden house after passage of ordinance declaring such houses nuisances; *Atty. Gen. v. Lea*, 38 N. C. (3 Ired. Eq.) 301, holding injunction improper where it is doubtful that the proposed mill will prove a nuisance.

Cited in reference notes in 38 A. D. 568, on injunction in cases of equity; 30 A. D. 572; 54 A. D. 351,—on injunction against nuisance; 118 A. S. R. 879, on injunction against, or abatement of, nuisance created or maintained by two or more persons.

Cited in notes in 73 A. D. 114, on injunctions against threatened nuisances; 118 A. S. R. 882, on necessity that injury be irreparable to warrant injunction against two or more persons creating or maintaining nuisance.

Distinguished in *State ex rel. Circuit Attorney v. Uhrig*, 14 Mo. App. 413, refusing injunction to restrain maintenance of dramshop, though same a public nuisance.

—Relating to waters.

Cited in *Atty. Gen. ex rel. Raleigh v. Hunter*, 16 N. C. (1 Dev. Eq.) 12, restraining maintenance of disease-spreading milldam notwithstanding pendency of indictment therefor; *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685, refusing to restrain the depositing of sewage on plaintiff's land, the evidence not showing irreparable injury; *Pedrick v. Raleigh & P. S. R. Co.* 143 N. C. 485, 10 L.R.A. (N.S.) 554, 55 S. E. 877, holding that completion of bridge at certain point will not be restrained unless fact of nuisance clearly shown.

Cited in notes in 59 L.R.A. 885, on equitable relief against damming back water of stream; 40 L.R.A. 470, on injunction by municipalities against pollution of waters and other matters affecting health.

Distinguished in *Atty. Gen. ex rel. Eason v. Perkins*, 17 N. C. (2 Dev. Eq.) 38, refusing to restrain rebuilding of mill which would, though injuring plaintiff, benefit neighborhood.

15 AM. DEC. 529, WRIGHT v. LATHROP, 2 OHIO, 33.**What operates to discharge joint trespasser.**

Cited in *Turner v. Hitchcock*, 20 Iowa, 310, holding that plaintiff's marrying a joint trespasser operates to discharge cotrespassers; *Matthews v. Menedger*, 2 McLean, 145, Fed. Cas. No. 9,289, holding judgment against joint trespasser not a bar to action against cotrespasser.

Cited in reference notes in 38 A. D. 512, on judgment as bar to second action; 43 A. D. 667, on effect of judgment against one of several joint tort feorsors; 32 A. D. 340, on unsatisfied judgment against one of several for detention of property as bar to suit against another person guilty of same detention.

Cited in notes in 73 A. D. 144, on joint and several liability of cotrespassers; 54 A. D. 205, on judgment against one cotrespasser as bar to action against other; 58 L.R.A. 427, on effect of judgment against one joint tort feasor with satisfaction in whole or in part on liability of the other; 92 A. S. R. 887, on effect of unsatisfied judgment against one wrongdoer on liability of others; 73 A. D. 145, on necessity of plaintiff recovering separate judgments electing *de melioribus damnis*.

15 AM. DEC. 533, JOHNSON v. HAINES, 2 OHIO, 55.**Validity of defectively executed or acknowledged instrument.**

Cited in *Kane v. Moulton*, 7 Ohio N. P. 293, 1 Ohio Dec. 410, holding mortgage defectively witnessed invalid as against subsequent grantees with notice; *White v. Denman*, 16 Ohio, 59, holding recorded mortgage defectively witnessed inoperative against subsequent judgment creditors; *Langmede v. Weaver*, 65 Ohio St. 17, 60 N. E. 992, holding same of lease defectively executed and acknowledged; *Richardson v. Bates*, 8 Ohio St. 257, holding lease defectively acknowledged and attested insufficient to support action for rent founded thereon; *Brannon v. Brannon*, 2 Disney (Ohio) 224, to point that an improperly executed or acknowledged mortgage is not entitled to recordation; *Warner v. Baltimore & O. R. Co.* 31 Ohio St. 265, holding copy of record of sealed instrument defectively executed and acknowledged inadmissible as evidence; *Sloane v. McConahy*, 4 Ohio, 157, holding unacknowledged bond covenanting to lay pipes, not a conveyance.

Distinguished in *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N. E. 866, holding mortgage valid lien from time of recordation, though various errors occurred in names of parties.

Description in acknowledgment of officer taking it.

Cited in *Simpson v. Montgomery*, 25 Ark. 365, 99 A. D. 228, holding that equity will relieve against mistake made in describing officer taking acknowledgment; *Livingston v. M'Donald*, 9 Ohio, 168, sustaining acknowledgment taken before foreign judge, though fact of his authority not set forth; *Tuten v. Gazen*, 18 Fla. 751, holding recital in acknowledgment as to office of person taking same prima facie proof of such fact.

Cited in reference note in 41 A. D. 415, on invalidity of acknowledgment which does not show official character of person taking.

Cited in notes in 108 A. S. R. 549, on necessity for setting forth in certificate of acknowledgment official character of officer taking same; 41 A. D. 171, on proof of official character of person taking acknowledgment.

Recording undelivered deeds.

Cited in *Harvey v. Jones*, 1 Disney (Ohio) 65, holding that the recording of an undelivered deed is of no effect.

Deeds not within recording statutes.

Cited in *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742, 1 Ohio Fed. Dec. 100, to point that copies of records of deeds not contemplated by recording statutes are not evidence.

15 AM. DEC. 534, ELLIS v. BITZER, 2 OHIO, 89.**Release of one joint wrongdoer.**

Cited in *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441, holding that satisfaction made by one joint wrongdoer discharges all; *Brown v. Kencheloe*, 3 Coldw. 192, holding that satisfaction from one joint wrongdoer discharges all, whether so intended or not; *Ducey v. Patterson*, 37 Colo. 216, 119 A. S. R. 284, 9 L.R.A. (N.S.) 1066, 86 Pac. 109, holding that satisfaction in favor of one joint tortfeasor discharges all, notwithstanding contrary stipulation; *McBride v. Scott*, 132 Mich. 176, 102 A. S. R. 416, 61 L.R.A. 445, 93 N. W. 243, 1 A. & E. Ann. Cas. 61; *Abb v. Northern P. R. Co.* 28 Wash. 428, 92 A. S. R. 864, 58 L.R.A. 293, 68 Pac. 954,—holding that release of one joint wrongdoer discharges others, notwithstanding contrary stipulation; *Vigeant v. Scully*, 35 Ill. App. 44, holding that satisfaction by one of two wrongdoers severally liable discharges other; *Turner v. Hitchcock*, 20 Iowa, 310, holding that plaintiff's marrying a joint trespasser discharged the cotrespassers; *Breslin v. Peck*, 38 Hun, 623, holding that where wrongdoers were sued jointly, but verdict and judgment were several, satisfaction of one judgment discharged other; *Burns v. Womble*, 131 N. C. 173, 42 S. E. 573, holding that releasing sheriff from liability in serving writ operates to release plaintiff therein; *Ellis v. Esson*, 50 Wis. 138, 36 A. R. 830, 6 N. W. 518, holding that contract not to sue joint wrongdoer does not discharge others unless consideration therefor intended as a full satisfaction.

Cited in reference notes in 29 A. D. 602, on release of one joint debtor as release of all; 41 A. D. 371, on release of one of several joint trespassers discharging all.

Cited in notes in 100 A. S. R. 402; 58 L.R.A. 301,—on effect of accord and satisfaction of one joint tortfeasor on liability of the other; 73 A. D. 146; 11 A. S. R. 907, 908,—on effect of release given to, or satisfaction accepted from one of several joint wrongdoers; 92 A. S. R. 876, on effect of partial satisfaction by one joint tortfeasor; 92 A. S. R. 874, on right to only one complete satisfaction from joint tortfeasors; 92 A. S. R. 882, on effect of reservation in release of one joint tortfeasor of right to hold others.

Distinguished in *Bell v. Perry*, 43 Iowa, 368, holding judgment obtained against one joint wrongdoer, not satisfied by dismissing pending action against other on payment of costs.

When accord and satisfaction may be pleaded.

Cited in *Heirn v. Carron*, 11 Smedes & M. 361, 49 A. D. 65, holding that plea of accord and satisfaction may be filed in action of trespass.

15 AM. DEC. 539, BEGGS v. THOMPSON, 2 OHIO, 95.**Effect of foreclosure on title to crops.**

Cited in *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, holding that matured crop, though unsevered, does not pass to purchaser at foreclosure sale; *Cassilly v. Rhodes*, 12 Ohio, 88, holding same of crop of growing wheat.

Possession as a requisite to maintenance of trespass.

Cited in *Yorgensen v. Yorgensen*, 6 Neb. 383, holding action of trespass not maintainable by one not in possession.

Cited in reference note in 58 A. D. 59, on levy of execution upon land not devesting judgment debtor of title thereto.

15 AM. DEC. 542, FULTON v. STUART, 2 OHIO, 215.

What covenants run with the land.

Cited in *Sutliff v. Atwood*, 15 Ohio St. 186, holding that contract to pay certain rent for farm and stock thereon runs with the land; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 A. R. 623, holding same of railroad's covenant to establish flag station, prohibited sale of intoxicants, and allow grantor privileges.

Cited in reference notes in 27 A. D. 84, 553; 36 A. D. 94; 80 A. D. 189,—on what covenants run with land; 35 A. D. 716, on covenant or agreement not to build on adjacent land of grantor, inuring to benefit of purchasers from grantee.

Cited in notes in 2 L.R.A. 199, on covenants in deed running with the land; 51 A. D. 306, on what are covenants in lease running with land.

Distinguished in *Crawford v. Chapman*, 17 Ohio, 449, holding action not maintainable in name of grantee against lessee upon express covenant of lease to pay rent.

What are subleases, and what liabilities arise thereunder.

Cited in *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123, holding sublease created where lessee lets portion of premises; *Hicks v. Martin*, 25 Mo. App. 359; *Noble v. Becker*, 3 Brewst. (Pa.) 550,—to same point; *Hogg v. Reynolds*, 61 Neb. 758, 87 A. S. R. 522, 86 N. W. 479, holding one acquiring by assignment lessee's interest in distinct part of leased land, liable only for proportionate share of rent; *Jones v. Smith*, 14 Ohio, 606, holding that transfer of lease of house and furniture not an assignment unless both house and furniture included therein; *Beck v. Minnesota & W. Grain Co.* 131 Iowa, 62, 7 L.R.A. (N.S.) 930, 107 N. W. 1032, to point that lessor cannot sue sublessee upon lessee's covenant to pay rent; *Williams v. Michigan C. R. Co.* 133 Mich. 448, 103 A. S. R. 458, 95 N. W. 708, holding landlord accepting from tenant surrender and assignment of interest in subleases, not entitled to recover rent from sublessees.

Cited in reference notes in 16 A. S. R. 439, on remedies of lessor against sublessee; 61 A. D. 542, on remedies by lessor against assignees and sublessees; 1 A. S. R. 83, on liability of tenants in common holding as assignees of leased premises.

Cited in notes in 117 A. S. R. 97, on what is a subletting; 51 A. D. 306; 86 A. D. 405,—distinguishing between assignment of lease and subletting; 10 A. S. R. 564; 11 L.R.A. 855,—on liability of sublessee to lessor; 15 E. R. C. 502, on right of lessor to maintain action against assignee or sublessee where lessee assigns for shorter period than lease.

15 AM. DEC. 546, BENTLEY v. DEFOREST, 2 OHIO, 221.

Essentials to instrument of conveyance.

Cited in *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786, holding it essential that instrument to conveying interest in land contain words showing intention to convey.

Cited in note in 31 A. S. R. 28, on effect of indorsement or assignment of deed as a conveyance.

15 AM. DEC. 547, MATTOX v. MATTOX, 2 OHIO, 233.

Divorce where both parties at fault.

Cited in *Conant v. Conant*, 10 Cal. 249, 70 A. D. 717, holding wife guilty of

desertion entitled only to divorce *a mensa* because of husband's adultery; *Eikenbury v. Eikenbury*, 33 Ind. App. 69, 70 N. E. 837, holding wife guilty of adultery not entitled to divorce on ground of abandonment; *Burke v. Burke*, 44 Kan. 307, 21 A. S. R. 283, 24 Pac. 466; *Haines v. Haines*, 62 Tex. 216,—holding husband guilty of adultery not entitled to divorce on ground of wife's adultery; *Day v. Day*, 71 Kan. 385, 80 Pac. 974, 6 A. & E. Ann. Cas. 169, holding husband guilty of cruelty and desertion not entitled to divorce on ground of wife's adultery; *Church v. Church*, 16 R. I. 667, 7 L.R.A. 385, 19 Atl. 244, holding husband guilty of cruelty not entitled to divorce on ground of wife's adultery; *Fisher v. Fisher*, 93 Md. 298, 48 Atl. 833, holding that divorce will not be granted where both parties guilty of adultery; *Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855, holding that divorce will not be granted where both parties are guilty of cruelty.

Cited in reference note in 70 A. D. 724, on refusal of divorce to complainant guilty of same crime of which he complains.

Cited in notes in 86 A. S. R. 334, 336, on mutuality of fault as defense in divorce proceedings; 86 A. S. R. 336, on adultery of plaintiff as defense in action for divorce on ground of adultery.

Decree for alimony.

Cited in *Elliott v. Elliott*, 34 Colo. 298, 83 Pac. 630, holding alimony is improperly decreed where divorce is denied because of mutual guilt; *De Witt v. De Witt*, 67 Ohio St. 340, 66 N. E. 136, to point that the jurisdiction of courts of Ohio in suits for alimony is statutory; *Mullane v. Folger*, 21 Ohio L. J. 277, 10 Ohio Dec. Reprint, 485, holding decree for alimony becomes dormant unless kept alive by execution.

15 AM. DEC. 547, *MASSIE v. LONG*, 2 OHIO, 287.

Effect of death of party to execution proceeding.

Cited in *Brown v. Parker*, 15 Ill. 307, holding execution sued out in name of deceased plaintiff, void; *Cist v. Beresford*, 1 Ohio C. C. 32, 1 Ohio C. D. 19, holding that the action must be reviewed by administrator where plaintiff dies before levy made.

Cited in reference note in 18 A. D. 344, on effect of death of plaintiff or defendant after levy.

Cited in note in 61 L.R.A. 393, on effect of death of one of the parties after judgment upon remedy by execution.

— Of defendant.

Cited in *Sumner v. Moore*, 2 McLean, 59, Fed. Cas. No. 13,610, holding that death of defendant does not affect execution and levy made prior thereto; *Mundy v. Bryan*, 18 Mo. 29, sustaining sale made subsequent to defendant's death under levy made prior thereto; *United States v. Drennen*, Hempst. 320, Fed. Cas. No. 14,992; *Fritsch v. Van Mittendorff*, 2 Cin. Super. Ct. Rep. 261,—holding to point that sale may be made where levy made prior to defendant's death; *Bigelow v. Renker*, 25 Ohio St. 542, holding sale under *venditioni exponas* issued after defendant's death, valid where levy was made prior thereto; *Cartney v. Reed*, 5 Ohio, 221, holding sale made where levy was under fl. fa. issued subsequent to defendant's death, void; *Davis v. Oswalt*, 18 Ark. 414, 68 A. D. 182, to point that a levy cannot be made subsequent to defendant's death.

Cited in reference notes in 22 A. D. 329, on effect of defendant's death after execution; 38 A. D. 465; 68 A. D. 187,—on effect of defendant's death after is-

suance and levy of execution; 56 A. D. 436, on effect on sheriff's power to levy or sell of death of judgment debtor before or after execution issued; 62 A. D. 768, on validity of executions issued or served after death of defendant or dissolution of defendant corporation.

Cited in note in 61 L.R.A. 366, on necessity of revivor on death of sole judgment debtor before issuance of execution.

Disapproved in *Warder v. Tainter*, 4 Watts, 270, on right to take out execution without sci. fa. after defendant's death.

Sufficiency of description of land.

Cited in *Wofford v. McKinna*, 23 Tex. 36, 76 A. D. 53, holding description in tax deed requiring extrinsic evidence to identify land, insufficient; *Hershey v. Thompson*, 50 Ark. 484, 8 S. W. 689, holding assessment of land for taxation, describing it as "part of" designated section, void; *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090, holding describing lot in assessment for taxes thereon as "part of lot 5," insufficient; *Richardson v. Simpson*, 82 Md. 155, 33 Atl. 457, holding tax sale advertisement in effect describing the land as part of a named tract, insufficient; *Raymond v. Longworth*, 4 McLean, 481, Fed. Cas. No. 11,595; *Blair Town Lot & Land Co. v. Scott*, 44 Iowa, 143; *Stanberry v. Nelson*, Wright (Ohio) 766; *Lafferty v. Byers*, 5 Ohio, 458; *Burchard v. Hubbard*, 11 Ohio, 316; *Humphries v. Huffman*, 33 Ohio St. 395; *Head v. James*, 13 Wis. 641,—holding describing land sold for taxes as being certain number of acres of named tract, insufficient.

Cited in reference note in 125 A. S. R. 627, on necessity for description of land to validity of tax assessment.

Power of tenants in common to make joint demise.

Cited in *Wilkinson v. Fleming*, 2 Ohio, 301, holding tenants in common may make a joint demise.

Rights and duties of next friends, etc.

Cited in note in 97 A. S. R. 1005, on rights and duties of guardians *ad litem* and next friends of infants.

Necessity of notice to parties in interest.

Cited in *Littlefield v. Tinsley*, 26 Tex. 353, holding the notice required by statute to be given by probate courts decreeing sales, a jurisdictional matter.

Plaintiff's retaking possession as defense to action of ejectment.

Cited in *McCheaney v. Wainwright*, 5 Ohio, 452, holding it no defense to action of ejectment that plaintiff takes possession pending suit.

15 AM. DEC. 553, SERGEANT v. STEINBERGER, 2 OHIO, 305.

Existence of joint tenancies, tenancies by entireties, etc.

Cited in *McClaskey v. Barr*, 54 Fed. 781, to point that, notwithstanding the rule at common law, joint tenancies have no existence in Ohio; *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742 (reversing *Seawall v. Berry*, 55 Fed. 731); *Tabler v. Wiseman*, 2 Ohio St. 207,—to point that joint tenancies, with their common-law incidents, do not exist in Ohio; *Miles v. Fisher*, 10 Ohio 1, 36 A. D. 61, holding that survivorship does not attach to estate expressly limited in joint tenancy; *Wilson v. Fleming*, 13 Ohio, 68, holding that survivorship does not attach to a conveyance to husband and wife; *Penn v. Cox*, 16 Ohio, 30, holding same of a devise to husband and wife; *Farmers & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *Helvie v. Hoover*, 11 Okla. 687, 69 Pac. 958,—holding that conveyance to husband and wife constitutes them tenants in common;

Hoffman v. Stigers, 28 Iowa, 302, holding same of a judgment in partition settling land upon husband and wife; *Thompson v. Dingman*, 2 Ohio Dec. Reprint, 711, holding bequest to two or more persons creates a tenancy in common; *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919, holding survivorship incident to estate created by conveying land to two persons jointly; *Baker v. Stewart*, 40 Kan. 442, 10 A. S. R. 213, 2 L.R.A. 434, 19 Pac. 904 (dissenting opinion), on nature of estate created by conveyance to husband and wife.

Cited in reference notes in 36 A. D. 63, on existence of joint tenancy in Ohio; 41 A. S. R. 429, as to when husband and wife are cotenants; 10 A. S. R. 99, as to how estate by entirety arises and effect of statutes; 88 A. D. 696, on conveyance to husband and wife vesting in them estate by entireties.

Cited in notes in 30 L.R.A. 315, as to where and to what extent entirety estate exists; 18 A. D. 381, on states where tenancy by entireties does not exist.

Disapproved in *Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 A. D. 439; *Ketchum v. Walsworth*, 5 Wis. 95, 68 A. D. 49,—holding that survivorship attaches to conveyance to husband and wife.

Extent to which common law adopted.

Cited in *Knapp v. Thomas*, 39 Ohio St. 377, 45 A. R. 462, holding certain early English statute regulating pardons, not in force in Ohio; *Boyle v. State*, 6 Ohio C. C. 163, 3 Ohio C. D. 397, holding same of common-law rule respecting liability of proprietors of newspaper for libels appearing therein; *Kerwacker v. Cleveland, C. & C. R. Co.* 30 Ohio St. 172, 62 A. D. 246, holding same of rules regulating rights of one allowing his cattle to stray from his land.

Cited in note in 22 L.R.A. 506, on limitation of adoption of common law in United States.

15 AM. DEC. 555, WALSH v. RINGER, 2 OHIO, 327.

Sufficiency of description of land.

Cited in *Stahl v. Van Vleck*, 53 Ohio St. 136, 41 N. E. 35, holding conveyance sufficiently definite where land intended by parties could be located; *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50; *Bybee v. Hageman*, 66 Ill. 519,—holding conveyance of certain number of acres in named corner, sufficiently definite; *Smith v. Nelson*, 110 Mo. 552, 19 S. W. 734, holding same of similar description in tax deed; *American Freehold Land Mortg. Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377, to same point; *Bowers v. Chambers*, 53 Miss. 259, holding describing land sold for taxes as being 13 acres off certain corner or end of named tract, sufficient; *Annan v. Baker*, 49 N. H. 161, holding tax deed describing land as being certain number of acres of named tract and giving two boundaries, sufficient; *Cunningham v. Harper, Wright (Ohio)* 366, holding tax deed describing land as being 51 acres in northeast part of named tract, sufficient; *Dolan v. Trelevan*, 31 Wis. 147, holding reservation in tax deed of certain number of acres in designated corner, sufficiently definite; *St. Louis, I. M. & S. R. Co. v. Beidler*, 45 Ark. 17, holding deed excepting 5 acres in named corner sufficiently definite; *Johnson v. Ashland Lumber Co.* 47 Wis. 326, 2 N. W. 552, holding exception of 7 acres to be taken on east side of certain section, sufficiently definite; *Hay v. Storrs, Wright (Ohio)* 711, holding reservation of half acre in form of square, on street opposite certain residence, sufficient; *Edrington v. Hermann*, 97 Tex. 193, 77 S. W. 408, on right where so many acres are called for to survey same in a square from the corner as a base; *Lamar v. Minter*, 13 Ala. 31, holding conveyance of certain number of acres of "south part" of designated section is not a convey-

ance of south half of such section; *Pickering v. Pickering*, 50 N. H. 349, determining how to locate a devise of 5 acres in named corner of certain field; *Dotson v. Milliken*, 27 App. D. C. 500, holding broker procuring purchaser for certain number of acres of large tract, entitled to his commissions.

Criticized in *College Corner & R. Gravel Road Co. v. Moss*, 92 Ind. 119, holding complaint to recover land describing it as "about $\frac{1}{4}$ acre," situated in certain corner of named section, insufficient.

Disapproved in *Emshwiller v. Tyner*, 16 Ind. App. 133, 44 N. E. 811, on grantee's right to make the location where certain number of acres are granted from larger tract.

15 AM. DEC. 557, *TIERNAN v. BEAM*, 2 OHIO, 383.

Right of vendor to lien for purchase money and its priority.

Cited in *Ahrend v. Odiorne*, 118 Mass. 261, 19 A. R. 449, holding doctrine that vendor has lien for unpaid purchase money does not obtain in Massachusetts; *Smith v. O'Connor*, 6 Ohio Dec. Reprint, 935, 5 Ohio L. J. 414; *Nash v. LeClercq*, 2 Ohio L. J. 146, Fed. Cas. No. 10,021,—holding that where no security is taken a lien arises in favor of vendor for purchase money; *Hunter v. Hunter*, 7 Ohio Dec. Reprint, 79, holding vendor's lien enforceable so long as right of action for purchase money exists; *Miller v. Albright*, 60 Ohio St. 48, 53 N. E. 490, holding that vendor's lien has precedence over lien of judgment creditors; *Neil v. Kinney*, 11 Ohio St. 58, holding mechanic's liens subject to prior vendor's lien, notwithstanding vendor was given mortgage.

Cited in reference notes in 17 A. D. 157; 24 A. D. 691; 37 A. D. 633; 39 A. D. 202; 40 A. D. 460; 45 A. D. 272, 52 A. D. 66, 212; 60 A. D. 559,—on vendor's lien upon real estate for purchase money; 39 A. D. 330, on creation, existence, and extent of vendor's lien.

—**Effect of taking note or bond.**

Cited in reference notes in 81 A. D. 241, on effect of taking note or bond on vendor's lien; 68 A. D. 523, on taking note for purchase money as affecting vendor's lien.

Criticized in *Williams v. Roberts*, 5 Ohio, 35, holding that vendor's lien does not exist where vendor conveys and receives notes with collateral security.

Assignability of vendor's lien.

Cited in *Hall v. Click*, 5 Ala. 363, 39 A. D. 327, holding vendor's lien not enforceable by one taking note without recourse; *Smith v. Smith*, 9 Abb. Pr. N. S. 420, 1 Sheldon, 238, holding that vendor's lien does not pass where vendor assigns debt without recourse; *Shall v. Biscoe*, 18 Ark. 142; *Taylor v. Foote*, Wright (Ohio) 356; *Brush v. Kingsley*, 14 Ohio, 20,—holding that vendor's lien does not pass to assignee of note given for purchase money; *Lavender v. Abbott*, 30 Ark. 172, holding that vendor's lien descends to heir upon same terms as held by ancestor; *Hatry v. Painesville & Y. R. Co.* 1 Ohio C. C. 426, 1 Ohio C. D. 238, to point that legatee of the debt may enforce the vendor's lien.

Cited in reference notes in 60 A. D. 559, on right to assign vendor's lien; 81 A. D. 241, on assignment of note given to secure purchase money of land as carrying with it vendor's lien on property; 13 A. D. 629, on descent of vendor's lien to heirs or devisees of vendor.

Cited in notes in 13 L.R.A. 188, on assignability of vendor's lien; 28 A. D. 199, on existence, waiver, and assignability of vendor's lien.

Loss or waiver of vendor's lien.

Cited in *Boos v. Ewing*, 17 Ohio, 500, 49 A. D. 478, holding vendor by taking mortgage does not release his lien for unpaid purchase money.

Cited in reference notes in 24 A. D. 692; 77 A. D. 101,—on waiver of vendor's lien; 38 A. S. R. 825, as to when vendor's lien is not waived; 76 A. S. R. 881, on discharge of vendor's lien.

Cited in note in 46 A. D. 194, on effect of vendor's death upon vendor's lien.

Ground for refusing specific performance.

Cited in reference note in 34 A. D. 112, as to when default or negligence is ground for refusal of specific performance.

Relief in equity.

Cited in *Compton v. Wabash, St. L. & P. R. Co.* 7 Ohio L. J. 99, holding vendor cannot be compelled to convey until purchase price is paid; *Dickey v. Beatty*, 14 Ohio St. 389, to point that equity may aid defective execution of a power but cannot supply the want thereof; *Lilby v. Ludlow*, 4 Ohio, 469, holding that equity will not aid sale made by administrator when law court found that he had no power to sell; *Piatt v. St. Clair*, 7 Ohio, pt. 2 p. 165, to point that equity will aid defective conveyance by administrator if he have power to convey.

15 AM. DEC. 569, HOUGH v. HUNT, 2 OHIO, 495.**Validity of, and relief from oppressive contracts.**

Cited in reference notes in 24 A. D. 451; 42 A. D. 182; 3 A. S. R. 724; 28 A. S. R. 94; 39 A. S. R. 420; 53 A. S. R. 682,—on rescission of contracts in equity; 19 A. D. 55, as to when rescission of contract will be decreed; 17 A. D. 50; 57 A. S. R. 431,—on equity jurisdiction over rescission of contracts; 57 A. D. 598, on rescission of contracts in equity in absence of fraud, accident, or mistake; 39 A. D. 158, on rescission of contracts made with heirs; 33 A. R. 184, on enforcement of unconscionable contracts.

Cited in notes in 81 A. S. R. 666, on unconscionable contracts; 74 A. D. 657, on how and within what time right to rescind contract must be exercised.

—Grounds for relief.

Cited in *Green v. Lowry*, 38 Ga. 548, holding contract of one whose ignorance and inexperience is taken advantage of, unenforceable; *Kelley v. Caplice*, 23 Kan. 474, 33 A. R. 179, holding assignee's agreement to pay beneficiary in endowment policy substantial sum upon her signing receipt enabling him to receive amount due, unenforceable; *Holmes v. Holmes*, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638, to point that conveyance of property worth \$25,000 for \$1,000 is presumably oppressive; *Brown v. Hall*, 14 R. I. 249, 51 A. R. 375, holding that equity will grant relief where party gave broker a note bearing excessive interest.

Cited in reference notes in 55 A. S. R. 590, on rescission of contracts for mistake of facts; 59 A. D. 615, on setting aside of contracts in equity for constructive fraud; 59 A. D. 615, on setting aside contract for undue influence; 79 A. D. 457, on contracts as affected by inadequacy of consideration; 21 A. D. 603; 59 A. D. 615,—on setting aside contract for inadequacy of consideration; 23 A. D. 720, as to when intoxication is ground for avoiding contract; 22 A. D. 526, on effect of intoxication upon contract and relief in equity.

Distinguished in *Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473, holding that equity will not grant relief against interest, though much in excess of current rate; *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809, holding that equity

will not relieve one who, to control corporation, purchased stock at excessive price, and citing annotation also on this point.

— Prerequisites to rescission.

Cited in *Henry v. Allen*, 93 Ala. 197, 9 So. 579, to point that party seeking to rescind contract for fraud must place adversary in *statu quo*, and citing annotation also on this point.

Cited in reference notes in 34 A. D. 58, on prerequisites to rescission of contract; 39 A. D. 344, on conditions precedent to rescission of contract by vendee.

15 AM. DEC. 575, DUDLEY v. LITTLE, 2 OHIO, 504.

Right to combine to bid at public sale.

Cited in *Phippen v. Stickney*, 3 Met. 384, holding agreement between buyers, that one shall bid for the other, not necessarily invalid; *Morrison v. Commerce Bank*, 81 Ind. 335, holding agreement to bid jointly at tax sale to protect liens, not unlawful; *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787, holding purchases at public sales by associations formed therefor, not necessarily invalid; *Towle v. Leavitt*, 23 N. H. 360, 55 A. D. 195, holding by bidding and "puffing" at auction sales, against public policy; *People v. Lord*, 6 Hun. 390, holding public board entitled to recover damages sustained by stifling competition in bidding for public contracts; *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33, to point that mere formation of partnership for purpose of obtaining public contracts, not necessarily prohibited.

Cited in reference notes in 20 A. D. 229, on combination to prevent bidding at public sale; 55 A. D. 755, as to when agreements to unite in bid at auction sale are valid.

Cited in notes in 20 L.R.A. 546, 551, on effect of preventing or checking bids on validity of sale at auction; 18 A. D. 566, on title acquired by purchaser at tax sale where combination was formed to make purchases thereat.

Distinguished in *Piatt v. Oliver*, 1 McLean, 295, Fed. Cas. No. 11,114, holding purchases by associations at public auction, of public lands, valid.

Partnership for illegal purpose.

Cited in note in 115 A. S. R. 410, on effect of illegal purpose of partnership.

Presumptions and rights attendant upon public sales — Tax sales.

Cited in *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615, holding errors made in assessing taxes, sufficient ground to avoid tax sale; *Lafferty v. Byers*, 5 Ohio 458, to point that no presumption is made in favor of validity of tax sale; *Stewart v. Kemp*, 54 Tex. 248, holding one paying taxes while holding under invalid tax title, not entitled to compensation therefor.

Cited in note in 75 A. S. R. 249, on right of partnership to purchase tax title.

— Sale of school lands.

Cited in *Sealing v. Lawrence*, 27 Ohio St. 441 (dissenting opinion), on effect of defective advertisement upon validity of sale of school lands by county auditor.

Avoiding fraudulent sales.

Cited in *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179, holding it unnecessary to tender money received before suit to annul conveyance because of collusion among purchasers; *Slater v. Maxwell*, 6 Wall. 268, 18 L. ed. 796, to point that equity should be applied to for relief from sales impeached for fraud.

15 AM. DEC. 578, DILLER v. ROBERTS, 13 SERG. & R. 60.

Applicability of terms of original lease to tenant holding over.

Cited in *Foltz v. Prouse*, 17 Ill. 487; *Phillips v. Monges*, 4 Whart. 226,—holding

that tenant holds over under terms and covenants of original lease; *Ames v. Schuesler*, 14 Ala. 600, holding it error to instruct jury that they might infer party holding over intended to hold at same rate; *Crommelin v. Thiess*, 31 Ala. 412, 70 A. D. 499, holding that presumption of holding over at same rent does not arise where new contract is made; *Plattsmouth v. New Hampshire Sav. Bank*, 71 C. C. A. 507, 139 Fed. 631; *Abbot v. Shepherd*, 4 Phila. 90, 17 Phila. Leg. Int. 222,—holding presumption that tenant holds over under terms of original lease, inapplicable where special provision made therefor; *Martin v. Hamersky*, 63 Kan. 360, 65 Pac. 637, holding same where, for rent, tenant was to “break” land; *Ives v. Williams*, 50 Mich. 100, 15 N. W. 33, holding tenant holding over not entitled to insist on provisions of lease which have become inapplicable; *Muller’s Estate*, 16 Phila. 321, 41 Phila. Leg. Int. 6, 14 W. N. C. 308, holding that tenant holding over becomes tenant from year to year under terms of original lease; *Hemphill v. Flynn*, 2 Pa. St. 144, holding that landlord may treat tenant holding over as tenant from year to year; *San Antonio v. French*, 80 Tex. 575, 26 A. S. R. 763, 16 S. W. 440, holding contra where tenant is a municipal corporation; *Clayton v. McCay*, 143 Pa. 225, 22 Atl. 754, 28 W. N. C. 402, upon question of terms under which tenant is presumed to hold over; *Hughes v. Lillibridge*, 22 Pa. Co. Ct. 185, 8 Pa. Dist. R. 358, holding warrant of attorney to confess judgment for nonpayment of rent, inapplicable to period of holding over; *Carter v. Collar*, 1 Phila. 339, 9 Phila. Leg. Int. 50, holding in assumpsit for rent for holding over period, original lease, though under seal, admissible to prove amount due.

Cited in reference notes in 60 A. D. 629, on method of determining rent upon holding over; 32 A. D. 158, on tenant holding over without new stipulations holding impliedly subject to lease.

Distinguished in *Hollis v. Burns*, 100 Pa. 206, 45 A. R. 379, 13 W. N. C. 241, 39 Phila. Leg. Int. 421, 13 Pittsb. L. J. N. S. 304, holding that landlord cannot treat monthly tenant holding over as tenant from year to year.

Distraint for rent.

Cited in *Martin’s Appeal*, 5 Watts & S. 220, denying right of landlord to distraint for rent agreed to be paid in advance, under lease not yet commenced.

Cited in notes in 9 E. R. C. 609, on right to distraint for nonpayment of rent; 15 A. D. 587, on existence of relation of landlord and tenant as prerequisite to distress.

Conclusiveness of officer’s return to writ.

Cited in *Splahn v. Gillespie*, 48 Ind. 397; *Sauser v. Werntz*, 1 Legal Chron. 249; *Denning’s Estate*, 18 Phila. 224, 44 Phila. Leg. Int. 430, 20 W. N. C. 391, 4 Pa. Co. Ct. 179; *Hill v. Robertson*, 2 Pittsb. 103, 7 Pittsb. L. J. 258,—holding sheriff’s return conclusive as between the parties; *Stranghellan v. Ward*, 13 W. N. C. 111, to same effect; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833, holding officer’s return of service of process, conclusive upon parties in collateral suit; *Rickard v. Major*, 34 Pa. Super. Ct. 107, holding that sheriff’s return in replevin cannot be contradicted by defendant in his affidavit of defense; *Rivard v. Gardner*, 39 Ill. 125, holding that defendant cannot, as against third persons, set up falsity of sheriff’s return; *Smith’s Estate*, 13 Pa. Dist. R. 80, holding sheriff’s return to execution against assignor, conclusive for purposes of distribution of assigned estate; *Mentz v. Hamman*, 5 Whart. 150, 34 A. D. 546, holding that as between execution creditors sheriff’s return to *fi. fa.* cannot be gainsaid; *Phillips v. Elwell*, 14 Ohio St. 240, 84 A. D. 373, holding officer’s return only *prima facie* evidence against defendant’s prior vendee.

Cited in reference notes in 22 A. D. 393; 23 A. D. 217; 29 A. D. 499,—on conclusiveness of sheriff's return; 25 A. D. 239, as to when and upon whom return of sheriff or other officer is conclusive; 34 A. D. 530, on conclusiveness of sheriff's return on parties to suit; 80 A. D. 432, on conclusiveness of officer's return when collaterally called into question; 24 A. D. 39, on officer's return as evidence.

Cited in note in 43 A. D. 531, on sheriff's return of process as evidence between parties.

15 AM. DEC. 581, LICHTENTHALER v. THOMPSON, 13 SERG. & R. 157.

Priority of claim for rent.

Cited in *Oram's Estate*, 5 Kulp, 423, holding landlord as against execution creditors, entitled to accruing rent up to time of levy; *Parker's Appeal*, 5 Pa. 390, to point that landlord's priority to execution creditors is not confined to the last year's rent; *Greider's Appeal*, 5 Pa. 422, holding landlord not entitled to share in proceeds of execution against tenant, where tenancy extinguished prior to sale; *Ege v. Ege*, 5 Watts, 134, holding same as to one without right of distraint; *Re Ralston*, 2 Clark (Pa.) 224, holding landlord not entitled to priority for year's rent where year's rent not due at tenant's death.

Right to rent where tenant decreed a bankrupt.

Cited in *Prentiss v. Kingsley*, 10 Pa. 120, holding rent accruing subsequent to time tenant decreed a bankrupt, recoverable.

Distress for rent.

Cited in reference notes in 38 A. D. 576; 41 A. D. 211; 53 A. S. R. 303,—on distress for rent; 26 A. D. 689, as to when distress for rent lies; 35 A. S. R. 910, on what subject to distress for rent.

Cited in note in 9 E. R. C. 610, on right to distrain for nonpayment of rent.

Release of surety by creditor's showing favor to debtor.

Cited in *Davis v. Mikell*, Freem. Ch. (Miss.) 548, holding surety released where creditor abandoned levy on land and levied on debtor's personalty; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 A. D. 685, holding surety discharged by creditor's surrendering security held by him, though other security taken; *La Farge v. Herter*, 11 Barb. 159, holding surety discharged where, after judgment, creditor accepted from debtor security in discharge of execution had against him. *Storms v. Thorn*, 3 Barb. 314, holding surety discharged where creditors agreed with debtor to suspend collection of judgment; *Maquoketa v. Willey*, 35 Iowa, 323; *Baker v. Briggs*, 25 Mass. 122, 19 A. D. 311,—holding that creditor parting with debtor's property loses claim against surety to value thereof; *Fuller v. Loring*, 42 Me. 481 (dissenting opinion); *Geddis v. Hawk*, 1 Watts, 280 (dissenting opinion),—upon same point; *Com. v. Brice*, 22 Pa. 211, 60 A. D. 79, holding sheriff's sureties not discharged by commissioners' failure to retain money due him; *Whitehouse v. American Surety Co.* 117 Iowa, 328, 90 N. W. 727, holding surety not released by claimant's failure to prosecute proceeding securing him preference but not lien; *Richards v. Com.* 40 Pa. 146, holding surety not discharged where creditor failed to present his claim to debtor's assignee; *Coatesville v. Hope*, 1 Chester Co. Rep. 57, holding surety of tax collector not released because treasurer failed to issue warrant and seize collector's property; *Hayes v. Josephi*, 26 Cal. 535, holding surety tendering amount due creditor thereby released where debtor becomes insolvent.

Cited in reference notes in 29 A. D. 226, on what acts of creditor discharge

surety; 37 A. D. 595, on discharge of surety by creditor's interference; 24 A. D. 645, on release of surety by indulgence to principal; 43 A. S. R. 358, on impairment of surety's remedy; 37 A. D. 725, on release of surety accommodation indorser or acceptor by neglect or indulgence as to debtor; 49 A. D. 461, on release of surety by creditor surrendering collateral securities or property in his hands.

Cited in notes in 41 L. ed. U. S. 413, on subrogation of sureties; 115 A. S. R. 98, on duty of creditor to surety where he has property or funds of principal in his possession; 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal; 51 A. D. 303, on holder's surrender of collateral security as discharge of surety.

Distinguished in *Cunningham v. Morrow*, 24 Pa. Co. Ct. 348, holding surety not discharged by creditor's failing to take the money when offered by debtor; *Glazier v. Douglass*, 32 Conn. 393, holding surety not released by creditor's failure to avail himself of a set-off.

15 AM. DEC. 589, STEWART v. STOCKER, 13 SERG. & R. 199.

Executions irregularly issued.

Cited in *Elliott v. Hart*, 45 Mich. 234, 7 N. W. 812, holding that omission of name of county in justice's execution may be cured by parol evidence; *Lawber's Appeal*, 8 Watts & S. 387, 42 A. D. 302, holding that objection to an execution apparently valid can be made only by defendant therein; *Stewart v. Stocker*, 1 Watts, 135, holding validity of execution informally entered not subject to collateral attack.

—Premature issuance of.

Cited in *Olmstead v. Brewer*, 91 Ala. 124, 8 So. 345, holding execution prematurely issued voidable and not void; *Wilkinson's Appeal*, 65 Pa. 189, holding execution prematurely issued on award of arbitrators not void; *Shimp v. Hay*, 8 Ill. App. 68, holding execution issued after dismissal of appeal, but before procedendo filed, voidable only; *Buck v. James*, 2 Chester Co. Rep. 401, holding that executions prematurely issued cannot be avoided by subsequent attaching creditors; *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033, holding alias execution issued before return day of original execution valid where debtor arrested after such day; *Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462, holding that constable cannot plead the premature issuance of execution or that it commanded collection of excessive interest; *Steele v. Tutwiler*, 68 Ala. 107, holding summary execution against sureties on administration bond issued before return day of execution against administrator, voidable; *Sheetz v. Huber*, 31 Phila. Leg. Int. 28, 2 Legal Chron. 9, 6 Legal Gaz. 68, holding execution issued before expiration of stay, only voidable; *Beebe v. United States*, 161 U. S. 104, 40 L. ed. 633, 16 Sup. Ct. Rep. 532, holding execution issued before expiration of time agreed on for stay thereof, not void; *Elliott v. Brinzer*, 1 Pearson (Pa.) 39, holding execution not stayed as agreed upon, valid as against other creditors of debtor; *Sheetz v. Wyncoop*, 74 Pa. 198, sustaining execution entered before expiration of stay thereof where record showed no order to stay.

Cited in reference notes in 24 A. S. R. 778, on right collaterally to attack execution prematurely issued upon existing judgment; 21 A. S. R. 908, on collateral attack by another execution creditor on execution prematurely issued.

Cited in note in 23 A. D. 710, on validity of execution prematurely issued.

Effect of irregularities in judgments.

Cited in *Sondheimer v. Fox*, 19 Lanc. L. Rev. 386, holding judgment recovered

by default on note before same due, voidable only; *Dickerson's Appeal*, 7 Pa. 255, holding judgment not void because sci. fa. named unnecessary parties; *Stradding v. Henck*, 2 Phila. 302, 14 Phila. Leg. Int. 212, holding judgment, though entered in violation of agreement, not open to collateral attack; *Com. v. Rogers*, 4 Clark (Pa.) 252, *Brightly (Pa.)* 450, holding sheriff satisfying judgment subsequently reversed, not liable in action for restitution.

When interest allowed.

Cited in *Beetim v. Buchanan*, 4 Watts, 59, holding interest not recoverable where defendant pays purchase money upon final decree, as an alternative condition of his bond.

Cited in note in 51 A. D. 277, on allowance of interest.

15 AM. DEC. 593, AMMANT v. NEW ALEXANDRIA & P. TURNP. ROAD, 13 SERG. & R. 210.

Liability of public or quasi public corporation's property — To levy.

Cited as a leading case in *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. 290, to point that railroad right of way is not subject to execution.

Cited in *Shamokin Valley R. Co. v. Livermore*, 47 Pa. 465, 86 A. D. 552; *Youngman v. Elmira & W. R. Co.* 65 Pa. 278, 27 Phila. Leg. Int. 317, 2 Legal Gaz. 165,—to point that property of public corporation necessary to exercise of its franchise is exempt from execution; *Reynolds v. Reynolds Lumber Co.* 26 Pittsb. L. J. N. S. 61, holding property of corporation, the operation of which is a matter of direct public interest, not subject to sale by creditors; *East Side Bank v. Columbus Tanning Co.* 15 Pa. Co. Ct. 357, holding corporation's property necessary to use of its public franchises, subject only to special execution; *Graham v. Pennsylvania & O. Canal Co.* 3 Pittsb. 341, 19 Pittsb. L. J. 101, holding canal company's franchises as to property situated within Pennsylvania, not subject to sale under fi. fa.; *Loudenslager v. Benton*, 3 Grants Cas. 384, 4 Phila. 382, 18 Phila. Leg. Int. 196, holding that sequestration is to be resorted to where a railroad company becomes insolvent; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 A. D. 315, holding house occupied by collector of canal tolls exempt from execution; *Northern P. R. Co. v. Shimmell*, 6 Mont. 161, 9 Pac. 889, holding same of railroad company's depot safe; *Ludlow v. Hurd*, 1 Disney (Ohio) 552, holding same of necessary office furniture of a railroad; *Covey v. Pittsburg, Ft. W. & C. R. Co.* 3 Phila. 173, 15 Phila. Leg. Int. 228, holding same of personal property of railroad necessary to its operation; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488, holding same of franchises and roadbed of turnpike company; *Gooch v. McGee*, 83 N. C. 59, 35 A. R. 558, holding same of land condemned by navigation company; *Hart v. Burnett*, 15 Cal. 530, holding same of municipal lands held in trust for public; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 94 A. S. R. 948, 64 L.R.A. 501, 44 S. E. 294, holding foreign railroad car not subject to attachment in garnishment proceeding; *Leedom v. Plymouth R. Co.* 5 Watts & S. 265, holding railroad's right to take tolls not bound by judgment against it; *For-dyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 550, 7 L.R.A. (N.S.) 485, 96 S. W. 155, holding charitable corporation allowing judgment to go against it for its agent's negligence, entitled to recover the property executed upon; *Macon & W. R. Co. v. Parker*, 9 Ga. 377, on right to seize and sell a railroad under execution; *Reed v. Penrose*, 36 Pa. 214, 2 Grants Cas. 472 (dissenting opinion), on liability of tolls, etc. of improvement company to execution attachment.

Annotation cited in *McNeal Pipe & F. Co. v. Howland*, 111 N. C. 615, 20

L.R.A. 743, 16 S. E. 857 (dissenting opinion), on liability of public corporation's property to levy and sale under execution.

Cited in reference notes in 29 A. S. R. 516, on execution against corporate franchises; 68 A. S. R. 27, on exemption of franchises and rolling stock of corporation from execution; 20 A. D. 533, on exemption of franchises from execution; 3 A. S. R. 496.

Cited in notes in 35 A. S. R. 390, on franchises subject to execution; 20 L.R.A. 738, on execution or judicial sale of corporate franchise or property necessary to its enjoyment; 35 A. S. R. 396, on sequestration of profits of franchises by equity.

— To sale and assignment.

Cited in *Yellow River Improv. Co. v. Wood County*, 81 Wis. 554, 17 L.R.A. 92, 51 N. W. 1004, to point that corporation's franchises and its necessary property are not assignable; *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 3 L.R.A. 435, 20 N. E. 432, holding that court in directing railroad to be sold as an entirety to satisfy statutory lien exceeded its authority; *Connor v. Tennessee C. R. Co.* 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 931, holding decree directing sale of portion of railroad's roadbed, apart from the franchises ineffective; *Coe v. Pennock*, Fed. Cas. No. 2,942, to point that equity will decree sale of railroad and distribute proceeds only in cases of absolute necessity; *Arthur v. Commercial & R. Bank*, 9 Smedes & M. 394, 48 A. D. 719, holding that, while a railroad's franchise cannot be assigned, the road itself can; *Montgomery v. Multnomah R. Co.* 11 Or. 344, 3 Pac. 435, on validity of assignment of ferry license; *Hackett v. Wilson*, 12 Or. 25, 6 Pac. 652, upon same point.

— To mechanics' liens.

Cited in *Guest v. Lower Merion Water Co.* 142 Pa. 610, 12 L.R.A. 324, 21 Atl. 1001, 28 W. N. C. 285, holding property of public water company necessary to its operation, exempt from mechanics' liens; *Foster v. Fowler*, 60 Pa. 27, holding necessary property of a water company not subject to mechanic's lien; *McPheeters v. Merrimac Bridge Co.* 28 Mo. 465, holding privately owned public bridge not subject to mechanic's lien.

Executions against property of private corporations.

Cited in *Reynolds v. Reynolds Lumber Co.* 169 Pa. 626, 47 A. S. R. 935, 32 Atl. 537, 36 W. N. C. 537; *East Side Bank v. Columbus Tanning Co.* 170 Pa. 1, 32 Atl. 539,—holding property of purely private corporation subject to levy and sale under execution.

Transfer of corporate franchise.

Cited in reference note in 42 A. D. 316, on power of corporation to make valid transfer of franchises and make corporate rights.

Cited in notes in 35 A. S. R. 390, 391, on nontransferability of franchises; 35 A. S. R. 405, 406, on transfer of property essential to exercise of franchise.

Service of writ.

Cited in *Smith v. Altoona & P. Connecting R. Co.* 182 Pa. 139, 37 Atl. 930, 41 W. N. C. 1, holding that under the sequestration statute sheriff may serve his writ at corporation's principal office, wherever situated.

Respective functions of legislature and court.

Cited in *Shewell v. Keen*, 1 Miles (Pa.) 186, suggesting application to legislature to remedy what was considered a defective law.

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15 AM. DEC. 596, SICKMAN v. LAPSLEY, 13 SERG. & R. 224.

Extent to which fraudulent contracts are binding.

Cited in *Telford v. Adams*, 6 Watts, 429, holding transaction intended to deceive creditors binding on parties to it; *Eyrick v. Hetrick*, 13 Pa. 488, holding that one deriving title from grantee in fraudulent deed cannot impeach same; *Horn v. Star Foundry Co.* 23 W. Va. 522, holding contract made in consideration of insolvent debtor's promise to depreciate value of his property, unenforceable.

Cited in reference notes in 26 A. D. 194, on voluntary conveyances; 31 A. D. 484, on fraudulent conveyances and transfers; 53 A. D. 94, on effect of fraudulent conveyance; 17 A. D. 756, on validity of voluntary conveyances; 28 A. D. 206; 12 A. S. R. 517,—on validity of fraudulent conveyance as between the parties; 68 A. S. R. 504, on rights as between parties to fraudulent conveyances; 64 A. D. 175, as to when administrator can impeach fraudulent conveyance of intestate; 50 A. D. 469, on right of administrator of grantor or vendor to impeach fraudulent conveyance, transfer, or assignment.

Cited in notes in 34 A. D. 765, 766, on rights of parties to illegal or fraudulent transactions; 3 A. S. R. 735, on right of person to set up his own fraud in executing instrument.

Allowance of interest.

Cited in notes in 51 A. D. 277, on allowance of interest; 50 A. D. 272, as to when interest is allowed.

— In garnishment proceedings.

Cited in *Jackson v. Lloyd*, 44 Pa. 82, upon rule for determining allowance of interest in garnishment proceedings; *Mackey v. Hodgson*, 9 Pa. 468, holding garnishee withholding sum greater than debt claimed in foreign attachment, liable for interest.

Who liable for cost in garnishment proceeding.

Cited in *Warniche v. Seamen*, 5 Kulp, 428, holding that, if garnishee has no funds, costs of the attachment are chargeable to plaintiff.

15 AM. DEC. 601, BUCHANAN v. MOORE, 13 SERG. & R. 304.

What will amount to an estoppel in pais.

Cited in *Miller's Appeal*, 84 Pa. 391, 4 W. N. C. 405, 34 Phila. Leg. Int. 348, holding party who in ignorance of his own title induces another to purchase from third person, estopped thereby; *Horn v. Cole*, 51 N. H. 287, 12 A. R. 111, 5 Legal Gaz. 49, holding owner representing goods to belong to another estopped to deny such fact when such other's debtor attaches them; *Power v. Thorp*, 92 Pa. 346, holding that loss consequent upon innocent misrepresentation made by purchaser at sheriff's sale falls on him; *Com. v. Moltz*, 10 Pa. 527, 51 A. D. 499, as to what conduct upon part of ward amounts to estoppel *in pais*.

Cited in reference notes in 60 A. D. 749, on estoppel *in pais*; 56 A. D. 120, on estoppel *in pais* arising from acts, admissions, and conduct; 56 A. D. 362, on estoppel of owner of land in asserting title where he acquiesces in or invites its disposition to another; 50 A. D. 248, on estoppel of one permitting his land to be sold on execution against another; 40 A. D. 165, on concealment of title as estoppel.

Cited in note in 39 A. D. 60, on ratification of unauthorized execution sale.

— Silence.

Cited in *Epley v. Witherow*, 7 Watts, 163, holding one standing by and seeing his property sold as the property of another, estopped thereby; *Bixler v. Gilleland*, 4 Pa. 156, to same effect; *Logan v. Gardner*, 136 Pa. 588, 20 A. S. R. 939,

20 Atl. 625, 47 Phila. Leg. Int. 475, holding that estoppel arises after removal of disability by merely remaining silent while grantee makes improvements; Verrier v. Guillou, 14 Phila. 2, 37 Phila. Leg. Int. 50, holding that failure to object to counterclaim will preclude one from pleading limitations to same.

—Pointing out land conveyed.

Cited in *Clark v. Hindman*, 46 Or. 67, 79 Pac. 56, holding father estopped by pointing out boundary of land conveyed to daughter, buildings being erected in reliance thereon; *Hickernell v. Stoner*, 1 Dauphin Co. Rep. 133, holding same of owner pointing out to prospective purchaser a boundary line; *Mitchell v. Millingar*, 55 Pa. 215, 25 Phila. Leg. Int. 172, holding same of grantor pointing out certain land as the land conveyed.

15 AM. DEC. 603, RAYMOND v. BAAR, 13 SERG. & R. 318.

Payment in counterfeit money.

Cited in reference notes in 36 A. D. 574, on payment in counterfeit note; 45 A. D. 179, on liability of party making payment in counterfeit bills.

Cited in note in 52 A. D. 451, on payment in counterfeit bank bills.

Time to object to forged indorsement or character of money received.

Cited in *Rick v. Kelly*, 30 Pa. 527, holding that to recover consideration notice of forged indorsement must be made within reasonable time, unless note worthless; *Curcier v. Pennock*, 14 Serg. & R. 51, holding delay of three years in objecting to character of coin taken in exchange for goods, unreasonable.

Cited in note in 10 L.R.A. (N.S.) 541, on effect of laches of one accepting, without indorsement, transfer of worthless check or note of third person.

15 AM. DEC. 604, CULLER v. MOTZER, 13 SERG. & R. 356.

Adverse possession by cotenant.

Cited in *Unger v. Mooney*, 63 Cal. 586, 49 A. R. 100; *King v. Carmichael*, 136 Ind. 20, 43 A. S. R. 303, 35 N. E. 509; *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407; *Abernathie v. Consolidated Virginia Min. Co.* 16 Nev. 260; *Town v. Needham*, 3 Paige, 545, 24 A. D. 246; *Bogardus v. Trinity Church*, 4 Paige, 178; *Weisinger v. Murphy*, 2 Head, 674; *Johnston v. Virginia Coal & I. Co.* 96 Va. 158, 31 S. E. 85,—holding that grantee in open possession as sole owner may acquire title adverse to his grantor's cotenant; *Goewey v. Urig*, 18 Ill. 238; *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. 388; *Dikeman v. Parrish*, 6 Pa. 210, 47 A. D. 455,—to same effect; *Van Gunden v. Virginia Coal & I. Co.* 3 C. C. A. 294, 8 U. S. App. 229, 52 Fed. 838, holding that one purchasing at tax sale and holding as sole owner thereby ousts delinquent's cotenant; *Gill v. Fauntleroy*, 8 B. Mon. 177, holding that grantee in open possession for twenty-six years claiming as sole owner, required title adverse to his grantor's cotenant; *Beall v. McMenemy*, 63 Neb. 70, 93 A. S. R. 427, 88 N. W. 134, holding sale coupled with exclusive possession by grantee, sufficient to constitute ouster of cotenant; *King v. Pardee*, 96 U. S. 90, 24 L. ed. 666, holding that where tenant in common enters and claims as sole owner his cotenant is thereby ousted; *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367, holding that one in open possession as sole owner may acquire title adverse to his cotenant; *Law v. Patterson*, 1 Watts & Serg. 184, holding same where acts of exclusive ownership exercised by one tenant in common; *Miller v. Miller*, 60 Pa. 16, 100 A. D. 538, holding one witnessing his cotenant's will, devising the land as sole owner, thereby ousted; *Northrop v. Wright*, 7 Hill, 476, to point that possession by grantees under deed not purporting to convey an undivided

portion will enable them to set up adverse title; *Reed v. Bachman*, 61 W. Va. 452, 123 A. S. R. 996, 57 S. E. 769, holding to point that cotenant's entry after purchasing other interests is presumed to be under former interest.

Cited in reference notes in 28 A. D. 297, on adverse possession against cotenant by grantee under deed in severalty; 77 A. D. 651, as to when possession is adverse to wife.

Right of cotenant to purchase in outstanding title.

Cited in *Wright v. Sperry*, 21 Wis. 331, holding that tenant in common claiming as sole owner may purchase in an outstanding tax title.

Running of limitations against married women.

Cited in *Care v. Keller*, 77 Pa. 487, 1 W. N. C. 288, holding that statute of limitations applies to an action of dower; *Winters v. De Turk*, 133 Pa. 359, 7 L.R.A. 658, 25 W. N. C. 511, 19 Atl. 354, 20 Pittsb. L. J. N. S. 457, 47 Phila. Leg. Int. 288, holding that widow's right of action for dower in land conveyed by husband during coverture accrues at his death; *Varick v. Edwards*, Hoffm. Ch. 382, to same effect; *Foster v. Marshall*, 22 N. H. 491, holding that limitations do not accrue against wife until termination of estate of tenant by curtesy initiate.

Cited in note in 36 A. D. 70, on effect of coverture on limitation of actions.

Effect of bar of co-owner.

Cited in *Rankin v. Tenbrook*, 6 Watts, 388, holding that statute of limitations makes no provision for successive disabilities; *Jordan v. Thornton*, 7 Ga. 517, holding that one within exception of statute may recover notwithstanding his cotenant barred.

15 AM. DEC. 608, FUHRMAN v. LOUDON, 13 SERG. & R. 386.

Validity of acknowledgments incorrect as to name of county.

Cited in *Angier v. Schieffelin*, 72 Pa. 106, 13 A. R. 659, holding mortgage entitled to record, though acknowledgment had mistake as to name of county; *Beckel v. Petticrew*, 6 Ohio St. 247, holding that body of mortgage may be resorted to to supply name of county left blank in acknowledgment; *Ross's Appeal*, 106 Pa. 82, 15 W. N. C. 217, 41 Phila. Leg. Int. 366, holding acknowledgment sufficient, though it failed to set out county for which officer was justice.

Cited in notes in 23 A. D. 211, on sufficiency of acknowledgment where name of county is left blank; 41 A. D. 172, as to where acknowledgments may be taken, and necessity of location appearing in certificate.

Rights of vendee where vendor without title.

Cited in *Ludwick v. Huntsinger*, 5 Watts & Serg. 51, holding evidence that vendor had no title admissible in action on bond given for purchase money.

Rights of vendee where title defective.

Cited in *Wilson v. Cochran*, 46 Pa. 229, 20 Phila. Leg. Int. 260, holding that grantee in warranty deed may defend purchase-money suit by showing eviction under paramount right of way; *Murphy v. Richardson*, 28 Pa. 288, holding that grantee intended to take risk of title not inferable from fact that old deeds referring to outstanding title were recorded; *Wiggins v. McGimpsey*, 13 Smedes & M. 532, holding it no defense to action for purchase money that land was subject to judgment liens.

Distinguished in *Christy v. Reynolds*, 16 Serg. & R. 258, holding that grantee in warranty deed may defend suit for purchase money by pleading subsequently discovered liens.

-Effect of vendee's knowledge of defect.

Cited in *Anderson v. Lincoln*, 5 How. (Miss.) 279, holding that equity will not grant relief to one buying with knowledge of defect in title; *Green v. Finucane*, 5 How. (Miss.) 542, refusing to enjoin collection of purchase-money notes where vendee knew vendor had only equitable title; *Wilson's Appeal*, 109 Pa. 606, 43 Phila. Leg. Int. 332, holding that vendee taking with knowledge outstanding lease cannot defend suit for purchase money; *Fellows v. Jeter*, 3 Phila. 130, 15 Phila. Leg. Int. 139, holding same of vendee taking counter security against known mortgage; *Caldwell v. Lightner*, 13 Pa. Dist. R. 683, holding same of grantee in general warranty deed purchasing with knowledge of defects in title; *Beidelman v. Foulk*, 5 Watts, 308, to same effect; *Lighty v. Shorb*, 3 Penr. & W. 447, 24 A. D. 334, holding that where covenant against known defect exists, purchase money cannot be detained unless such covenant broken; *Wilson v. Cochran*, 48 Pa. 107, 86 A. D. 574, 22 Phila. Leg. Int. 37, holding eviction under paramount title no defense where vendee bought with knowledge thereof; *Goucher v. Helmbold*, 1 Miles (Pa.) 407, to point that grantee with knowledge that grantor's power to convey is doubtful assumes attendant risks.

Effect of removal on necessity of demand.

Cited in reference note in 17 A. D. 597, on effect of removal of maker of note on necessity of demand and notice.

15 AM. DEC. 612, HULL v. CONNOLLY, 3 M'CORD, L. 6.

Contracts for necessities by infant living with parent or guardian.

Cited in *Kline v. L'Amoureux*, 2 Paige, 419, 22 A. D. 652, holding infant's contract for necessities unenforceable when same furnished him by his guardian; *Nicholson v. Spencer*, 11 Ga. 607, holding that tradesman must show articles furnished infant were necessary in addition to those furnished by guardian; *Roche v. Chaplin*, 1 Bail. L. 419, as to liability of infant for necessities, he having a guardian; *Danforth v. Colvin*, M'Mull. L. 14, holding that infant suitably maintained by parent cannot bind herself for necessities; *Englebert v. Troxell* (*Englebert v. Pritchett*), 40 Neb. 195, 42 A. S. R. 665, 26 L.R.A. 177, 58 N. W. 852, to point that infant living with parent not liable for services of guardian *ad litem*; *Rhode v. Tuten*, 34 S. C. 496, 13 S. E. 676, to point that mother is best fit to determine what is necessary for her infant children.

Cited in reference notes in 36 A. D. 297, on validity of infants' contracts; 26 A. D. 748, on liability of infants on contracts for necessities; 28 A. D. 634, on infant's liability on contract for necessities.

Cited in notes in 21 A. D. 161; 22 A. D. 654; 12 L.R.A. 859,—on liability of infant for necessities; 18 A. S. R. 696, on who may take advantage of infancy.

- When furnished an allowance.

Cited in *Rivers v. Gregg*, 5 Rich. Eq. 274, holding infant having sufficient allowance *prima facie* not liable for necessities furnished on credit.

Cited in note in 18 A. S. R. 647, 649, on effect of infant's being already supplied with necessities upon contract for.

15 AM. DEC. 614, GALPIN v. FISHBURNE, 3 M'CORD, L. 22.

Entry of judgment *nunc pro tunc*.

Cited in reference note in 35 A. D. 526, on entry of judgment *nunc pro tunc*.

Cited in notes in 20 L.R.A. 148, on *nunc pro tunc* entry of judgment in case of delay or negligence of party; 4 A. S. R. 833, on effect of entry of judgment *nunc*

pro tunc rights of third parties; 15 L.R.A. (N.S.) 683, on right to enter judgment *nunc pro tunc* as of date of rendition so as to affect intervening rights of third persons.

What judgments affect purchasers.

Cited in *McClannahan v. Smith*, 76 Mo. 428, holding that one purchasing prior to amendment of a judgment not affected thereby; *Coe v. Erb*, 59 Ohio St. 259, 63 A. S. R. 764, 52 N. E. 640, to point that purchaser takes subject only to existing judgments.

15 AM. DEC. 615, HAYWARD v. MIDDLETON, 3 M'CORD, L. 121.

Requisites of customs and usages.

Cited in *Ft. Worth & D. C. R. Co. v. Johnson*, 2 Tex. App. Civ. Cas. (Willson) 179, holding that customs are binding only when general and long acquiesced in.

Cited in reference notes in 20 A. D. 434, on usage of trade; 35 A. D. 271, on what constitutes usage; 63 A. S. R. 811, on validity of custom; 30 A. D. 584, on nature and validity of usages; 70 A. D. 523, on essentials to binding force of usages and customs; 55 A. D. 172, on overruling of particular custom against natural reason.

Consignor's liability for freight.

Cited in *Holt v. Westcott*, 43 Me. 445, 69 A. D. 74, holding consignor liable for freight, notwithstanding bill of lading provides that consignee pay same.

Cited in reference notes in 47 A. D. 169; 69 A. D. 77; 85 A. D. 709,—on liability of consignor for freight; 38 A. S. R. 403, as to who is liable to carrier to pay freight.

15 AM. DEC. 622, TURNBULL v. RIVERS, 3 M'CORD, L. 131.

Presumption of grant of easement.

Cited in reference notes in 30 A. D. 278, on presumption of grant of right of way; 59 A. D. 746, on long user as presumption of right to easement; 67 A. D. 240, on period necessary to raise presumption of grant of easement; 57 A. D. 299, on presumption of grant from owners of land from long use of road by public.

Ways of necessity.

Cited in *Gaines v. Lunsford*, 120 Ga. 370, 102 A. S. R. 109, 47 S. E. 967, holding that constitutional provision securing landowners ways of necessity does not contemplate ways of convenience; *Pierce v. Selleck*, 18 Conn. 321, holding way of necessity extinguished upon construction of public way, though same less convenient; *Kingsley v. Gouldsborough Land Improv. Co.* 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074, holding that access by water to land bordering on sea precludes way of necessity over adjoining land; *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462, holding that way of necessity may exist where access by water is not generally available.

Cited in reference notes in 38 A. D. 64; 100 A. D. 116,—on right of way by necessity; 33 A. D. 546; 35 A. D. 305; 59 A. D. 388,—as to when way by necessity exists.

Cited in notes in 35 A. D. 465; 85 A. D. 675,—on ways from necessity; 85 A. D. 677, 678, on cases in which ways of necessity exist; 85 A. D. 677, on fact that ways of necessity must be supported by necessity; 17 L.R.A. (N.S.) 1019, 1022, on way of necessity where other possible modes of access exist.

Criticized in *Smith v. Kinard*, note 2 Hill, L. 642, to point that way of necessity may arise where grantor reserves center of tract.

Easements arising by implication and prescription.

Cited in *Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co.* 20 Mont. 533, 52 Pac. 375, holding that easement to flood and store water upon grantor's land excluded right to lay water pipes thereon; *Wynn v. Garland*, 19 Ark. 23, 68 A. D. 190, to point that easements may arise from deed or prescription; *Rosser v. Bunn*, 66 Ala. 89, as to what rules govern question of public road *vel non* in new country.

Necessity of submitting case to jury.

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1029, holding right to trial by jury not violated by allowing demurrer to evidence for insufficiency thereof.

Power of appellate court in granting new trials.

Cited in *Lockett v. Townsend*, 3 Tex. 119, 49 A. D. 723, holding that appellate court will exercise controlling power of granting new trials.

Cited in reference note in 24 A. D. 319, as to when new trial may be granted.

15 AM. DEC. 625, BARNSTINE v. EGGART, 3 M'CORD, L. 162.**Consideration required by statute of frauds to support contracts of guaranty.**

Cited in *Ellis v. Carroll*, 68 S. C. 376, 102 A. S. R. 679, 47 S. E. 679, holding one's agreement to pay attachee's debt on creditor releasing his goods, not within statute; *Dunlap v. Thorne*, 1 Rich. L. 213, holding same of agreement to pay boarder's bill on innkeeper's releasing his trunk; *Pope v. Fort*, 2 McMull. L. 60 (dissenting opinion), upon consideration necessary to contract of guaranty to render same binding under statute of frauds.

Cited in note in 95 A. D. 263, on consideration in new promise to take case out of statute of frauds.

15 AM. DEC. 627, COATE v. SPEER, 3 M'CORD, L. 227.**Admissibility of hearsay evidence.**

Distinguished in *Sexton v. Hollis*, 26 S. C. 231, 1 S. E. 893, holding evidence as to who was the "reputed owner" of the land in question, inadmissible; *Lynn v. Thomson*, 17 S. C. 129, holding declarations of deceased builder inadmissible to prove height of dam.

— Declarations respecting boundary lines.

Cited in *Gibson v. Poor*, 21 N. H. 440, 53 A. D. 216, holding undisputed corresponding line competent evidence to settle a line in dispute; *Morton v. Folger*, 15 Cal. 275, holding deposition in one action of deceased surveyor, respecting boundary lines, admissible in another action between different parties; *Stroud v. Springfield*, 28 Tex. 649, to point that deceased surveyor's field notes are admissible; *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500, holding declarations of deceased surveyor respecting boundaries of which he was not shown to have knowledge, inadmissible; *Tracy v. Eggleston*, 47 C. C. A. 357, 108 Fed. 324 (dissenting opinion), on admissibility of declarations of deceased and interested surveyor respecting lines of his survey; *Hunnicutt v. Peyton*, 102 U. S. 333, 26 L. ed. 113, holding declarations respecting private boundary by deceased person not shown to have knowledge of the facts, inadmissible; *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536, as to extent to which declarations of deceased former owner respecting boundaries are admissible; *High v. Pancake*, 42 W. Va. 602, 26 S.

E. 536, upon admissibility of declarations as to boundaries and citing annotation also on this point.

Cited in reference notes in 34 A. D. 105, on evidence of boundary; 15 A. D. 519; 17 A. D. 594; 13 A. S. R. 728; 67 A. S. R. 153,—on hearsay evidence as to boundary; 31 A. D. 636, as to when declaration of person in possession of land is evidence on question of boundary; 68 A. S. R. 648, on admissibility of declarations of deceased persons as to boundary; 30 A. D. 595, on admissibility of declarations and admissions of person deceased made while in possession of land as to boundary; 15 A. D. 706, on evidence as to boundaries; 42 A. D. 633, on admissibility of declarations of vendor as to boundary lines.

Cited in notes in 94 A. S. R. 680, 681, on admissibility of declarations of persons since deceased as to private boundaries; 94 A. S. R. 682, on admissibility as against third persons of declarations of surveyor and chainmen since deceased.

Distinguished in *Taylor v. Glenn*, 29 S. C. 292, 13 A. S. R. 724, 7 S. E. 483, holding declarations of deceased persons respecting course of stream admitted to be a boundary, inadmissible.

15 AM. DEC. 631, SHEPHERD v. TURNER, 3 M'CORD, L. 249.

Right to set-off.

Cited in reference notes in 22 A. D. 84; 26 A. D. 711,—on law of set-off; 27 A. D. 131, as to when set-off is allowable; 45 A. D. 137, as to what demands are subject to set-off; 59 A. D. 386, on breach of warranty as set-off to action for price of goods.

—As dependent upon time demand accrued.

Cited in *Enter v. Quesse*, 30 S. C. 126, 14 A. S. R. 891, 8 S. E. 796, holding that counterclaim must exist in favor of defendant at commencement of suit; *Godley v. Barnes*, 13 Rich. L. 161, holding that for third party's note to be available as set-off transfer before suit commenced must be shown; *Weaver v. First Nat. Bank*, 126 Ind. 111, 25 N. E. 887, to point that only mutual and subsisting debts available by way of set-off; *Lowrie v. Williamson*, 3 M'Cord, L. 247, holding that one owing insolvent at time of assignment cannot set off debt subsequently acquired; *Bemis v. Simpson*, Ga. Dec. pt. 2, p. 224, holding that equity will not set off claim arising subsequent to commencement of action at law, though judgment creditor insolvent.

Cited in reference note in 60 A. D. 74, on necessity that set-off be debt existing in defendant's favor at commencement of action.

Cited in notes in 17 L.R.A. 460, on effect of immaturity of claim against insolvent at time of insolvency on right of set-off; 55 L.R.A. 50, on set-off in bankruptcy cases of debts created or claims arising after insolvency.

Distinguished in *McAlpin v. Wingard*, 2 Rich. L. 547, holding note of payee not due when note in suit transferred, unavailable as a set-off.

15 AM. DEC. 632, BENT v. GRAVES, 3 M'CORD, L. 280.

Power of parties to confer jurisdiction on courts.

Cited in *Rathbun v. Moody*, 4 Minn. 364, Gil. 273, holding that parties cannot by consent confer jurisdiction on supreme court; *Winn v. Freele*, 19 Ala. 171, holding consent of parties ineffective to give court jurisdiction in appeals from justices; *Lindsay v. People*, 1 Idaho, 438, to point that parties cannot by consent confer jurisdiction upon court; *Price v. Hobbs*, 47 Md. 359, holding that parties cannot empower appellate court to apply equitable principles to appeal

from judgment at law; *Burckle v. Eckhart*, 3 N. Y. 132, holding that waiver cannot exist where residence of defendant within certain district is a jurisdictional fact; *Zonker v. Cowan*, 84 Ind. 395, holding objection to validity of appointment of trial judge properly raised in appellate court.

Cited in reference notes in 14 A. S. R. 140; 36 A. S. R. 754; 66 A. S. R. 733,—on jurisdiction conferred by consent; 18 A. D. 127, on consent of parties as conferring jurisdiction; 54 A. D. 433, on power of parties to confer jurisdiction on justice of the peace by consent.

—By reducing amount of claim.

Cited in *Planters' & M. Bank v. Chipley*, Ga. Dec. pt. 1, p. 50, holding that justice's court cannot be given jurisdiction by splitting debt into small sums; *Burke v. Adoue*, 3 Tex. Civ. App. 494, 22 S. W. 824, holding that plaintiff cannot bring his claim for liquidated damages within court's jurisdiction by entering a fictitious credit; *Wells v. Michigan Mut. L. Ins. Co.* 41 W. Va. 131, 23 S. E. 527, holding that party may reduce his claim for unliquidated damages to bring same within justice's jurisdiction.

Cited in reference notes in 42 A. D. 319, on jurisdiction depending on amount in controversy; 73 A. D. 294, on right of plaintiff to waive part of demand to bring it within jurisdiction of inferior court.

Cited in note in 28 L.R.A. 226, on right to make remission to bring debt within jurisdiction of courts.

Distinguished in *Huff v. Huff*, 1 Bail. L. 456, holding that in trover plaintiff may recover to extent of jurisdiction, though property value exceed same.

15 AM. DEC. 633, BYNUM v. CLARK, 3 M'CORD, L. 298.

Referring to title and preamble in construing statute.

Cited in *Re Benezet Joint Stock Asso.* 42 Phila. Leg. Int. 140, 17 Phila. 215, holding that preamble can aid, but not control, the interpretation; *Bohle v. Stannard*, 7 Mo. App. 51, holding it improper to look to preamble where ordinance unambiguous; *Robinson v. Tuttle*, 37 N. H. 243, holding that preamble may be resorted to, to aid in interpreting statutes; *Cochran v. Library Co.* 6 Phila. 492, 25 Phila. Leg. Int. 20, holding title of doubtful statute may be referred to in interpreting same.

Cited in reference notes in 38 A. S. R. 301, on construction of statute; 41 A. S. R. 311, on reference to title in construction of statute; 46 A. D. 108, on right to use preamble of statute to explain equivocal expressions.

Cited in note in 23 A. D. 477, as to purpose for which preamble of statute may be looked to.

Validity of yearly leases, when oral.

Cited in *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596, holding that tenant in possession under parol lease for twelve months may maintain trespass; *Davis v. Pollock*, 36 S. C. 544, 15 S. E. 718, holding action to charge one upon a parol lease for twelve months not sustainable.

15 AM. DEC. 634, STONEY v. UNION INS. CO. 3 M'CORD, L. 387.

Concealment of facts by insured.

Cited in reference note in 81 A. S. R. 139, on effect of concealment and warranty on liability on marine policy.

Cited in notes in 13 E. R. C. 530, on duty of party effecting marine insurance to disclose material facts; 40 A. D. 350, on effect on validity of insurance of concealment of material fact by insurer.

15 AM. DEC. 640, GALPIN v. HARD, 3 M'CORD, L. 394.**Place of payment of note.**

Cited in reference notes in 61 A. S. R. 238, on place of payment of negotiable instrument; 74 A. S. R. 764, on place of payment of negotiable instrument.

Duty toward indorser as to demand and notice.

Cited in reference notes in 28 A. D. 255, on demand of payment of negotiable instruments; 53 A. D. 742; 54 A. D. 557,—on necessity for demand and notice to charge indorser of bill or note; 39 A. D. 736, on maker's waiver of demand; 52 A. D. 594, as to when checks are to be presented.

Cited in notes in 96 A. D. 612, on degree of diligence required of holder of note in making demand and giving notice; 97 A. S. R. 990, on diligence required against indorser of non-negotiable instrument.

— Upon removal of maker.

Cited in *Reid v. Morrison*, 2 Watts & S. 401, holding presentment unnecessary where maker left for foreign country.

Cited in reference notes in 59 A. D. 178, on removal of maker as excusing demand of payment; 37 A. D. 456, on absence of maker of note as affecting necessity for demand to hold indorser.

— Place of demand.

Cited in *Foard v. Johnson*, 2 Ala. 565, 36 A. D. 421, holding it insufficient to address notice to drawer of bill at place where same dated; *Nicholson v. Barnes*, 11 Neb. 452, 38 A. R. 373, 9 N. W. 652, holding demand at place where note dated insufficient if maker known to reside elsewhere within state; *Taylor v. Snyder*, 3 Denio, 145, 45 A. D. 457, to point that maker is only presumed to reside where note dated.

Cited in reference notes in 21 A. S. R. 231; 37 A. S. R. 406,—on place of demand of payment of negotiable instrument; 3 A. S. R. 626, on place of presentment of bill of exchange; 66 A. D. 197, as to when demand of payment must be made at maker's residence.

Liability of indorser of note payable to bearer.

Cited in *Allwood v. Haseldon*, 2 Bail. L. 457, holding liability of one indorsing note payable to bearer same as if note payable to order.

15 AM. DEC. 645, MEADOWS v. MEADOWS, 3 M'CORD, L. 458.**Sufficiency of memorandum of sale.**

Cited in *Frazer v. Howe*, 106 Ill. 563, holding writing failing to show unqualified agreement, insufficient; *Secrist v. Twitty*, 1 McMull. L. 255, holding sheriff's entry of sale in execution book, sufficient where, though not signed, it contained purchaser's name.

Cited in reference notes in 65 A. D. 668; 66 A. D. 549,—on requisites of memorandum required by statute of frauds; 58 A. D. 213; 87 A. D. 644,—on requisites of memorandum of agreement for sale of lands required by statute of frauds; 60 A. D. 760, on requisites of memorandum of sale at auction; 30 A. D. 389, as to what auctioneer's memorandum must show; 30 A. D. 502, on memorandum of auctioneer within statute of frauds; 51 A. S. R. 149, on memorandum made at auction as compliance with statute of frauds; 61 A. D. 255, on necessity that auctioneer's memorandum be contemporaneous with sale to take it out of statute of frauds.

Cited in notes in 26 A. D. 661, on certainty in contract as essential to specific

performance; 11 L.R.A. 143, on what memorandum of contract must show to authorize its specific performance.

Distinguished in *Peay v. Seigler*, 48 S. C. 496, 50 A. S. R. 731, 26 S. E. 885, holding writing, though not signed by both, sufficient where contract affirmed by adverse party in his answer.

Right of auctioneer to make memorandum of sale.

Cited in *Brock v. Jones*, 8 Tex. 78, to point that entry by auctioneer of terms of sale is sufficient to satisfy statute.

Cited in reference notes in 30 A. D. 389; 54 A. D. 300,—on auctioneer as agent of both parties; 37 A. D. 416, on auctioneer's power to sign memorandum.

—Right of auctioneer's clerk to make memorandum of sale.

Cited in *Doty v. Wilder*, 15 Ill. 407, 60 A. D. 756, holding memorandum by auctioneer's clerk made at time of sale, sufficient to bind both parties; *Cathcart v. Keirnaghan*, 5 Strobb. L. 129, holding entry by auctioneer's clerk, sufficient when assent of purchaser proved; *Entz v. Mills*, 1 McMull. L. 453, holding entry by auctioneer's clerk in sales book, when not made with assent of parties, insufficient.

15 AM. DEC. 647, HOUSTON v. HOUSTON, 3 M'CORD, L. 491.

Law determining validity of will.

Cited in *Colonna v. Alton*, 23 App. D. C. 296; *Re Elcock*, 4 M'Cord, L. 39, 17 A. D. 703,—holding validity of execution of will of personalty determined by law existing at testator's death.

Cited in note in 51 A. D. 574, on governing force of law at testator's death as to sufficiency of execution of will.

Distinguished in *Lane's Appeal*, 57 Conn. 182, 14 A. S. R. 94, 4 L.R.A. 45, 17 Atl. 926, holding validity of execution of will determined by law in force at time will executed.

Operation of will upon subsequently acquired personalty.

Cited in *Garrett v. Garrett*, 2 Strobb. Eq. 272, to point that subsequently acquired personalty passes under will bequeathing all property.

Distinguished in *Martindale v. Warner*, 15 Pa. 471, upon same point in holding statute regarding lapsing of legacies inapplicable.

15 AM. DEC. 648, DE GRAFFENREID v. MITCHELL, 3 M'CORD, L. 506.

Presumption of gift from delivery.

Cited in *Martin v. Martin*, 13 Mo. 36, holding that gift will be presumed where father delivers slave to son upon his marriage; *Hooe v. Harrison*, 11 Ala. 499, holding same where slaves are delivered to son-in-law about to leave state.

Cited in reference notes in 32 A. D. 266, on delivery as essential to gift; 42 A. D. 609, on presumption of gift where parent suffers possession of property to go into hands of child on marriage.

Cited in note in 40 A. D. 434, on presumption of gift arising from delivery of property from parent to child.

Right to break into house to serve writ.

Cited in *Kelley v. Schuyler*, 20 R. I. 432, 78 A. S. R. 887, 44 L.R.A. 435, 39 Atl. 893, holding officer breaking and entering dwelling to serve writ of replevin after admittance refused, a trespasser.

Cited in reference notes in 35 A. D. 632, on breaking outer door to levy

execution; 22 A. D. 432; 25 A. D. 566,—on breaking open doors or windows of dwelling to make levy.

Cited in note in 11 E. R. C. 643, 647, on right of sheriff to break into a house to execute process.

Distinguished in *McElhenny v. Wylie*, 3 Strobb. L. 284, 49 A. D. 643, holding rule preventing one using his house to protect another's goods against execution, inapplicable where contract of hiring existed.

15 AM. DEC. 650, LEE v. PERRY, 3 M'CORD, L. 552.

Acknowledgment required to revive barred debt.

Cited in reference note in 18 A. D. 662, on sufficiency of acknowledgment to revive debt barred by limitation.

Cited in notes in 23 A. D. 589, on acknowledgment to remove bar of limitations; 10 A. D. 572, on necessity of promise to remove bar of limitations; 102 A. S. R. 754, on general effect of acknowledgment or new promise to suspend running or remove bar of limitations; 102 A. S. R. 771, on acts or writings showing acknowledgment or new promise to pay sufficient to suspend running or remove bar of limitations.

Distinguished in *Lee v. Polk*, 4 M'Cord, L. 215, holding admitting an account, but claiming a greater discount, insufficient acknowledgment; *Young v. Monpoey*, 2 Bail. L. 278, holding indorser's statement that he would have paid barred note had he been notified, insufficient.

15 AM. DEC. 652, CROCKER v. SPENCER, 2 D. CHIP. (VT.) 68.

Necessaries within exemption statutes.

Cited in *Montague v. Richardson*, 24 Conn. 338, 63 A. D. 173, holding it improper to construe "necessary" in exemption statute as meaning "indispensably requisite;" *Hart v. Hyde*, 5 Vt. 328, holding cooking stove a necessary and exempt from attachment.

Cited in note in 45 A. D. 256, on meaning of term "household furniture" as used in exemption statutes.

Distinguished in *Dunlap v. Edgerton*, 30 Vt. 224, holding piano not a necessary article of furniture within exemption statute.

Proper action where exempt property taken.

Cited in *Dow v. Smith*, 7 Vt. 465, 29 A. D. 202, holding trespass the appropriate action where property exempt from execution taken.

15 AM. DEC. 653, GRAVES v. SHELDON, 2 D. CHIP. (VT.) 71.

Implied revocation of wills.

Cited in *Hoitt v. Hoitt*, 63 N. H. 475, 56 A. R. 530, 3 Atl. 604, holding will only revoked *pro tanto* where testator conveyed part of his estate; *Prater v. Whittle*, 16 S. C. 40, holding will not entirely revoked by testator's conveying all his realty and part of his personalty; *Blandin v. Blandin*, 9 Vt. 210, holding testator's subsequently acquiring from his son entire interest in farm devised, no revocation; *Fellows v. Allen*, 60 N. H. 439, 49 A. R. 328, holding sister's destruction of her will made in favor of testator, no revocation of latter's will.

Cited in reference notes in 51 A. D. 386, on revocation of wills; 34 A. D. 139, on what amounts to revocation of will; 16 A. D. 382; 22 A. D. 72; 35 A. S. R. 549; 90 A. D. 331,—on implied revocation of will; 39 A. D. 724, on revocation of will *pro tanto* by alteration in circumstances of testator's estate; 40 A. S. R.

539, on revocation of will by subsequent conveyance; 21 A. S. R. 329, on revocation of will by marriage.

Cited in notes in 28 A. S. R. 344, 356, on implied revocation of wills; 10 L.R.A. 57, on presumptive revocation of will; 28 A. S. R. 358, on sale of property as revocation of will; 20 A. D. 488; 80 A. D. 516,—on implied revocation of wills by marriage and birth of issue.

15 AM. DEC. 661, WASHBURN v. TRACY, 2 D. CHIP. (VT.) 128.

Contributory negligence.

Cited in *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456, holding employee injured by explosion of boiler entitled to recover if using ordinary care.

Cited in reference notes in 36 A. D. 659; 46 A. D. 671,—as to when contributory negligence bars recovery.

Cited in notes in 23 A. D. 669, on contributory negligence of person injured; 34 A. D. 280, on contributory negligence defeating recovery for injury.

—In highway.

Cited in *Riepe v. Elting*, 89 Iowa, 82, 48 A. S. R. 356, 26 L.R.A. 769, 56 N. W. 285, holding question of negligence of each for jury where one on horseback turned at night to left, on hearing another approach; *Parker v. Adams*, 12 Met. 415, 46 A. D. 694, holding plaintiff, being negligent, not entitled to recover where carriages collided, though defendant on wrong side; *McKelvey v. Twenty-Third Street R. Co.* 5 Misc. 424, 26 N. Y. Supp. 711, denying recovery to one injured by passing car while shoveling coal from wagon.

Cited in reference note in 13 A. R. 135, on rules governing passing vehicles on public highway.

Cited in notes in 73 A. D. 405, on law of the road; 48 A. S. R. 372, 373, on negligence of travelers in meeting on road; 48 A. S. R. 376, on relative rights in road of horsemen and footmen, light and heavy vehicles; 73 A. D. 407, on duty of both parties to exercise ordinary care to avoid collision or injury in highway; 73 A. D. 408, on contributory negligence of person injured by collision on highway.

—At railroad crossing or on track.

Cited in *Beers v. Housatonic R. Co.* 19 Conn. 566, holding one driving cattle along highway crossed by railroad, bound to use reasonable care; *Macon & W. R. Co. v. Winn*, 19 Ga. 440, holding that plaintiff injured at railroad crossing could not recover if by ordinary diligence he could have avoided defendant's negligence; *Galena & C. Union R. Co. v. Jacobs*, 20 Ill. 478, holding that fault of plaintiff injured while on railroad track is to be measured by negligence of defendant.

Right to have jury instructed.

Cited in *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456, holding party entitled to direct and positive instruction upon point material to issue and evidence.

Cited in reference notes in 26 A. D. 433, on necessity of instructions on question of law on evidence adduced; 39 A. D. 656, on party's right to instruction on point of law if there is evidence to prove same.

Cited in note in 99 A. D. 126, as to when instructions requested must be given.

15 AM. DEC. 664, ROSS v. BANK OF BURLINGTON, 1 AIK. (VT.) 43.**Law of the case.**

Cited in *Sherman v. Estey Organ Co.* 69 Vt. 355, 38 Atl. 70, holding decision of court will not be reversed upon second appeal, where facts are unchanged; *Herrick v. Belknap*, 27 Vt. 673, holding that decision upon any point in a case is conclusive in that case; *Re Wells*, 69 Vt. 388, 38 Atl. 83, holding such rule applicable to decrees of probate court.

Cited in note in 39 A. D. 376, on establishment of law in particular case as being the law of the case.

Right to recover on lost instrument.

Cited in reference notes in 41 A. D. 298, on actions on lost or destroyed notes; 81 A. D. 669, as to when recovery may be had on destroyed bank note; 84 A. D. 505, on right of owner of destroyed bank notes to recover their amount from bank.

Cited in note in 52 A. D. 450, on owner's right to recover from bank on proof of destruction of bank note.

Admissibility of declarations.

Cited in *Coffin v. Bradbury*, 3 Idaho, 770, 95 A. S. R. 37, 35 Pac. 715, holding time not necessarily controlling element in doctrine of *res gestæ*; *Moorman v. Danville*, 90 Va. 455, 18 S. E. 869, holding declarations of bankrupt in favor of his grandchildren, inadmissible against creditors.

Cited in reference notes in 39 A. D. 448; 42 A. D. 609; 56 A. D. 120; 59 A. D. 610,—on admissibility of declarations of a party as part of *res gestæ*; 10 A. S. R. 306, as to when declarations are part of the *res gestæ*; 52 A. D. 164, 180, on declarations of party as evidence for himself as part of *res gestæ*; 26 A. D. 356, on admissibility of declarations in favor of person making them, when they are part of *res gestæ*.

Cited in note in 39 A. D. 656, on inadmissibility of party's declaration in his own favor.

Distinguished in *Worden v. Powers*, 37 Vt. 619, holding party's declarations made after transaction completed, not admissible in his favor.

— To fix date.

Cited in *Wilkins v. Metcalf*, 71 Vt. 103, 41 Atl. 1035, holding self-serving declaration of defendant in bastardy proceeding, admissible to fix time of alleged act; *Hill v. North*, 34 Vt. 604, holding that for purpose of identifying date evidence of what plaintiff said to witness admissible; *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35, holding hearsay admissible to identify the occasion and to characterize the transaction.

Granting new trials.

Cited in *May v. Gamble*, 14 Fla. 467, holding that new trial will not be granted for errors which are not prejudicial; *Walworth v. Readsboro*, 24 Vt. 252, denying new trial where it clearly appeared same verdict would be reached.

Cited in reference notes in 66 A. S. R. 101, on grounds for new trial; 85 A. D. 270, on granting new trial where it appears that result must be same on retrial.

Cited in note in 99 A. D. 129, on erroneous instructions as ground for reversal or new trial.

15 AM. DEC. 669, CONANT v. SMITH, 1 AIK. (VT.) 67.**Right of co-owner to have partition.**

Cited in *Hunt v. Wright*, 47 N. H. 396, 93 A. D. 451, sustaining provision

against partition in deeds to cotenants of hotel property; *Hall v. Vernon*, 47 W. Va. 295, 81 A. S. R. 791, 49 L.R.A. 464, 34 S. E. 764 (dissenting opinion), on right to have partition of oil and gas owned in fee separate from surface; *Coleman v. Coleman*, 19 Pa. 100, 57 A. D. 641, to point that equity may deny partition and regulate enjoyment of the property between owners; *Crowell v. Woodbury*, 52 N. H. 613, holding partition of sawmill and water privilege by allowing alternate occupations, improper; *Lenfers v. Henke*, 73 Ill. 405, 24 A. R. 263, 7 Legal Gaz. 110, to point that dower in mines cannot be assigned by metes and bounds nor partition made at law.

Cited in reference notes in 93 A. D. 455, on partition between tenants in common as common-law right; 30 A. S. R. 208, on what may be partitioned; 81 A. S. R. 797, on partition of mineral interests.

Cited in notes in 16 L.R.A. 220, on validity of agreement against right to partition; 91 A. S. R. 887, on partible nature of mines by actual partition between cotenants; 91 A. S. R. 888, on partible nature of mines between cotenants by sale.

Distinguished in *Smith v. Smith*, 10 Paige, 470 (modifying Hoffm. Ch. 506), decreeing partition of mill and mill pond; *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369, holding cotenant entitled to partition notwithstanding loss may result therefrom.

15 AM. DEC. 670, BOARDMAN v. KEELER, 1 AIK. (VT.) 158.

Validity of sales when possession not changed.

Cited in *Beattie v. Robin*, 2 Vt. 181, holding sale without change of possession void as against vendor's attaching creditors; *Clark v. Morse*, 10 N. H. 236, holding sale not rendered fraudulent by attaching debtor's regaining possession under contract of hiring; *Lowe v. Matson*, 140 Ill. 108, 29 N. E. 1036, holding that assignor's retaining possession for time does not render assignment void as to execution creditors, and citing annotation also on this point.

Cited in reference notes in 29 A. D. 363, on retention of possession of personal property by vendor; 49 A. D. 65; 53 A. D. 94; 30 A. S. R. 484,—on retention of possession of chattels by seller as evidence of fraud; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor.

—Judicial sale.

Cited in *Gate v. Gaines*, 10 Vt. 346, holding sheriff's sale exception to rule rendering sales without change of possession fraudulent; *Fitzpatrick v. Peabody*, 51 Vt. 195, to same effect; *Caswell v. Jones*, 65 Vt. 457, 36 A. S. R. 879, 20 L.R.A. 503, 26 Atl. 529, holding that sheriff's sale may, though change of possession be unnecessary, be attacked for actual fraud.

Cited in reference notes in 36 A. S. R. 343; 69 A. S. R. 64,—on change of possession after execution sale; 20 A. D. 199, 241; 23 A. D. 62; 24 A. D. 409,—on retention of possession by defendant in execution after sheriff's sale; 47 A. D. 89, on effect of leaving execution debtor in possession after sale; 64 A. D. 655, on effect of possession of personal property being retained by defendant in execution after sale; 26 A. D. 256, on nonapplicability of statute of frauds to judicial sales.

15 AM. DEC. 673, ROBINSON v. REYNOLDS, 1 AIK. (VT.) 174.

Effect of husband's alienage or nonresidence upon wife's status.

Cited in *Mead v. Hughes*, 15 Ala. 141, 50 A. D. 123, holding that wife may

make contracts where husband left state intending to abandon her; *Riel v. Press*, 70 N. H. 334, 47 Atl. 608, holding resident married woman's deed valid, though not signed by alien husband; *Mitchell v. Hughes*, 3 Colo. App. 43, 32 Pac. 185, holding that *feme covert* testamentary incapacity continues unless husband's abjuration clearly proved; *Levi v. Marsha*, 122 N. C. 565, 29 S. E. 832, holding resident wife of nonresident alien liable on her contracts; *M'Arthur v. Bloom*, 2 Duer, 151, holding same of wife of alien not allowed to emigrate without permission; *Matteson v. Dederkey*, 12 R. I. 68, holding that under statute suit against wife abated on husband's return; *Smith v. Silence*, 4 Iowa, 321, 66 A. D. 137, holding abandoned wife entitled to sue where husband out of state, notwithstanding she had interviews with him; *Mayhugh v. Rosenthal*, 1 Cin. Sup. Ct. Rep. 492 (dissenting opinion), on effect on wife's right to deed property, of husband's long-continued absence.

Cited in reference note in 54 A. D. 621, as to when wife may sue or be sued as *feme sole*.

Cited in notes in 37 A. D. 712, on requisites of abandonment to give wife rights of *feme sole*; 64 A. S. R. 869, on effect of husband's desertion on wife's power to make deed; 64 A. S. R. 867, on effect of husband's abandonment upon wife's property rights, power to contract, etc; 64 A. S. R. 864, on effect of husband's abjuration of realm or leaving state on wife's property rights or power to contract; 55 A. D. 610, on conclusiveness of personal judgment against married woman while she is virtually *feme sole*; 37 A. D. 710, on wife of alien as *feme sole*; 37 A. D. 709, on wife of one who is *civiliter mortuus*, as *feme sole*.

15 AM. DEC. 676, PINGRY v. WASHBURN, 1 AIK. (VT.) 264.

Order of proof.

Cited in *Ranney v. St. Johnsbury & L. C. R. Co.* 67 Vt. 594, 32 Atl. 810, holding order of testimony, as regards examination of particular witnesses and course of trial, within court's discretion; *Pratt v. Rawson*, 40 Vt. 183, to same effect and holding that no exception lies to court's decision; *State v. Magoon*, 50 Vt. 333, sustaining trial court's action in allowing, upon rebuttal, evidence not strictly of such nature.

Impairment of vested rights.

Cited in *Lawson v. Jeffries*, 47 Miss. 686, 12 A. R. 342, holding ordinance of constitutional convention granting new trials upon certain classes of final judgments, void.

Cited in reference notes in 54 A. D. 393, on statutes impairing obligation of contracts; 42 A. D. 728, on legislative grant as a contract the obligation of which cannot be impaired.

— Corporate matters.

Cited in *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506, holding statute regulating railroad traffic rates void where charter reserved no power to legislature; *State v. Richmond & D. R. Co.* 73 N. C. 527, 21 A. R. 473, holding that railroad's charter right to alter its gauge cannot be taken away by statute; *White's Creek Turnp. Co. v. Davidson County*, 3 Tenn. Ch. 396, holding statute changing position of corporation's tollgates with respect to a recently developed town, unconstitutional; *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833, holding that railroad commission cannot enforce traffic rates insufficient to cover expenses; *Thorpe v. Rutland & B. R. Co.*

27 Vt. 140, 62 A. D. 625, sustaining statute requiring railroads to maintain cattle guards at farm crossings.

Cited in reference notes in 29 A. S. R. 378, on vested rights in franchise; 69 A. D. 580, on right of legislature to alter charter of private corporation.

Agreements against public policy.

Cited in *Frost v. Belmont*, 6 Allen, 152; *Harris v. Roof*, 10 Barb. 489,—holding “lobbying” contracts void; *Hyer v. Richmond Traction Co.* 26 C. C. A. 175, 42 U. S. App. 522, 80 Fed. 839, holding agreement intended to prevent competition between rival competitors for street railway franchise, void; *Noyes v. Day*, 14 Vt. 384, holding note given for forbearance to bid upon public contract, unenforceable; *Stanton v. Allen*, 5 Denio, 434, 49 A. D. 282, holding agreement among canal boat proprietors, intended to control traffic rates, void; *Buck v. First Nat. Bank*, 27 Mich. 293, 15 A. R. 189, holding note given bank on condition that it, as prosecutor, recommend clemency, unenforceable; *Doane v. Chicago City R. Co.* 160 Ill. 22, 35 L.R.A. 588, 45 N. E. 507, holding purchase of abutting owner’s consent to lay track, void where statute required assent of such owners; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 224, 6 L.R.A. 601, 44 N. W. 17, holding railroad’s agreement not to seek grant of public lands, but to assist another in obtaining same and to share therein, void; *Old Colony R. Co. v. New Bedford*, 188 Mass. 234, 74 N. E. 468, to point that town’s contract to buy off railroad’s objection to certain grade crossing is void; *Prime v. Brandon Mfg. Co.* 16 Blatchf. 453, Fed. Cas. No. 11,421, applying rule *in pari delicto*, etc., to extensions of patent founded on a conveyance intended to deceive patent office.

Cited in reference notes in 18 A. D. 403, on validity of contract prohibited by statute; 34 A. S. R. 613, on invalidity of contract to procure legislation; 42 A. D. 666, on invalidity of contract for purpose of influencing legislature; 40 A. D. 524, on validity of agreement in consideration of withdrawing opposition to passage of act of legislature; 61 A. D. 350, on invalidity of agreement to grant certain privileges in consideration of withdrawal of opposition to passage of act.

Cited in notes in 30 L.R.A. 742, on validity of contract to procure legislation; 66 A. D. 510, on invalidity of contracts to secure appointment to office or place of trust.

Distinguished in *Lyon v. Mitchell*, 36 N. Y. 235, 93 A. D. 502, sustaining contract of agency to make sale to government, though agent selected because of his political influence.

Passing tollgate.

Cited in *Boek v. State*, 50 Ind. 281, holding company authorized to erect tollgate entitled to close same against traveler refusing to pay toll; *Panton Turnp. Co. v. Bishop*, 11 Vt. 198, holding town not entitled to demolish tollgate, though its citizens had acquired right to pass toll-free.

Requisites of magistrate’s certificate to depositions.

Cited in *Lund v. Dawes*, 41 Vt. 370, rejecting deposition where magistrate’s certificate, following printed form, disregarded deponent’s name.

15 AM. DEC. 679, MAZOZON v. FOOT, 1 AIK. (VT.) 282.

Suspension of limitations where debtor nonresident.

Cited in *Dunning v. Chamberlin*, 6 Vt. 127, holding that saving clause of statute extends as well to foreigners as to absent citizens.

Cited in reference note in 39 A. D. 50, on absence from state as exception to statute of limitations.

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Cited in note in 8 L.R.A. 334, on interruption of statute of limitations by absence from state.

— **Effect of debtor's return.**

Cited in *Stevens v. Fisher*, 30 Vt. 200, holding merely proving debtor a non-resident insufficient, as he might have come within state; *Hall v. Nasmith*, 28 Vt. 791, as to necessity of debtor's return being known to creditor; *Hill v. Bellows*, 15 Vt. 727, holding debtor's making temporary visits to state, insufficient where creditor ignorant thereof; *Didier v. Dawson*, 2 Sandf. Ch. 61, holding it sufficient that debtor's return be public, with intention to remain, though creditor without knowledge thereof; *Davis v. Marshall*, 37 Vt. 69, to point that debtor's return interrupts suspension, notwithstanding he subsequently leave state.

Distinguished in *Davis v. Field*, 56 Vt. 426, holding debtor's coming to reside permanently within state, sufficient, though creditor ignorant thereof.

— **Effect of debtor's possession of attachable property.**

Cited in *Rixford v. Miller*, 49 Vt. 319, holding burden on nonresident defendant to show he had known attachable property; *Burnham v. Courser*, 69 Vt. 183, 37 Atl. 288, to same effect.

15 AM. DEC. 681, BLAKE v. HOWE, 1 AIK. (VT.) 306.

Tenant's right to assert title adverse to landlord.

Cited in *Norwood v. Kirby*, 70 Ala. 397, denying right of one holding as tenant to assert title adverse to his landlord.

Cited in reference notes in 38 A. S. R. 194; 82 A. S. R. 183,—on estoppel of tenant to dispute landlord's title.

Cited in notes in 17 A. D. 521, on right of tenant or subtenant to set up claim to land; 7 L.R.A. (N.S.) 931, on estoppel of subtenant to question original landlord's title; 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title.

Who may acquire tax title.

Annotation cited in *Burns v. Lewis*, 86 Ga. 591, 13 S. E. 123, holding that one morally bound to pay taxes cannot better his title by purchasing at tax sale; *Curtis v. Borland*, 35 W. Va. 124, 12 S. E. 1113, holding that purchase by agent at tax sale, it being his duty to purchase for owner, operates merely as payment of taxes.

Cited in reference notes in 36 A. D. 103, on tax sales; 15 A. D. 577; 76 A. D. 406; 85 A. D. 100; 10 A. S. R. 384; 19 A. S. R. 125; 24 A. S. R. 788; 43 A. S. R. 920; 62 A. S. R. 877; 75 A. S. R. 229,—on who may purchase at a tax sale; 100 A. S. R. 365, on who may purchase and enforce a tax title; 67 A. D. 455, on strengthening title by purchase at tax sale; 50 A. D. 469; 66 A. D. 533,—on right of one whose duty it is to pay taxes to strengthen title by purchase at tax sale; 91 A. D. 387, on right of trustee to purchase trust property at tax sale thereof.

— **Tenant's right to.**

Cited in *Oppenheimer v. Levi*, 96 Md. 296, 60 L.R.A. 729, 54 Atl. 74, holding tax title acquired by lessee covenanting to pay taxes, cloud on reversioner's title and removable in equity; *Bailey v. Campbell*, 82 Ala. 342, 2 So. 646, holding that tenant acquires no title by purchasing certificate issued to purchaser at tax sale, and citing annotation also on this point.

Cited in reference notes in 65 A. D. 452, on liability of tenant to pay taxes on landlord's land; 76 A. D. 362, on tenant's right to acquire landlord's title to land by virtue of tax sale.

Cited in notes in 89 A. S. R. 84, on acquisition of landlord's title by tenant;

75 A. S. R. 241, on right of tenant to purchase and enforce tax title; 15 E. R. C. 305, on right of tenant to purchase landlord's land on sale against latter; 53 L.R.A. 939, on right of tenant to acquire title derived from tax sale during tenancy where he has agreed to pay the tax.

- Cotenant's right to.

Cited in reference note in 14 A. S. R. 540, on right of tenant for life to purchase tax title and hold adversely to remainderman or reversioner.

- Co-owner's right to.

Cited in *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615, to point that one cannot purchase at tax sale to injury of his quasi co-owner; *Muthersbaugh v. Burke*, 33 Kan. 260, 6 Pac. 252, holding purchase of tax title by one, inoperative to destroy his cotenants' interests, and citing annotation also on this point; *Clark v. Lindsey*, 47 Ohio St. 437, 9 L.R.A. 740, 25 N. E. 422, holding that purchase at tax sale by one cotenant inures to benefit of all cotenants, and citing annotation also on this point.

Cited in reference note in 76 A. D. 362, on cotenant's right to acquire title to joint property by tax sale.

- Vendee's right to.

Cited in *Hunt v. Rowland*, 22 Iowa, 53, holding title adverse to vendor not acquired by one purchasing at tax sale at instance of vendee; *Johnston v. Smith*, 70 Ala. 108, holding that acquirement of tax title by one holding under contract to purchase operates merely as payment of taxes.

- Mortgagor's and mortgagee's right to.

Cited in *Smith v. Lewis*, 20 Wis. 351, holding that second mortgagee purchasing on foreclosing his mortgage and acquiring tax title holds subject to first mortgage; *Dunn v. Snell*, 74 Me. 22, holding that one bound to pay taxes cannot, as against mortgagee, acquire tax title; *Howze v. Dew*, 90 Ala. 178, 24 A. S. R. 783, 7 So. 239, to point that tax title acquired by mortgagee in possession is inoperative against mortgagor or his devisee, and citing annotation also on this point.

Annotation cited in *Burchard v. Roberts*, 70 Wis. 111, 5 A. S. R. 148, 35 N. W. 286, holding that purchase at tax sale for benefit of mortgagees operates merely as payment of taxes; *Jones v. Black*, 18 Okla. 344, 90 Pac. 422 (dissenting opinion), on right of mortgagee to acquire tax title as against mortgagor.

Cited in reference notes in 59 A. S. R. 152; 66 A. S. R. 267,—on purchase by mortgagee at tax sale; 5 A. S. R. 156, on mortgagee's right to acquire tax title and set it up against mortgagor.

Granting new trial because of surprise.

Cited in *Brooks v. Douglass*, 32 Cal. 208, holding that surprised party moving for new trial must show injury by showing what case he could establish.

Cited in reference notes in 35 A. D. 440; 78 A. D. 518,—on accident or surprise as ground for new trial; 40 A. D. 271, as to when new trial will be granted on ground of surprise.

Reacquisition as an equitable redemption.

Cited in *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787, holding that equity will deem reacquisition by original purchaser at foreclosure who failed to satisfy liens, an equitable redemption for benefit of holders of outstanding claims, and citing annotation also on this point.

15 AM. DEC. 691, STANIFORD v. BARRY, 1 AIK. (VT.) 314.**Retrospective statutes.**

Cited in reference note in 40 A. D. 496, on retrospective statutes.

Power of legislature — To grant new trial or to extend time for appeal.

Cited in *Beaupre v. Hoerr*, 13 Minn. 366, Gil. 339, holding statute retrospective in terms and enlarging time for appeal, inapplicable to fixed and final judgments; *Gompf v. Wolfinger*, 67 Ohio St. 144, 65 N. E. 878, holding that subsequent statute cannot authorize review of judgment which had become final by existing law; *Andrews v. Beane*, 15 R. I. 451, 8 Atl. 540, holding statute validating fatally defective appeal bond, void because extending time for appeal; *Lawson v. Jeffries*, 47 Miss. 686, 12 A. R. 342, holding an ordinance of constitutional convention granting new trials in certain cases, void.

— To authorize particular sales.

Cited in *Davison v. Johonnot*, 7 Met. 388, 41 A. D. 448, sustaining legislative resolution authorizing named guardian to sell insane ward's realty and pay off encumbrances; *Langdon v. Strong*, 2 Vt. 234, sustaining private act authorizing one of two administrators to convey lands to creditors.

Duty of courts in respect to unconstitutional statutes.

Cited in *Beall v. Beall*, 8 Ga. 210; *Bank of St. Mary's v. State*, 12 Ga. 475,—holding that the judiciary will declare unconstitutional acts null and void.

15 AM. DEC. 692, STANIFORD v. BARRY, 1 AIK. (VT.) 321.**Availability of writ of audita querela.**

Cited in *Griswold v. Rutland*, 23 Vt. 324, denying relief by audita querela where party had opportunity to avail himself of matters complained of; *Witherell v. Goss*, 26 Vt. 748, holding audita querela not sustainable for want of notice of suit, where officer's return shows same given; *Johnson v. Roberts*, 58 Vt. 599, 2 Atl. 482, holding same where complainant, though present, made no objection to the improper assessment of costs; *Foster v. Stearns*, 3 Vt. 322, holding same where complainant failed to appear, and improper claim was inserted in judgment; *Hadlock v. Clement*, 12 N. H. 68, denying audita querela to vacate judgment and execution where, upon default no assessment of damages was had; *Spaulding v. Swift*, 18 Vt. 214, holding audita querela improper where unauthorized attorney entered his appearance; *Faxon v. Baxter*, 11 Cush. 35, denying relief by audita querela to one failing to plead pending insolvency proceedings; *Porter v. Vaughn*, 24 Vt. 211, denying audita querela to vacate execution on ground that same had been enjoined by equity; *Poultney v. State*, 25 Vt. 168, holding county court without power to vacate by audita querela extent from state treasurer for collection of taxes; *Shuford v. Cain*, 1 Abb. (U. S.) 302, Fed. Cas. No. 12,823, holding motions in the cause preferable to writs of audita querela, etc., to raise questions of irregularity.

Cited in reference notes in 15 A. D. 700; 27 A. D. 386,—on audita querela; 36 A. D. 330, on nature and effect of writ of audita querela; 42 A. D. 532, on nature and uses of audita querela and to whom it is available.

Cited in note in 20 L. ed. U. S. 405, as to nature of audita querela and when it will lie.

Review of decisions of prior tribunal.

Cited in *Griffin v. Cunningham*, 20 Gratt. 31, denying power of legislature to authorize court to review decisions of tribunal that preceded it.

15 AM. DEC. 696, BROWN v. TURNER, 1 AIK. (VT.) 350.**What may be partitioned.**

Cited in *Wood v. Little*, 35 Me. 107, holding cotton factory partitionable, though property thereby destroyed for purposes for which erected.

Cited in reference notes in 30 A. S. R. 208, on what may be partitioned; 28 A. D. 167, on right to partition between tenants in common.

Distinguished in *Smith v. Smith*, 10 Paige, 470 (modifying Hoffm. Ch. 506), holding dam and pond partitionable.

Right to have sale where partition impracticable.

Criticized in *Baldwin v. Aldrich*, 34 Vt. 526, 80 A. D. 695, holding where partition impracticable, that an assignment of the whole or sale may be had.

15 AM. DEC. 698, LITTLE v. COOK, 1 AIK. (VT.) 363.**Issuance of writs by clerk.**

Cited in *Christler v. Locke*, 103 Mich. 86, 61 N. W. 263, holding that clerk may issue writ of restitution during vacation.

Cited in reference note in 65 A. D. 94, on execution following judgment as matter of course.

Availability of writ of audita querela.

Cited in *Griswold v. Rutland*, 23 Vt. 324, denying relief by audita querela where party had opportunity to avail himself of matters complained of; *Walter v. Foss*, 67 Vt. 591, 32 Atl. 643, denying audita querela where defendant failed to enter his appearance through misunderstanding with plaintiff's attorney; *Eastman v. Waterman*, 26 Vt. 494, holding audita querela not sustainable where justice had jurisdiction, party had his day in court, etc.; *Radclyffe v. Barton*, 161 Mass. 327, 37 N. E. 373, to point that audita querela is unavailable unless original action defended on the merits; *Kimball v. Randall*, 56 Vt. 558, sustaining audita querela where justice was absent upon return of writ.

Cited in reference notes in 27 A. D. 386, on audita querela; 36 A. D. 330, on nature and effect of writ of audita querela; 42 A. D. 532, on nature and uses of audita querela and to whom it is available.

Cited in note in 20 L. ed. U. S. 405, as to nature of audita querela and when it will lie.

Modified in *Comstock v. Grout*, 17 Vt. 512, sustaining audita querela against creditor to set aside execution upon which complainant was committed to jail.

15 AM. DEC. 700, HOLDEN v. CRAWFORD, 1 AIK. (VT.) 390.**Annulment of deeds of imbeciles.**

Cited in *Doughty v. Doughty*, 7 N. J. Eq. 227, annulling deed of person of weak mind where facts showed unfair advantage taken of him.

Cited in reference notes in 44 A. D. 463, on effect of weakness of intellect on contracts; 59 A. D. 615, on setting aside contracts in equity for weakness of mind.

15 AM. DEC. 704, RALSTON v. MILLER, 3 RAND. (VA.) 44.**Effect of defects in title upon right to purchase money.**

Cited in *Beale v. Seiveley*, 8 Leigh, 658, holding vendee in undisturbed possession under warranty deed, not entitled to relief upon theory of probable eviction; *Bolton v. Branch*, 22 Ark. 435, holding apprehended difficulties in title no defense to action for purchase money; *Peers v. Barnett*, 12 Gratt. 410, holding that sale

for purchase money will be decreed where title perfected before the hearing; *Lovell v. Chilton*, 2 W. Va. 410, holding sale of land to collect purchase money proper after title perfected; *Harris v. Bolton*, 7 How. (Miss.) 167; *Koger v. Kane*, 5 Leigh, 606; *Faulkner v. Davis*, 18 Gratt. 651, 78 A. D. 698; *Thompson v. Catlett*, 24 W. Va. 524,—to point that vendee, to obtain relief, must clearly show the defects in title; *Heavner v. Morgan*, 30 W. Va. 335, 8 A. S. R. 55, 4 S. E. 406, holding that, if title is clearly defective, equity will not require payment of purchase money until defects removed.

Cited in reference note in 115 A. S. R. 908, on equitable relief to purchaser of land against obligation to pay when title is defective.

Distinguished in *Wamsley v. Stalnaker*, 24 W. Va. 214, denying vendee in warranty deed relief against payment of purchase money because of judgment liens, where vendor able to pay same.

—Injunction against collection of.

Cited in *Harvey v. Ryan*, 59 W. Va. 134, 115 A. S. R. 897, 7 L.R.A. (N.S.) 445, 53 S. E. 7, holding that collection of purchase money will be enjoined where land recovered in ejectment by stranger; *Galloway v. Finley*, 12 Pet. 264, 9 L. ed. 1079, to point that vendee may enjoin payment of purchase money until vendor is able to convey agreed title; *Ragsdale v. Hagy*, 9 Gratt. 409, to point that payment of purchase money will be enjoined where land subject to encumbrance.

Cited in reference note in 63 A. D. 217, on injunction against grantor's collection of purchase money.

Cited in note in 7 L.R.A. (N.S.) 456, 458, 462, 465, on injunction against collection of purchase money by solvent vendors where title to land is defective.

Distinguished in *Miller v. Argyle*, 5 Leigh, 460, upon propriety of enjoining payment of purchase money after purchaser takes possession.

Proof of boundaries by reputation.

Cited in *Harriman v. Brown*, 8 Leigh, 697, holding general reputation admissible to prove boundaries; *Lamar v. Minter*, 13 Ala. 31, to same point; *Stetson v. Freeman*, 35 Kan. 523, 11 Pac. 431, holding general reputation admissible in absence of better evidence, to prove boundary and location of city lot; *Cox v. State*, 41 Tex. 1, holding general reputation admissible to prove county line in criminal cases; *Doe ex dem. Farmer v. Mobile*, 8 Ala. 279, holding same as to boundary of public lot; *McAnich v. Hulse*, 113 Iowa, 58, 84 N. W. 914, to point that reputation is admissible to prove private boundary conceded to coincide with line recognized by public; *Gibson v. Poor*, 21 N. H. 440, 53 A. D. 216, holding corresponding undisputed line competent evidence to prove disputed boundary line; *Hellman v. Los Angeles*, 125 Cal. 383, 58 Pac. 10, holding that boundary of street may be found as indicated by improvements continuing through twenty-five years.

Cited in reference note in 39 A. S. R. 826, on precedence in case of conflict between surveys.

Distinguished in *McClellan v. Weston*, 49 W. Va. 669, 55 L.R.A. 898, 39 S. E. 670, holding recorded plat and survey of public streets notice to abutting owners of location of lines thereof.

Prescriptive right to obstruct dedicated streets.

Cited in *Taylor v. Com.* 29 Gratt. 780, holding that right to obstruct street dedicated to, and accepted by, public, cannot be acquired by prescription.

Unmatured obligation as subject of set-off in equity.

Cited in *Feazle v. Dillard*, 5 Leigh, 30, holding that bond not yet due may be the subject of set-off in equity.

15 AM. DEC. 706, BANKS v. POITIAUX, 3 RAND. (VA.) 136.**Corporate powers.**

Cited in *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, 46 A. D. 183, upholding power of corporation to take bequest of its own stock; *Haynes v. Covington*, 13 Smedes & M. 408, holding board of police, as corporation, empowered to make loan, under statute authorizing it to manage certain fund and invest surplus in such stocks as deemed advisable; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 A. R. 221, holding railroad and manufacturing corporations without power to guarantee payment of expenses of musical festival; *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 A. D. 481, upholding power of foreign corporation to take mortgage on land in state of forum.

Cited in reference notes in 53 A. D. 770, on inherent corporate powers; 46 A. D. 188, on corporation's implied power of buying; 66 A. D. 501, on power of corporation to sell its property; 56 A. D. 741; 57 A. D. 414,—on incidental powers possessed by corporations.

— Who may question.

Cited in *Robins v. Embry*, Smedes & M. Ch. 207, denying right of creditors to attack provision in assignment by bank, as violation of charter; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, denying right of one sued by corporation for goods sold to defend on ground of forfeiture of charter for nonpayment of license fee; *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 620, denying right of defendant in foreclosure to question power of water company to make loan on mortgage security.

— Banks.

Cited in *Bond v. Central Bank*, 2 Ga. 92, upholding right of bank to recover on note for antecedent indebtedness, although note for amount exceeding charter limit; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508, holding loan not void for want of authority where bank takes greater rate of interest than allowed by charter; *Wroten v. Armat*, 31 Gratt. 228, upholding power of national bank to loan money on real estate security; *Sherry v. Denn*, 8 Blackf. 542, upholding power of bank to bid in real estate at judicial sale for amount exceeding its own debt; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, upholding power of national bank to enforce deed of trust assigned to it, together with note, as security for loan.

Distinguished in *Russell v. Topping*, Fed. Cas. No. 12,163, denying power of bank to purchase at foreclosure sale lot not covered by its mortgage; *Michigan Bank v. Niles*, Walk. Ch. (Mich.) 99, denying power of bank under charter, to purchase real estate of one person for sale to another.

— Conveyance to or by corporation.

Cited in *Hall v. Farmers' & M. Bank*, 145 Mo. 418, 46 S. W. 1000, holding deed of land to corporation for purpose not allowed in charter, not absolutely void; *Mallett v. Simpson*, 94 N. C. 37, 55 A. R. 595, holding transfer of real estate to corporation, in violation of charter, valid until assailed in direct proceeding by state; *New York Dry Dock v. Hicks*, 5 McLean, 111, Fed. Cas. No. 10,204, holding that corporation will be presumed to have taken deed to land in exercise of its legitimate functions, in absence of proof to contrary; *Fayette Land Co. v. Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016, upholding conveyance of land by railroad, although the land when taken by it was in excess of amount allowed by statute; *Walsh v. Barton*, 24 Ohio St. 28, upholding conveyance of land by railroad, although acquired by abuse of charter powers; *Society Perun v. Cleve-*

land, 43 Ohio St. 481, 3 N. E. 357, holding rights in real estate acquired through corporation *de facto* not divested by subsequent judgment in quo warranto excluding it from use of corporate franchises; Tarpey v. Deseret Salt Co. 5 Utah, 494, 17 Pac. 631, holding it unnecessary for one deriving title through corporations to show, by law of state where organized, that they were empowered to hold or convey real estate.

Cited in notes in 94 A. D. 381, 382, 385, on capacity of corporations to take title to realty; 23 A. D. 741; on *jus disponendi* in corporations.

Attacking right of corporation to hold property.

Cited in reference note in 43 A. D. 465, on collateral inquiry into violation of corporate charter.

Cited in note in 8 A. S. R. 195, on necessity for direct proceedings by state to forfeit corporate franchises.

— Who may question.

Cited in Hough v. Cook County Land Co. 73 Ill. 23, 24 A. R. 230, holding question whether charter powers exceeded in buying land, one between state and corporation; First English Evangelical Lutheran Church v. Arkle, 49 W. Va. 92, 38 S. E. 486, holding objection that church violated statute in holding certain real estate, only available to state; Russell v. Texas & P. R. Co. 68 Tex. 646, 5 S. W. 686, holding that right to question authority of railroad corporation to hold lands rests with state alone; Summet v. City Realty & Brokerage Co. 208 Mo. 501, 106 S. W. 614, holding that state alone can question corporation's right to hold realty for period longer than allowed by constitution; Bogardus v. Trinity Church, 4 Sandf. Ch. 633, holding same where corporation receives grant netting income exceeding that allowed by charter; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544, denying right of private party to question corporation's power to take, hold, and convey real estate; Litchfield v. Preston, 98 Va. 530, 37 S. E. 6, denying right of private party to question legality of purchase of land by bank in violation of statute; Hubbard v. Worcester Art Museum, 194 Mass. 280, 9 L.R.A. (N.S.) 689, 80 N. E. 490, 10 A. & E. Ann. Cas. 1025; Farrington v. Putnam, 90 Me. 405, 38 L.R.A. 339, 37 Atl. 652,—holding objection to bequest to corporation, that amount of property already held by it had reached charter limit, not available to heirs; Chambers v. St. Louis, 29 Mo. 543, denying right of heirs to object to devise of real estate to city, on ground that it was without power to take; Raley v. Umatilla County, 15 Or. 172, 3 A. S. R. 142, 13 Pac. 890, holding that grantor or heirs cannot question right of county to take land granted; Southern P. R. Co. v. Orton, 32 Fed. 457, denying right of one sued by railroad company for possession of land, to question corporation's authority to take; Burns v. Milwaukee & M. R. Co. 9 Wis. 450, denying right of owner receiving pay for land condemned, to raise question of right of corporation to take.

Cited in note in 32 L.R.A. 296, on right of private persons to contest power of corporation to take or hold property in action by corporation for specific performance.

Necessity of corporate seal.

Cited in reference notes in 39 A. S. R. 289, on necessity for seal on corporate contracts; 33 A. D. 494, as to when acts of corporation are valid without corporate seal; 48 A. D. 364, on liability of corporation for contracts by its agents not under seal; 23 A. D. 748, on necessity of corporate seal to agreement to convey realty by corporation.

Cited in notes in 50 A. S. R. 152; 6 E. R. C. 325,—on necessity of seal to validity of contract made by corporation.

Liability of corporation on contracts.

Cited in *Butts v. Cuthbertson*, 6 Ga. 166, holding corporation liable on note given by authorized agent; *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W. Va. 360, holding board of education of township not bound by contract of majority of its members acting individually; *Johnson v. Southwestern Railroad Bank*, 3 Strob. Eq. 263 (dissenting opinion), on defect in corporate charter as excusing corporation from performing its contracts.

Liability of corporation violating charter or misusing privileges.

Cited in *Pixley v. Roanoke Nav. Co.* 75 Va. 320, holding quo warranto by government for forfeiture proper remedy against corporation failing to improve streams as required by charter; *Swan v. Williams*, 2 Mich. 427, holding railroad corporation amenable to state for misuse of charter privileges.

15 AM. DEC. 712, WISELEY v. FINDLAY, 3 RAND. (VA.) 361.**Right of cotenants to have partition.**

Cited in *Updike v. Adams*, 22 R. I. 432, 48 Atl. 384, holding partition in equity matter of right where there are no legal objections to complainant's title; *Ransom v. High*, 37 W. Va. 838, 38 A. S. R. 67, 17 S. E. 413, holding deraignment of title necessary only to show right to partition how parties became co-owners; *Willard v. Willard*, 145 U. S. 116, 36 L. ed. 644, 12 Sup. Ct. Rep. 818, holding tenant in common entitled of right to partition in court having general jurisdiction in equity to grant partition; *Deloney v. Walker*, 9 Port. (Ala.) 497, holding plaintiff with clear title entitled of right, in equity, to partition; *Smith v. Smith*, Hoffm. Ch. 506, to same point where bill was for partition of dam and millpond; *Caldwell v. Snyder*, 178 Pa. 420, 35 L.R.A. 198, 35 Atl. 996, 27 Pittsb. L. J. N. S. 213, to same point in holding devisee entitled to partition notwithstanding provisions of will; *Coles v. Coles*, 13 N. J. Eq. 365, to same point in holding that costs are to be borne in proportion to respective values.

Cited in reference notes in 57 A. D. 200, on who may claim partition; 28 A. D. 167; 49 A. D. 663,—on right of cotenant to partition; 24 A. S. R. 783, on equitable partition as a matter of right; 55 A. D. 442, as to when courts of equity will assume jurisdiction in partition cases; 56 A. D. 650, on decree of partition when title clear; 22 A. D. 179, on validity of partition followed by possession.

Cited in note in 23 A. D. 393, on jurisdiction to make partition.

Distinguished in *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, holding remainderman not entitled to partition during continuance of particular estate.

Questions to be tried in partition suit.

Cited in *Vint v. King*, Fed. Cas. No. 16,950, holding that questions of fraud may sometimes be inquired into on bill for partition.

—Questions of title.

Cited in *Stuart v. Coalter*, 4 Rand. (Va.) 74, 15 A. D. 731, holding that questions of title will not be tried upon bill for partition; *Straughan v. Wright*, 4 Rand. (Va.) 493; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53,—retaining bill for partition until complainant establishes his legal title; *Horton v. Sledge*, 29 Ala. 478, holding such practice proper; *Currin v. Spraul*, 10 Gratt. 145, holding such practice proper previous to certain statute changing practice; *Moore v. Harper*, 27 W. Va. 362, holding that by statute questions of title may be passed upon under bill for partition.

Title acquired from grantor having greater estate than he was aware of.

Cited in *Madden v. Madden*, 2 Leigh, 377, as to title passing under deed conveying all grantor's interest, he believing he had only life estate.

Acceptance of devise as bar to dower.

Cited in *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139, to point that wife's right to dower unaffected by certain statute concerning renunciation of provisions of will.

Cited in reference notes in 17 A. D. 277, on devise or legacy in lieu of dower; 58 A. S. R. 461, on election between will and dower.

Cited in notes in 51 A. D. 579, as to when dower is barred by provision in will; 10 E. R. C. 347, on election by widow between testamentary provision and dower; 3 L.R.A. 497, on widow's right of dower; 26 A. D. 503, on election between benefits conferred by will and share in community property; 92 A. S. R. 696, on widow's duty to elect between benefits of will and right to dower or in community property.

Distinguished in *Dixon v. McCue*, 14 Gratt. 540, to point that widow taking devise of lands for years or personalty may be barred of her dower.

Assignment of dower.

Cited in *Doe ex dem. Shelton v. Carrol*, 16 Ala. 148, holding that husband's alienage may resort to equity to have dower allotted widow; *Ex parte Crittenden*, 10 Ark. 333, holding decree adjudging demandant entitled to dower and appointing commissioners to act and report at next term, not final.

Power of tenant's grantee to acquire adverse title.

Cited in *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426, holding that grantee in possession under fee-simple deed from tenant may acquire adverse title in equity as in law.

15 AM. DEC. 721, THOMPSON v. JACKSON, 3 RAND. (VA.) 504.

Grounds for rescission of contract.

Cited in *Fitzhugh v. Davis*, 46 Ark. 337, holding that vendee in possession under warranty deed cannot have rescission unless substantially deprived of benefits of purchase.

Cited in reference notes in 59 A. D. 615; 37 A. D. 787,—on inadequate consideration as ground for rescission of contract.

Cited in note in 5 L.R.A. 47, on relief in equity under covenants, in absence of eviction by paramount title.

— **Defects in title.**

Cited in *Campbell v. Medbury*, 5 Biss. 33, Fed. Cas. No. 2,365, holding defect in title conveyed by warranty deed no defense to nonpayment of purchase money by undisturbed grantee; *Decker v. Schulze*, 11 Wash. 47, 48 A. S. R. 858, 27 L.R.A. 335, 39 Pac. 261, to same effect; *Fletcher v. Wilson*, Smedes & M. Ch. 376, holding that rescission cannot be had on account of defective title when good title offered at hearing; *Wilty v. Hightower*, 6 Smedes & M. 345, to point that for defects in title vendee ordinarily must sue on covenants.

— **Mistake.**

Cited in *Finch v. Causey*, 107 Va. 124, 57 S. E. 562, holding mistake as to small part of premises leased, insufficient ground for rescission; *Leas v. Eidson*, 9 Gratt. 277, holding mutual mistake as to land's boundaries no ground for rescission unless same clearly proved; *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897, refusing to rescind executed conveyance because of mistake as to boundaries; *Newman*

v. Kay, 57 W. Va. 98, 68 L.R.A. 908, 49 S. E. 926, 4 A. & E. Ann. Cas. 39, refusing to rescind contract of sale of land in gross because of mistake as to quantity; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798, refusing to rescind contract of purchase of gold-bearing land on ground of mistake; Ferry v. Clarke, 77 Va. 397; Eldridge v. Young America & C. Consol. Min. Co. 27 Wash. 297, 67 Pac. 703,—to point that contracts will be rescinded only for substantial mistakes; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 A. S. R. 108, 9 S. E. 132, to point that executed contracts and confirmed sales will only be rescinded for substantial mistake; Glassell v. Thomas, 3 Leigh, 113; Fearon Lumber & Veneer Co. v. Wilson, 51 W. Va. 30, 41 S. E. 137, holding mutual mistake as to identity of land ground for rescission; Kowalke v. Milwaukee Electric R. & Light Co. 103 Wis. 472, 74 A. S. R. 877, 79 N. W. 762, holding release given defendant in action for personal injuries, valid, notwithstanding mistake as to plaintiff's pregnancy.

Cited in notes in 21 A. D. 41, on mistake in written instrument as ground of equitable relief; 117 A. S. R. 235, on what mistakes will authorize cancelation or correction of written instrument.

— Ignorance of law.

Disapproved in Brown v. Armistead, 6 Rand. (Va.) 594, holding that executed contracts will not be rescinded on ground of ignorance of law.

Enforcement of contracts in equity.

Cited in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, observing that different rules apply to the enforcement of executory and executed contracts; Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593, holding that equity will not enforce executory contracts if unfair or tainted with fraud; Booten v. Scheffer, 21 Gratt. 474, refusing specific performance where applicant was in default and surrounding circumstances much changed; Givens v. Clem, 107 Va. 435, 59 S. E. 413, refusing to enforce executor's agreement to convey where infant beneficiaries would be prejudiced.

What must be pleaded — Fraud.

Cited in Southall v. Farish, 85 Va. 403, 1 L.R.A. 641, 7 S. E. 534; Virginia F. & M. Ins. Co. v. Cottrill, 85 Va. 857, 17 A. S. R. 108, 9 S. E. 132; Loomis v. Jackson, 6 W. Va. 613,—holding that fraud must be pleaded and pleaded distinctly; Robson v. Harwell, 6 Ga. 589; Wren v. Moncure, 95 Va. 369, 28 S. E. 588,—to same effect.

— Usury.

Cited in Smith v. Nicholas, 8 Leigh, 330, holding that usury, if relied on in equity, must be distinctly alleged and proved accordingly.

Necessity that proof correspond with pleadings.

Cited in McKinley v. Irvine, 13 Ala. 681, holding bill showing title by descent not sustained by proof of title by devise; Thomas v. Winne, 58 C. C. A. 613, 122 Fed. 395, holding recovery will not be allowed upon case differing materially from that made by the pleadings.

15 AM. DEC. 726, COALTER v. HUNTER, 4 RAND. (VA.) 58.

Landowner's rights in waters of stream.

Cited in Binney's Case, 2 Bland, Ch. 99, to point that riparian owners may, unless injuring navigation, use waters of navigable streams.

Cited in reference notes in 22 A. D. 756; 26 A. D. 390; 27 A. D. 318,—on rights of riparian proprietors; 16 A. D. 698, on rights in water course; 38 A. D. 112, on

right of riparian proprietor to use of water flowing through his land; 37 A. D. 238, on right of riparian owner to natural flow of stream.

Cited in notes in 23 A. D. 513, on extent of owner's right in stream flowing through his land; 54 A. D. 794, on right of riparian owner to natural and uninterrupted flow of stream; 59 L.R.A. 848, on right as against public to dam back water of stream; 9 L.R.A. 812, on riparian owner's right to divert water of stream; 41 L.R.A. 750, on right as between upper and lower proprietors to restore flow of stream to ancient channel; 102 A. S. R. 837, on right to exercise power of eminent domain for creation of dams and water power.

Acquirement of easements by prescription.

Cited in *Nichols v. Aylor*, 7 Leigh, 546, holding twenty years' adversary use of certain water rights, not conclusive of the right; *Stokes v. Upper Appomattox Co.* 3 Leigh, 318, holding that for twenty years' user to give right to water of river, adversary user is necessary; *Cornett v. Rhudy*, 80 Va. 710, holding that right to flood another's land may be required by twenty years' adversary user; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020, holding right to unobstructed use of roadway acquired by open and continuous user, under claim of right, for twenty years; *Eells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 A. S. R. 787, 38 S. E. 479, in applying law of prescription to action for damages resulting from change in stream upon erection of bridge.

Cited in reference note in 35 A. D. 640, on ripening of privilege of license into right by lapse of time.

Cited in notes in 10 L.R.A. 486, on presumptive easement; 93 A. S. R. 712, on prescriptive title to surface water; 93 A. S. R. 722, on prescriptive title to water by adverse use or possession under claim of right.

Right to injunction against trespass or nuisance.

Cited in *Parker v. Winnipiseogee Lake Cotton & Woolen Mfg. Co.* 1 Cliff. 247, Fed. Cas. No. 10,752, dismissing bill to restrain interference with water privileges where plaintiff's right not clear nor injury feared certain; *Moore v. Steelman*, 80 Va. 331, to point that injunction will lie to prevent irreparable mischief.

Cited in reference notes in 24 A. D. 197; 26 A. D. 561; 68 A. D. 117,—on injunction against trespass; 21 A. D. 51, on injunction in case of trespass and nuisance; 26 A. D. 561, on injunction against waste and private nuisances.

Cited in note in 73 A. D. 114, on injunctions against threatened nuisances.

Effect of laches on right to injunction.

Cited in *Smith v. Adams*, 6 Paige, 435, denying injunction to one who waited until defendant had completed his aqueduct; *Amoskeag Mfg. Co. v. Garner*, 6 Abb. Pr. N. S. 265, 55 Barb. 151, holding delay of nine years ground for refusing injunction to restrain infringement of trademark.

Constitutionality of milldam acts.

Cited in *Harding v. Funk*, 8 Kan. 315, sustaining milldam act.

15 AM. DEC. 731, STUARTS v. COALTER, 4 RAND. (VA.) 74.

Failure to object properly to lack of jurisdiction of equity.

Cited in *Hudson v. Kline*, 9 Gratt. 379, dismissing bill not disclosing case proper for equity, though no exception taken in answer; *Miller v. Miller*, 25 W. Va. 495, holding appellate court should dismiss bill of which court below had no jurisdiction, unless bill may be amended so as to give jurisdiction; *Boston Blower Co. v. Carmon Lumber Co.* 94 Va. 94, 26 S. E. 390, holding that objection for want of equitable jurisdiction may be made for first time in appellate court.

Annotation cited in *Williams v. Wetmore*, 51 Fla. 614, 41 So. 545, holding that objection in appellate court to jurisdiction of equity to determine involved boundary dispute comes too late.

Equity jurisdiction to try title.

Cited in *Bush v. Martins*, 7 Leigh, 320, holding equitable action to try title not maintainable by party in possession against adverse claimant; *Hitchcox v. Morrison*, 47 W. Va. 206, 34 S. E. 993, holding bill to remove cloud from title not maintainable against adverse claimant in possession; *Logan v. Ward*, 58 W. Va. 366, 5 L.R.A. (N.S.) 156, 52 S. E. 398, holding bill to remove cloud from title not maintainable by one in possession entered upon by adverse claimant; *Lange v. Jones*, 5 Leigh. 192, holding bill not maintainable by vendee against vendor and third party claiming part of premises; *Henrico v. Hart*, 3 Leigh, 1, holding injunction not maintainable to restrain sale of land where complainant claimed legal title; *Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 250, holding that where equity assumes jurisdiction to correct mistake in deed it will settle all adverse claims; *Steed v. Baker*, 13 Gratt. 380, holding that in suit to enjoin collection of purchase money equity will not try title of adverse claimant in possession.

Distinguished in *Ambler v. Warwick*, 1 Leigh, 195, 21 A. D. 608, holding equitable action maintainable against defendants acquiring title subsequent to execution of deed of trust.

— Question of boundary.

Cited in *Johnston v. Jarret*, 14 W. Va. 230, holding it improper to decree against adverse claimants failing to answer bill involving settlement of boundaries; *Hickman v. Cooke*, 3 Humph. 640, holding court of chancery without jurisdiction of suit to determine boundary in absence of ground for equitable interference; *Sulphur Mines v. Boswell*, 94 Va. 480, 27 S. E. 24, holding bill ostensibly to remove cloud from title, but in effect to settle title and boundary disputes, not maintainable; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415, holding bill to settle boundaries not maintainable, notwithstanding it alleges defendant have deed showing true boundary; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557 (dissenting opinion), on right to have dispute as to titles and boundaries tried in equity.

Annotation cited with special approval in *Hays v. Bouchelle*, 147 Ala. 212, 119 A. S. R. 614, 41 So. 518, holding that where bill establishes case of fraud and imposition equity will settle boundary dispute.

Cited in reference notes in 58 A. S. R. 754, on equity jurisdiction in cases of disputed boundaries; 34 A. D. 105, on equity jurisdiction as to confusion of boundaries.

Cited in note in 119 A. S. R. 67, 68, on equity jurisdiction in case of uncertainty or confusion of boundary.

— In partition proceedings.

Cited in *Fuller v. Montague*, 8 C. C. A. 100, 16 U. S. App. 391, 59 Fed. 212, holding bill for partition alleging that defendant is in possession under fraudulent deed, not maintainable; *Hoffman v. Beard*, 22 Mich. 59, holding same where complainants out of possession and legal title doubtful; *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633, holding same where defendant's title not recognized; *Hudson v. Putney*, 14 W. Va. 561, to same point; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53, retaining bill for partition until legal title established; *Curran v. Sprauell*, 10 Gratt. 145, approving such practice; *Moore v. Harper*, 27 W. Va. 362; *Cecil v.*

Clark, 44 W. Va. 659, 30 S. E. 216,—holding that by statute equity is empowered to settle dispute as to title in partition proceeding; Hillens v. Brinsfield, 108 Ala. 605, 18 So. 604, holding petition for sale for division maintainable unless the adverse possession set up entirely excludes petitioner (probate proceeding).

Cited in reference notes in 41 A. D. 165, on nature of partition proceedings; 77 A. D. 685, on necessity of plaintiff's showing clear legal title in action for partition; 60 A. D. 660, on noninterference with title in partition suit.

Deraignment of title in partition proceedings.

Cited in Ransom v. High, 37 W. Va. 838, 38 A. S. R. 67, 17 S. E. 413, holding it necessary for plaintiff in partition to make deraignment of title to show how parties became co-owners and right to partition.

Multifarious bills.

Cited in Crickard v. Crouch, 41 W. Va. 503, 23 S. E. 727, holding bill against many defendants with distinct interests multifarious; Frum v. Fox, 58 W. Va. 334, 52 S. E. 178, holding bill to cancel tax deed and to settle claim for dower multifarious; Sadler v. Whitehurst, 83 Va. 46, 1 S. E. 410, holding a bill by creditors against dissolved partnership and others, bad for multifariousness; Washington City Sav. Bank v. Thornton, 83 Va. 157, 2 S. E. 193, holding bill seeking decree against one as indorser, seeking damages for breach of warranty, to quiet title, etc., multifarious; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653, holding bill asking for settlement of partnership account and seeking to collect fraudulently assigned note, not multifarious.

Cited in reference notes in 62 A. S. R. 148; 82 A. S. R. 224,—on multifariousness of bill; 37 A. D. 559, on rules governing multifariousness; 44 A. D. 46, on right to sue in one action all persons in possession of land claimed by plaintiff.

Proper parties.

Cited in Banning v. Bradford, 21 Minn. 308, 18 A. R. 398, holding adverse claimant not a proper party in action to foreclose mortgage; Corning v. Smith, 6 N. Y. 82, to same effect.

15 AM. DEC. 754, HAYS v. WOOD, 4 RAND. (VA.) 272.

Rights of persons advancing purchase money.

Cited in Hall v. Young, 37 N. H. 134, holding that trust results in favor of persons advancing purchase money in proportion to respective amounts advanced.

Distinguished in Schroeder v. Paterson, 4 R. I. 516, 70 A. D. 163, holding that one who had given his vendor a mortgage has no lien as against a vendee in whom he vested absolute title.

15 AM. DEC. 756, GARLAND v. RIVES, 4 RAND. (VA.) 282.

Validity of trust assignment as against execution creditor.

Cited in Evans v. Greenhow, 15 Gratt. 153, holding that assignee under deed of trust securing past debt is to be preferred to execution creditor.

Cited in reference note in 69 A. D. 559, on validity of conveyance, absolute in terms, but attended with secret trust.

Effect of fraud on contracts.

Cited in Williamson v. Goodwyn, 9 Gratt. 503, holding conveyance at excessively low price, a further conveyance being intended, with view to hindering creditors, invalid; Foster v. Grigsby, 1 Bush, 86; Parr v. Saunders, 1 Va. Dec. 724, 11 S. E. 979; Geahorn v. Snodgrass, 17 W. Va. 717,—to point that deed to secure

grantee his debt is invalid, though the provisions tending to hinder creditors were forced on him.

Cited in reference notes in 26 A. D. 194, on voluntary conveyances; 28 A. S. R. 618, on fraudulent voluntary conveyances; 17 A. D. 755, 756, on validity of voluntary conveyances; 50 A. D. 804, on conveyances to hinder, delay, or defraud creditors; 53 A. D. 94, as to when conveyance is fraudulent.

Distinguished in *Smith v. Riggs*, 56 Iowa, 488, 9 N. W. 385, holding conveyance by debtor to creditor in furtherance of latter's intention to convey voluntarily to debtor's wife, valid.

— Where consideration given.

Cited in *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320, holding conveyance intended to defraud creditors void, though founded on valuable consideration; *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531, holding same of similar mortgage given for debt actually due; *White v. Perry*, 14 W. Va. 66, holding similar deed invalid *in toto*, though some consideration paid therefor; *Harden v. Wagner*, 22 W. Va. 356; *Holmes v. Harshberger*, 31 W. Va. 516, 7 S. E. 452,—to same effect.

Cited in reference note in 56 A. D. 540, on effect of payment of full consideration to validate fraudulent conveyance where unaccompanied with good faith.

Cited in note in 23 A. D. 143, as to when conveyance to secure a just debt is void.

— Extent to which contract is affected.

Cited in *Beall v. Williamson*, 14 Ala. 55, holding mortgage executed in furtherance of fraudulent intent to defeat creditors void *in toto*; *Clafin v. Foley*, 22 W. Va. 434, holding same of trust deed fraudulent as to part of property conveyed; *Livesay v. Beard*, 22 W. Va. 585, holding trust deed with conditions and reservations, fraudulent upon its face and void *in toto*; *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816, holding conveyance of husband to wife for inadequate consideration and intended to defraud creditors, invalid *in toto*; *Dickinson v. Chesapeake & O. R. Co.* 7 W. Va. 390, as to extent to which a settlement upon wife by insolvent husband is void; *Gordon v. Cannon*, 18 Gratt. 387 (dissenting opinion), on right to expurge fraudulent or inoperative portions of deeds; *Hayes v. Westcott*, 91 Ala. 143, 24 A. S. R. 875, 11 L.R.A. 488, 8 So. 337, holding that, in absence of actual fraud, mortgages, though void as to part of property, are not void *in toto*; *Hayes v. Westcott*, 91 Ala. 143, 24 A. S. R. 875, 11 L.R.A. 488, 8 So. 337, upholding chattel mortgage as to property properly mortgaged, although constructively fraudulent as to other property.

Distinguished in *Skipwith v. Cunningham*, 8 Leigh, 271, 31 A. D. 642, holding same of trust deed providing for payment to grantor of surplus remaining after paying off those accepting deed; *Shattuck v. Knight*, 25 W. Va. 590, holding trust deeds fraudulent *per se*, invalid *in toto*.

— Participation by grantee in fraud.

Cited in *Farmers' Bank v. Douglass*, 11 Smedes & M. 469, holding that prior declarations of vendor are evidence against vendee only when he purchases with notice thereof.

Cited in reference notes in 70 A. D. 333, on effect of vendee's knowledge of and participation in vendor's fraud in transfer; 28 A. D. 207, on rights of purchasers with notice of fraudulent conveyance.

Cited in notes in 34 A. S. R. 395, on knowledge of vendee as affecting validity of fraudulent conveyance; 31 L.R.A. 635, on taking conveyance fraudulent on its

face as participation by creditor in debtor's fraudulent intent; 32 L.R.A. 38, 39, on what constitutes participation by purchaser in vendor's fraud so as to invalidate as against vendor's creditors transfer made on good consideration.

— Rights of purchaser without notice.

Cited in *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131, holding that to avoid deed for fraud grantee must have notice thereof, but same inferable from circumstances; *Fenno v. Sayre*, 3 Ala. 458, to point that one purchasing without notice from fraudulent purchaser is unaffected by fraud; *Andrews v. Jones*, 10 Ala. 400, to point that antenuptial settlement is valid if settler alone intended fraud; *Sorrells v. Sorrells*, 4 Ark. 296, holding innocent purchaser without notice of secret trust, entitled to protection.

Cited in reference notes in 19 A. D. 188; 50 A. D. 473,—on protection under statute of frauds of bona fide purchaser without notice of fraudulent design; 25 A. D. 108, on protection of bona fide purchaser without notice of fraud from one who was a party to the fraud.

Cited in note in 67 L.R.A. 896, on title of bona fide purchaser from fraudulent grantee.

Jurisdiction of equity in cases of fraud.

Cited in *Allen v. South Penn Coal Co.* 58 W. Va. 197, 52 S. E. 454, holding that in cases of fraud equity has concurrent jurisdiction with law and will give full relief; *Wagner v. Fehr*, 211 Pa. 435, 60 Atl. 1043, 3 A. & E. Ann. Cas. 608, holding bill against grantee and remote grantee, for reconveyance of realty where stock given therefor proves worthless, sustainable; *Planters' & M. Bank v. Walker*, 7 Ala. 926, holding that equity will interfere where fraudulent conveyances exist, notwithstanding property levied on.

Cited in reference notes in 27 A. D. 586; 36 A. D. 535,—on concurrent jurisdiction of law and equity in cases of fraud.

Conclusiveness of judgments.

Cited in *First Nat. Bank v. Huntington Distilling Co.* 41 W. Va. 530, 56 A. S. R. 878, 23 S. E. 792, holding judgments conclusive as to existence and amount of debt, unless attacked for fraud; *Bensimer v. Fell*, 35 W. Va. 15, 29 A. S. R. 774, 12 S. E. 1078, to same point; *Ludington's Petition*, 5 Abb. N. C. 307, holding judgment recovered against assignor after assignment made, conclusive as against assignee on petition for accounting.

Cited in reference notes in 43 A. D. 180, on judgment in former suit as evidence against one not a party; 41 A. D. 682, on admissibility and effect of former judgment as plea in bar, or as evidence under general issue in subsequent action; 59 A. D. 622, as to whether judgment in creditor's suit is impeachable.

Cited in notes in 51 A. D. 298, on judgment as evidence in judgment creditor's suit; 90 A. D. 299, on judgment against debtor as proof of indebtedness in creditors' suit; 67 L.R.A. 591, on judgment on which action to set aside alleged fraudulent conveyance is based as prima facie evidence of the debt; 23 A. D. 186, on conclusiveness of result of suit as to purchaser pending same; 67 L.R.A. 601, on conclusiveness of judgment on which action to set aside alleged fraudulent conveyance is based as to defense in usury; 90 A. D. 298, on collateral attack upon judgment on which creditors' bill is founded.

Lis pendens.

Cited in reference note in 25 A. D. 675, on doctrine of *lis pendens*.

Necessity of doing equity.

Cited in reference note in 72 A. D. 387, on maxim, He who seeks equity must do equity.

15 AM. DEC. 779, HAMILTON v. SHREWSBURY, 4 RAND. (VA.) 427.

Jurisdiction to remedy errors in sheriff's sales.

Cited in *Puterbaugh v. Elliott*, 22 Ill. 157, holding that clerical errors in sheriff's certificate of sale may be corrected in actions at law.

Presence of property at sheriff's sale.

Cited in reference note in 49 A. D. 406, on necessity for presence of goods at execution sale.

Title acquired under irregular sheriff's sale.

Cited in *Brooks v. Rooney*, 11 Ga. 423, 56 A. D. 430, holding title of one purchasing at sheriff's sale unaffected by irregularities in sheriff's return; *Minor v. Natchez*, 4 Smedes & M. 602, 43 A. D. 488, holding same where the advertising of the property was irregular; *Adamson v. Cummins*, 10 Ark. 541, holding that purchaser ignorant of any irregularity in execution takes valid title, notwithstanding execution subsequently quashed.

Cited in reference notes in 65 A. D. 95, on rights and duties of purchasers at execution sale; 83 A. D. 112, on effect of irregular acts of officers or plaintiff on rights of purchaser at execution sales; 76 A. D. 124, on binding force of plaintiff's irregular acts upon purchaser at execution sale; 17 A. D. 130, on effect of fraud in sheriff's sale on purchasers thereat.

Cited in notes in 39 A. D. 573, on binding force upon purchasers without notice at execution sale of officer's irregular acts; 21 L. ed. U. S. 466, as to whether purchaser at judicial sale is protected against irregularities in the proceedings or sale.

15 AM. DEC. 781, ALMOND v. ALMOND, 4 RAND. (VA.) 662.

Granting alimony without divorce.

Cited in *Glover v. Glover*, 16 Ala. 440; *Hinds v. Hinds*, 80 Ala. 225; *Galland v. Galland*, 38 Cal. 265; *Re Popejoy*, 26 Colo. 32, 77 A. S. R. 222, 55 Pac. 1083; *Baier v. Baier*, 91 Minn. 165, 97 N. W. 671; *Earle v. Earle*, 27 Neb. 277, 20 A. S. R. 667, 43 N. W. 118; *Bueter v. Bueter*, 1 S. D. 94, 8 L.R.A. 562, 45 N. W. 208,—holding action for separate maintenance sustainable without regard to question of divorce; *Stewart v. Stewart*, 27 W. Va. 167, to same point; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 454, holding wife's action for alimony without divorce, because of husband's desertion, defeated upon his offering to return.

Cited in reference notes in 18 A. D. 350; 28 A. D. 55, 442,—on jurisdiction to grant alimony; 33 A. S. R. 576, on separate suit by wife, suing for divorce, for maintenance; 28 A. D. 626, on lien for alimony on specific property of husband.

Cited in notes in 60 A. D. 666, on allowance of alimony without divorce; 77 A. S. R. 231, on right to maintain separate suit for maintenance independent of suit for divorce; 77 A. S. R. 235, on causes for which separate suit for maintenance independent of suit for divorce may be brought; 102 A. S. R. 706, on effect of mere commencement of suit for divorce on power of court to decree lien for alimony.

—How to be decreed.

Cited in *Phelan v. Phelan*, 12 Fla. 449, holding permanent alimony, not a gross sum or specific portion of husband's estate; *Kusel v. Kusel*, 147 Cal. 57, 81 Pac. 295, holding it improper to allow gross sum as alimony where divorce not sought; *Schonborn v. Schonborn*, 27 Wash. 421, 67 Pac. 987, to same effect; *Murray v. Murray*, 84 Ala. 363, 4 So. 239, holding that husband will not be divested of his property where alimony is sought without a divorce.

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— Applicability of doctrine of *lis pendens* to bills for.

Cited in *Houston v. Timmerman*, 17 Or. 499, 11 A. S. R. 848, 4 L.R.A. 716, 21 Pac. 1037, holding that bills for alimony do not bind defendant's property with *lis pendens*.

Cited in reference note in 19 A. S. R. 164, on *lis pendens*.

Cited in notes in 2 L.R.A. 615, on rule of *lis pendens* in actions for divorce; 56 A. S. R. 865, on necessity that property must be directly affected to be subject to law of *lis pendens*.

Distinguished in *Daniel v. Hodges*, 87 N. C. 95; *Powell v. Campbell*, 20 Nev. 232, 19 A. S. R. 350, 2 L.R.A. 615, 20 Pac. 156,—holding rule of *lis pendens* applicable to one purchasing realty from husband with notice of a divorce proceeding.

Husband's misconduct as an abandonment.

Cited in *James v. James*, 58 N. H. 266, holding abandonment established where husband's neglect and intemperance caused wife to leave him.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 16 AM. DEC.

16 AM. DEC. 33, GLADWIN v. LEWIS, 6 CONN. 49.

Service of process on legal holiday.

Cited in note in 19 L.R.A. 319, on how far the law of holidays extends to matters other than those relating to commercial paper.

Distinguished in *Weil v. Geier*, 61 Wis. 414, 21 N. W. 246, holding that statute does not prohibit issuance of summons on a legal holiday, it being a ministerial act.

16 AM. DEC. 35, JONES v. JONES, 6 CONN. 111.

Delivery of deed.

Cited in reference notes in 50 A. S. R. 710, on delivery of instruments; 19 A. D. 253; 42 A. D. 441; 1 A. S. R. 243,—on delivery of deed; 22 A. D. 418; 45 A. D. 367; 19 A. S. R. 322; 40 A. S. R. 424,—on sufficiency of deed's delivery; 20 A. D. 232; 51 A. D. 674; 33 A. S. R. 330,—as to what constitutes valid delivery of deeds; 20 A. D. 565, on what constitutes a good delivery of a deed; 38 A. S. R. 467, on what does not constitute delivery of deed; 19 A. D. 585; 30 A. D. 89; 80 A. S. R. 251,—on necessity of delivery of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed.

Cited in notes in 21 A. D. 361; 53 A. S. R. 541, 544,—on what constitutes delivery of deed; 55 A. D. 413, on invalidity of deed for want of delivery; 4 A. D. 187, as to when delivery of deed takes effect.

—To third person generally.

Cited in reference notes in 22 A. D. 563, on delivery of deed to a third person; 43 A. S. R. 463, on delivery of deeds in escrow; 93 A. D. 459, on deposit of deed with third person as delivery.

Cited in notes in 12 L.R.A. 174, on sufficiency of delivery of deed to third person as delivery to grantee; 53 A. S. R. 552, on delivery to third person for use of grantee as delivery of deed; 63 A. D. 246, on depository of escrow as agent or trustee of grantee.

— To take effect after death of grantor.

Cited in *Grilley v. Atkins*, 78 Conn. 380, 112 A. S. R. 152, 4 L.R.A. (N.S.) 816, 62 Atl. 337, holding delivery to third person of deed to be delivered to and for benefit of grantee after death of grantor, who parts with all dominion over deed, is good delivery; *Woodward v. Camp*, 22 Conn. 457, holding husband who receives deed of wife under promise to deliver it to grantee, after death of wife, is bound to do so; *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding conveyance binding where father conveyed to a son and took back a life lease, both instruments being given to a third person, to be recorded after death; *Cline v. Jones*, 111 Ill. 563 (dissenting opinion), on effect of a deed to be delivered after death.

Cited in reference notes in 24 A. S. R. 332, on necessity for delivery of deed during lifetime of grantor; 31 A. D. 569, on inoperativeness of deed not delivered during lifetime of grantor; 27 A. S. R. 581, on delivery of deed after grantor's death; 37 A. D. 155, on sufficiency of delivery to grantee after grantor's death; 17 A. D. 702, on validity of deed to take effect after grantor's death.

Cited in notes in 63 A. D. 243; 53 A. S. R. 554,—on delivery of deed to take effect on death of grantor; 54 L.R.A. 869, on delivery of deed to third person for delivery to grantee after grantor's death; 49 A. S. R. 222, on validity of deeds to take effect after grantor's death, if not delivered in his lifetime; 63 A. D. 244, 245, on necessity that grantor part with all control of deed to take effect after his death; 63 A. D. 245, on sufficiency of finding deed among grantor's effects after his death to constitute delivery; 39 A. D. 85, on authority not coupled with interest revoked by principal's death.

— Constructive delivery.

Cited in *Crawford v. Bertholf*, 1 N. J. Eq. 458, holding actual handing over of instrument not necessary; *Warren v. Swett*, 31 N. H. 332, holding delivery complete when grantor has parted with dominion over deed, with intent that title shall pass to grantee, though deed be left in custody of grantor; *Bogie v. Bogie*, 35 Wis. 659, holding same where there was a silent assent of all parties to a delivery by a magistrate; *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351, holding it no delivery where deed is stolen from grantor; *Lang v. Smith*, 37 W. Va. 725, 17 S. E. 213, holding deed ready for delivery, but not delivered by anything said or done, and laid away in grantor's drawer, is of no validity.

Distinguished in *Stevens v. Hatch*, 6 Minn. 64, Gil. 19, holding executed and acknowledged deed declared by grantor to be for use of grantee, who assents, is sufficient, although deed remains in hands of grantor.

Voluntary conveyances.

Cited in reference note in 20 A. D. 141, on voluntary conveyances.

Cited in notes in 9 L.R.A. 413, on validity of voluntary conveyance; 34 A. S. R. 192, on meritorious consideration for conveyance.

Enforcement of conveyance to relative.

Cited in *Whitmore v. Hay*, 85 Wis. 240, 39 A. S. R. 838, 55 N. W. 708, holding that grantee was entitled to land, he having performed his part of agreement, though deed given him was void.

Necessity of a transfer of possession to a transfer of title.

Cited in *M'Cutchen v. M'Cutchen*, 9 Port. (Ala.) 650, holding a gift of personal property is good between the parties without an actual delivery of property itself.

Time of operation of deed in escrow.

Annotation cited in *Prewitt v. Ashford*, 90 Ala. 294, 7 So. 831, holding that

when the condition upon which a delivery in escrow is made, is performed, it will relate back to time of first delivery if necessary to protect intervening rights of grantee.

Cited in note in 17 A. D. 548, on application to negotiable instruments of rule as to reasonable time being a question of law.

16 AM. DEC. 46, ATWATER v. WOODBRIDGE, 6 CONN. 223.

Exemptions of religious or charitable estates from taxation.

Cited in *Osborne v. Humphrey*, 7 Conn. 335, holding lands leased by an ecclesiastical society are within statute exempting estates from taxation; *Landon v. Litchfield*, 11 Conn. 251, holding a lease of such land for 999 years not a diversion so as to make land subject to taxation; *New Haven v. Sheffield*, 30 Conn. 160, holding that where such land is conveyed in fee it is not exempt from taxation in the hands of the purchaser; *Yale University v. New Haven*, 71 Conn. 316, 43 L.R.A. 490, 42 Atl. 87, on exemption from taxation of property given for charitable purposes; *Parker v. Redfield*, 10 Conn. 490 (dissenting opinion), on property without exemption from taxation of ecclesiastical property.

Cited in note in 29 A. S. R. 389, on exemption from taxation.

Distinguished in *Franklin Street Soc. v. Manchester*, 60 N. H. 342, holding constitution does not exempt church property from taxation; *Parker v. Redfield*, 10 Conn. 490, holding a house built on land given to an ecclesiastical society, by a lessee, with power to remove, is not exempt from taxation; *Hart v. Cornwall*, 14 Conn. 228, where a lease from ecclesiastical society, explicitly provided that, in the event of taxation, the lessee should pay taxes.

Exemption from tax as a contract.

Cited in *State v. County Court*, 19 Ark. 360, holding contracts made by state, exempting property from taxation, valid and binding; *Hartford First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274, holding that the statutes in force do not subject to taxation lands which prior to 1821 were given or granted for maintenance of gospel and which are now devoted to that use; *Seymour v. Hartford*, 21 Conn. 481; *Osborne v. Humphrey*, 7 Conn. 335,—holding lands given to an ecclesiastical society under a statute exempting such property from taxation cannot thereafter be made subject to taxation.

Cited in reference notes in 48 A. D. 539; 73 A. D. 707,—on exemption of taxation as contract.

Cited in note in 22 L. ed. U. S. 805, as to whether exemption from taxation is a contract or not.

Distinguished in *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 A. D. 664, holding that legislature has no power to alienate right of taxation so as to bind future legislatures.

Disapproved in *Brewster v. Hough*, 10 N. H. 138, denying the right of the legislature to grant away the right of taxation.

Overruled in *Lord v. Litchfield*, 36 Conn. 116, 4 A. R. 41, upholding statute taxing property given to an ecclesiastical society under a statute providing that such property should be forever free from taxation.

Remedy for collection of illegal tax.

Cited in *Bailey v. Goshen*, 32 Conn. 546, 87 A. D. 191, holding that money collected on an illegal tax may be recovered in assumpsit; *Wilson v. New York*, 4 E. D. Smith, 675, 1 Abb. Pr. 4, denying an injunction against collection of a tax.

Execution on private property to satisfy judgment against public corporation.

Cited in *McLoud v. Selby*, 10 Conn. 390, 27 A. D. 689, holding that the private property of the inhabitants of a school district may be taken to satisfy a judgment against district; *Beardsley v. Smith*, 16 Conn. 368, 41 A. D. 148, holding private property of an individual member of city, subject to levy to satisfy a judgment on a bond issued by city; *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865, holding that property of any inhabitant of a town in Connecticut may be taken on execution upon a judgment against the town.

Cited in notes in 69 L.R.A. 256, on liability of member of religious society for its debts; 43 A. D. 694, on liability at law of stockholders for corporate debts.

Corporation as separate entity.

Cited in *Wood v. Hartford F. Ins. Co.* 13 Conn. 202, 33 A. D. 395, holding that for the purpose of sustaining jurisdiction the court may regard the stockholders of a corporation as the real parties, defendants.

Cited in reference note in 27 A. D. 695, on members of quasi corporations as parties to suits against such corporations.

Distinguished in *Windham Cotton Mfg. Co. v. Hartford, P. & F. R. Co.* 23 Conn. 373, holding stockholders of a private corporation, not strictly defendants on the record.

Power of judiciary to declare a law unconstitutional.

Cited in *Bishop's Fund v. Rider*, 13 Conn. 87, holding it the duty of the court to disregard a law repugnant to constitutions of United States or states.

Binding legislative grants.

Cited in *East Hartford v. Hartford Bridge Co.* 17 Conn. 79, holding grant to a bridge company of an exclusive franchise at a certain point, binding on state.

Impairment of obligation of contract.

Cited in *Winter v. Jones*, 10 Ga. 190, 54 A. D. 379, holding that rights created by performance under an act of the legislature cannot be impaired by a subsequent legislature; *Young v. Harrison*, 6 Ga. 130, on right to repeal a charter granted without consideration and before its execution.

Cited in reference note in 27 A. D. 707, on corporate charter or franchise as a contract.

Power of legislature over tax exemptions.

Cited in *New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850, on power of legislature to exempt literary and charitable societies from taxation.

Criticized in *Hartford First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274, as being mere dictum, on validity of laws affecting exemption from taxes.

Subsequent laws as affecting existing ecclesiastical societies.

Cited in *Second Ecclesiastical Soc. v. First Ecclesiastical Soc.* 23 Conn. 255 (dissenting opinion), on effect of adoption of state Constitution on then existing ecclesiastical societies.

Description of purpose in tax levy.

Cited in *West School Dist. v. Merrills*, 12 Conn. 437, holding that a tax laid "for defraying the expenses of the district as reported by our committee and approved by vote of district," lawfully imposed.

16 AM. DEC. 53, AVERY v. CHAPPELL, 6 CONN. 270.

Parol evidence as to writing.

Cited in notes in 5 L.R.A. 159, on showing mistake by parol evidence in equity; 6 L.R.A. 38, on parol evidence to vary terms of written contract.

—To explain or vary will.

Cited in *Goode v. Goode*, 22 Mo. 518, 66 A. D. 630; *Parsons v. Lyman*, 4 Bradf. 268; *Re Garraud*, 35 Cal. 336,—holding a will cannot be varied, altered, or contradicted by parol evidence; *Lee v. Shivers*, 70 Ala. 288, holding same when words are clear and have a definite meaning, however awkwardly expressed; *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23, holding parol testimony of testator's intention only admissible in case of latent ambiguity; *Fairfield v. Lawson*, 50 Conn. 501, 47 A. D. 669, holding that to admit parol evidence to aid construction in cases of ambiguity it is necessary that the object of the gift should be fixed accurately; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106, holding that the object sought in the construction of wills is the intent, as expressed in the language used; *Bryan v. Bigelow*, 77 Conn. 604, 107 A. S. R. 64, 60 Atl. 266, holding that a will cannot be established by showing an intent to make one.

Cited in reference notes in 31 A. S. R. 38, on parol evidence as to wills; 47 A. D. 431, on parol evidence to explain, vary, or control will; 78 A. D. 505; 10 A. S. R. 463,—on admissibility of extrinsic evidence to explain will; 49 A. D. 441, on admissibility of evidence to correct or explain will; 45 A. D. 719, on extrinsic evidence as to intention of testator; 57 A. D. 709, on parol evidence of mistake in will.

Cited in notes in 3 L.R.A. 848, on parol evidence to vary, control, or enlarge terms of will; 6 L.R.A.(N.S.) 953, on power to change misdescription of land in will by parol proof; 6 L.R.A.(N.S.) 963, 964, on finality of will as to testator's intention in description of land; 6 L.R.A.(N.S.) 948, on inadmissibility of extrinsic evidence to correct misdescription of land in will in absence of ambiguity; 50 A. S. R. 286, on exceptions, permitting extrinsic evidence to explain will.

—To rebut resulting trust.

Cited in *Woodruff v. Marsh*, 63 Conn. 125, 38 A. S. R. 346, 26 Atl. 846, holding that resulting trusts which can be rebutted by parol are those claimed upon a mere implication of law.

Effect of omissions from will.

Cited in *Wallize v. Wallize*, 55 Pa. 242, holding will good though names of certain intended beneficiaries were omitted; *Warner v. Brinton*, Fed. Cas. No. 17,179, holding same as to omitted instructions given by testator to scrivener, as to certain property omitted from will; *Comstock v. Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 A. D. 100, holding same of an omission, by mistake of the scrivener, to insert an intended legacy.

Mistakes in wills or deeds.

Cited in *Dunham v. Averill*, 45 Conn. 61, 29 A. R. 642, holding that court would not intermeddle with a legacy to "The American and Foreign Missionary Society," though testator evidently did intend "The American Bible Society."

Cited in note in 11 L.R.A.(N.S.) 68, on intention of testator as to whether bequest of stocks, bonds, or notes is general or specific.

Distinguished in *Abbe v. Goodwin*, 7 Conn. 377, holding that in equity a mistake in a deed may be shown by parol.

16 AM. DEC. 58, GREENE v. DENNIS, 6 CONN. 293.**Charitable uses and bequests generally.**

Cited in reference notes in 33 A. D. 479, on charitable uses; 59 A. D. 619, on validity of bequests to charitable uses; 42 A. D. 355, as to when charitable bequests are void; 43 A. D. 425, on validity of grant to people of political division.

Cited in notes in 9 A. D. 580, 584, on charitable uses in United States; 21 A. D. 363, on charitable bequests and devises; 5 E. R. C. 576, on validity of bequest in trust for charitable purposes; 5 L.R.A. 33, as to whether statute of uses and trusts prevails in United States; 5 L.R.A. (N.S.) 693, on gift for benefit of members of particular organization as a charity.

Devise void for uncertainty as to devisee.

Cited in *Grimes v. Harmon*, 35 Ind. 198, 9 A. R. 690, holding a devise to "the orthodox Protestant clergymen of Delphi," etc., "to be expended in education of colored children," void for uncertainty, there being no organized body known as clergymen of Delphi.

Cited in note in 60 A. R. 235, on uncertainty of designation in charitable bequest.

Distinguished in *Vander Volgen v. Yates*, 3 Barb. Ch. 242, on uncertainty of grantee in a grant.

Devise to an unincorporated body.

Cited in *Owens v. Missionary Soc.* 14 N. Y. 380, 67 A. D. 160, holding that a devise or bequest to an unincorporated association is in general void in both law and equity; *State use of Methodist Episcopal Church v. Warren*, 28 Md. 338, on equity jurisdiction to sustain a bequest to an unincorporated body.

Cited in note in 14 L.R.A. (N.S.) 114, on unincorporated associations as trustees for charitable or religious purposes.

— To unincorporated charitable association.

Cited in *Hunt v. Tolles*, 75 Vt. 48, 52 Atl. 1042, holding a deed which assumes to convey property to a public use, but passes no legal estate because of inability of grantee to take, creates a trust which equity will protect by appointment of a trustee; *Wright v. Methodist Episcopal Church*, Hoffm. Ch. 202, holding a bequest to "the yearly meeting of Friends in New York," a voluntary unincorporated society, valid, and that payment could be made to treasurer and clerk in office.

Cited in reference note in 26 A. D. 68, on trust in favor of unincorporated religious or charitable society.

Cited in note in 32 L.R.A. 626, on right of unincorporated charity to take real estate or permanent fund.

Distinguished in *American Bible Soc. v. Wetmore*, 17 Conn. 181, holding in equity that a public charitable association may thereafter incorporate and take a devise.

Descent of lapsed devise or legacy.

Cited in *Van Kleeck v. Reformed Protestant Dutch Church*, 20 Wend. 457 (affirming 6 Paige, 600), holding lapsed devise goes to heir; *Remington v. American Bible Soc.* 44 Conn. 512; *Story v. Brown*, 4 Paige, 112; *Moss v. Helsley*, 60 Tex. 426; *Bruster v. McCall*, 16 Conn. 274,—holding that in case of a lapsed devise the lands do not vest in the residuary devisee but descend; *Williams v. Whittle*, 50 Ga. 523, holding in case of a void devise of land, that the land descends to the heir; *Casgrain v. Hammond*, 134 Mich. 419, 104 A. S. R. 610, 96 N. W. 510, holding that land conveyed under a void trust should, on death of grantor, be distributed under the statute; *Nutt v. Nutt*, Freem. Ch. (Miss.) 128, holding a

devise of real property, void because attested by but two witnesses, descends to heirs at law; *Mitcheson's Estate*, 16 Phila. 32, 22 W. N. C. 46, 45 Phila. Leg. Int. 94, 5 Pa. Co. Ct. 99, holding a devise of real property failing because of a statute goes as intestate property.

Cited in reference notes in 20 A. D. 423, on lapsed legacies; 48 A. D. 716, on lands vesting in heir in case of lapsed devise; 57 A. S. R. 537, on rights of residuary devisee to lapsed devise.

Cited in notes in 20 L.R.A. 517, on gift failing for remoteness going to heir or residuary legatee; 49 A. S. R. 136, on effect of violating rule against perpetuities.

Distinguished in *Patterson v. Swallow*, 44 Pa. 487, 20 Phila. Leg. Int. 204, holding under statute, that heir never takes a lapsed or void legacy or devise if the residuary clause is clear and sufficiently comprehensive to embrace it; *Youngs v. Youngs*, 45 N. Y. 254, holding an undisposed of contingent remainder passed under the residuary clause of will; *Giddings v. Giddings*, 65 Conn. 149, 48 A. S. R. 192, 32 Atl. 334, holding that property eliminated from a will by a codicil becomes residuary property; *West v. West*, 89 Ind. 529, holding that common-law distinction between bequests of personal property and devises of real property, destroyed by statute.

Disapproved in *Doe ex dem. Ferguson v. Hedges*, 1 Harr. (Del.) 524, holding that a lapsed bequest of real property goes to the heir at law; a void one to the residuary devisee.

— As to personal property.

Cited in *Thayer v. Wellington*, 9 Allen, 283, 85 A. D. 753; *Holbrook v. McCleary*, 79 Ind. 167,—holding that all lapsed or void legacies will pass by a general residuary bequest to the residuary legatee; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687, holding that a void bequest of personal property becomes residue property; *Vick v. M'Daniel*, 3 How. (Miss.) 337, holding a void bequest of slaves should go to residuary legatee; *White v. Fisk*, 22 Conn. 31, holding a bequest void for uncertainty is to be treated as intestate property; *Beekman v. People*, 27 Barb. 260, holding a bequest to a dispensary, which failed, did not pass as residue, which was devoted to charity.

Disapproved in *Davis v. Davis*, 62 Ohio St. 411, 78 A. S. R. 725, 57 N. E. 317, holding void legacies to descend under the statute and not under a residuary clause disposing of "the balance."

Effect of a void devise.

Cited in *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989, holding that where a limitation is void because too remote, all estates disposed of by the same will will fall with the void devise.

Jurisdiction to declare validity of will or devise.

Cited in *Treat's Appeal*, 35 Conn. 210, holding that the probate court has no power to decree a forfeiture under conditions of will.

Construction of wills.

Cited in *Bryan v. Bigelow*, 77 Conn. 604, 107 A. S. R. 64, 60 Atl. 266, holding that the meaning of a will must be derived from the words of it and not extrinsic evidence.

Cited in notes in 11 L.R.A. (N.S.) 68, on intention of testator as to whether bequest of stocks, bonds, or notes is general or specific; 6 L.R.A. (N.S.) 963, 964, on finality of will as to testator's intention in description of land.

Powers of a corporation.

Cited in *American Colonization Soc. v. Gartrell*, 23 Ga. 448, holding that a corporation can do only what is expressly allowed by its charter.

Cited in reference note in 73 A. D. 276, on power of corporations to take as trustees.

Cited in notes in 1 A. S. R. 161, on corporations as trustees; 11 L.R.A. 715, on corporations as trustees; 94 A. D. 387, on capacity of corporations to take title to realty.

Presumption of incorporation.

Cited in *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416,—holding a corporation not inferable from acts and proceedings which might be performed without corporate authority.

Cited in reference notes in 73 A. D. 661, on corporate existence; 39 A. D. 358, on presumption that corporation has legal existence.

Cited in note in 22 L.R.A. 277, on presumption as to incorporation in civil cases.

16 AM. DEC. 68, STATE v. KNAPP, 6 CONN. 415.

What constitutes high crimes and misdemeanors.

Cited in *State v. Howard*, 6 Conn. 473, holding that to elude an officer without violence, is not a high crime and misdemeanor; *State v. Hyde*, 11 Conn. 541; *State v. Smith*, 7 Conn. 428,—holding same as to the obstruction of a highway; *State v. Avery*, 7 Conn. 266, 18 A. D. 105, holding the solicitation of another to commit adultery is a high crime and misdemeanor.

Obstructions in highway as nuisances.

Cited in *State v. Merrit*, 35 Conn. 314, holding any erection which renders a highway less commodious is a nuisance; *Burnham v. Hotchkiss*, 14 Conn. 311 (dissenting opinion), on obstructions in a highway as a nuisance.

Cited in notes in 38 L.R.A. 164, on extent of municipal power over buildings as nuisances; 39 L.R.A. 655, on municipal power over nuisances consisting of obstructions of and encroachments on street; 39 L.R.A. 664, on municipal power over buildings and fences as nuisances affecting highways.

16 AM. DEC. 70, MAGILL v. HINSDALE, 6 CONN. 464a.

Attornment by tenant to landlord's mortgagee.

Cited in *Lockwood v. Tracy*, 46 Conn. 447, holding that a tenant of a mortgagor in possession may, after mortgagee has obtained judgment in ejectment against mortgagor, pay rent to mortgagee; *Simers v. Saltus*, 3 Denio, 214, sustaining right of tenant to attorn to or yield possession to purchaser at a foreclosure sale; *Moffat v. Strong*, 9 Bosw. 57, holding an entry of mortgagee and payment of rent to him a good defense in an action against tenant for rent; *Stout v. Merrill*, 35 Iowa, 47, on right of a tenant to deny landlord's title where there has been a foreclosure; *Moran v. Pittsburgh, C. & St. L. R. Co.* 32 Fed. 878, holding that mortgagee cannot demand benefits of a lease given by mortgagor without consent of lessee.

Cited in reference note in 25 A. D. 434, on attornment to mortgagees by mortgagor's tenant.

Distinguished in *German Cent. Bldg. Asso. v. Rosenbaum*, 2 Cin. Sup. Ct. Rep. 69, holding that a tenant cannot attorn to a mortgagee under a mortgage which was not given by or under lessor, but adverse to him.

Relation of landlord and tenant by attornment.

Cited in *Sioux City Stock Yards Co. v. Sioux City Packing Co.* 110 Iowa, 396, 81 N. W. 712, holding that where there is no privity of contract attornment is necessary to create relation of landlord and tenant.

Cited in notes in 89 A. S. R. 104, on validity of attornment to stranger; 18 L.R.A. (N.S.) 397, on attornment by lessee, to avoid eviction, to stranger entitled to immediate possession as defense in action for rent.

Form necessary for agent to bind principal.

Cited in *Savings Bank v. Davis*, 8 Conn. 191, holding form of words immaterial if it appears the instrument was executed in behalf of principal by authorized agent; *Warrick County v. Butterworth*, 17 Ind. 129, holding that agency must be stated in instrument itself and agent must therein stipulate for his principal by name; *Frambach v. Frank*, 33 Colo. 529, 81 Pac. 247, holding person authoritatively contracting avowedly, as agent of a known principal, incurs no personal liability; *Johnson v. Smith*, 21 Conn. 627, holding note signed "Vestrymen of P. Church" was note of society and not of individuals who signed it; *Hewitt v. Wheeler*, 22 Conn. 557; same case on later motion for new trial, 23 Conn. 284, holding same of contract by persons describing themselves as building committee in body and signature; *Carter v. Doe*, 21 Ala. 72, holding deed wherein principal is set forth as one of parties of first part and wherein letter of attorney is set forth, and signed "S. H. G., Attorney in fact for J. K.," to be deed of principal; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106, holding an instrument signed "Z. P., Mayor of Detroit," in body of which the capacity in which P. acted is fully explained, binds principal; *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262, holding same where grantor in body of deed is described as "P. M., attorney in fact for A. B." and by same words in covenants, and deed signed in same manner; *Tenney v. East Warren Lumber Co.* 43 N. H. 343, holding same as to a deed "We the E. W. L. Co. do grant and covenant," and signed "D. E. F., President," and "E. S. C., Treasurer;" *Second Nat. Bank v. Midland Steel Co.* 155 Ind. 581, 52 L.R.A. 307, 58 N. E. 833, holding where the name of a corporation was printed at head of note and note was signed "R. J. B., President," that extrinsic evidence of intention of parties to instruments was admissible.

Cited in reference note in 34 A. D. 178, as to when deed by agent binds principal.

Cited in note in 54 A. D. 720, on sufficiency of agent's contract to bind principal.

Distinguished in *Providence v. Miller*, 11 R. I. 272, 23 A. R. 453, where contract did not upon its face appear to have been intended to be contract of principal.

Disapproved in *Townsend v. Hubbard*, 4 Hill, 351, holding that a sealed instrument, when executed by one acting as attorney, must be executed in the name of the principal and purport to be sealed with his seal.

Personal liability of agent.

Cited in reference note in 13 A. S. R. 632, giving instances where agents were held personally liable on contracts executed by them.

Cited in notes in 48 A. S. R. 919, on personal liability to third persons of agent assuming without authority to make contract for corporation; 8 E. R. C. 640, on duty of agent to execute instrument in name of principal.

16 AM. DEC. 73, MORSE v. WELTON, 6 CONN. 547.

Relinquishment by parent of right to minor's services.

Cited in *Atwood v. Holcomb*, 39 Conn. 270, 12 A. R. 386, holding that right of father to his minor son's services may be terminated by mutual agreement; *McGarr v. National & P. Worsted Mills*, 24 R. I. 447, 96 A. S. R. 749, 60 L.R.A. 122, 53 Atl. 320, holding that father may relinquish earnings of minor child to

mother; *Kerwin v. Wright*, 59 Ind. 369, holding an agreement by parent that compensation for child's labor shall be paid child is a relinquishment of parent's right thereto; *House v. House*, 5 Luzerne Leg. Reg. 61; *Burdsall v. Waggoner*, 4 Colo. 261,—holding emancipation presumable where minor son contracts on his own account for services and father knows of it and makes no objection.

Cited in notes in 7 L.R.A. 177, on emancipation of infant; 113 A. S. R. 114, on acts amounting to emancipation of infants; 31 A. D. 119, on earnings of infant child; 53 A. D. 779, on right of father to earnings of minor child; 49 A. D. 666, on relinquishment of parent of right to son's earnings; 76 A. D. 409, on parent's right to relinquish services and earnings of minor child.

Distinguished in *Johnson v. Terry*, 34 Conn. 259, holding that father cannot divest himself of right to custody and control of his minor children.

Rights consequent on emancipation.

Cited in *Dierker v. Hess*, 54 Mo. 246, holding that where there has been an emancipation a creditor of father cannot attach gains of son; *Hall v. Hall*, 44 N. H. 293; *Wright v. Dean*, 79 Ind. 407,—sustaining right of child to recover wages from father, where there had been an emancipation; *Com. ex rel. Gilkeson v. Gilkeson*, 5 Clark (Pa.) 30, 1 Phila. 194, 8 Phila. Leg. Int. 86, holding that a father who has relinquished right to services of his minor child cannot reassert that right against wishes of child; *Lackman v. Wood*, 25 Cal. 147, sustaining right of emancipated infant to hold lands in his own right; *Wodell v. Coggeshall*, 2 Met. 89, 35 A. D. 391, holding that father who suffers minor son to live apart from him and employ himself as he pleases, cannot maintain trespass on case against one taking son for a voyage at sea; *Varney v. Young*, 11 Vt. 258, holding father not liable for charges during sickness of an emancipated son, to one having notice of intention of father to pay no debts of son.

Cited in note in 35 A. R. 117, on effect of parent's relinquishment of right to child's earnings.

Distinguished in *Moody v. Walker*, 89 Ala. 619, 7 So. 246, holding a gift of stock and use of land, to minor sons, not good against creditors.

16 AM. DEC. 76, MANSFIELD v. MANSFIELD, 6 CONN. 559.

Revocable powers.

Cited in *Hilliard v. Beattie*, 67 N. H. 571, 39 Atl. 897, holding where person to whom power is given derives a present or future interest in subject-matter over which power is to be exercised, the power is irrevocable; *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119, holding a power of attorney revocable at any time before the actual execution of it; *Lewis v. Kerr*, 17 Iowa, 73, holding a power to an agent to sell and convey revocable.

Cited in reference notes in 31 A. D. 508, on revocability of power; 64 A. D. 241, on effect of mortgagor's death to revoke power of sale; 36 A. S. R. 700, on termination of power coupled with interest by death of donor.

Cited in notes in 110 A. S. R. 855, as to when power of attorney is revocable; 110 A. S. R. 856, as to when power of attorney is not revocable; 16 E. R. C. 805, 806, on revocability of authority coupled with interest.

— What constitutes "interest" in a power.

Cited in *Chambers v. Seay*, 73 Ala. 372, holding that interest must be in the thing itself or in the property which is the subject of the power; *Marbury v. Barnett*, 17 Misc. 386, 40 N. Y. Supp. 76, holding interest must be in subject-matter, and not merely in result of execution of power; *Atwater v. Perkins*, 51

Conn. 188, holding power given an executor to sell any of estate when and as he shall deem expedient and to invest proceeds to be a naked power.

16 AM. DEC. 83, BRECKENRIDGE v. TODD, 3 T. B. MON. 52.

Effectiveness of record from filing deed.

Cited in *Bussing v. Crain*, 8 B. Mon. 593, holding statute requiring deed to be deposited for record within sixty days does not change the rule; *Chandler v. Scott*, 127 Ind. 226, 10 L.R.A. 374, 26 N. E. 797, holding chattel mortgage presumably recorded from delivery to proper office.

Cited in notes in 23 A. D. 342, on time from which record of deed takes effect; 27 L. ed. U. S. 643, on record of deed and its necessity and effect.

Presumption as to time of delivery of deed.

Cited in *Farmers' Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220, holding date of deed presumed to be time of delivery; *Lick v. Diaz*, 30 Cal. 65, holding deed will be presumed delivered at time of execution; *Crozier v. Grayson*, 4 J. J. Marsh. 514, holding date of mortgage, and not of acknowledgment, presumed to be time of delivery; *Crossen v. Oliver*, 37 Or. 514, 61 Pac. 885, holding delivery presumed at date of deed, and not of acknowledgment, where only former appears in evidence; *Clark v. Akers*, 16 Kan. 166, holding deed presumed delivered at least as early as acknowledgment, where that is subsequent to date and prior to time of record.

Cited in reference notes in 21 A. D. 361, on presumption as to time of delivery of deed; 21 A. D. 404, on presumption that deed was delivered on its date; 86 A. D. 63, as to whether deed is presumed to have been delivered at its date or at date of acknowledgment.

Acknowledgment of consideration in instrument.

Cited in note in 18 A. D. 507, on nonconclusiveness of acknowledgment of consideration in deed.

Burden of proof of negative.

Cited in *Scott v. Henry*, 13 Ark. 112, holding burden of proof on defendant admitting execution of defeasance and charging misrepresentation; *Higdon v. Higdon*, 6 J. J. Marsh. 48, holding burden of proof on heirs filing bill to contest will.

Time to object to deposition.

Cited in *Alexander v. Bank of Commonwealth*, 7 J. J. Marsh. 580, holding objection to reading of deposition waived unless raised in trial court.

Rescission for failure of title.

Cited in *Buxton v. Bowen*, 2 Woodb. & M. 365, Fed. Cas. No. 2,260, on mutual release of title upon failure of estate tail exchanged for a fee.

16 AM. DEC. 87, GOODWIN v. BLAKE, 3 T. B. MON. 106.

Secret preference to creditor.

Cited in notes in 12 E. R. C. 327, on validity of secret preference to creditor; 27 L.R.A. 37, on invalidity of contracts to induce assent to a composition.

16 AM. DEC. 90, FITZHUGH v. BANK OF SHEPHERDSVILLE, 3 T. B. MON. 126.

Lien of corporation on stock.

Cited in *Dana v. Brown*, 1 J. J. Marsh. 304, holding bank has no lien on stock

against judgment creditor of shareholder; *Tuttle v. Walton*, 1 Ga. 43, on superiority of lien to execution purchaser of stock with notice.

Cited in reference notes in 12 A. S. R. 152, on lien of corporation on shares; 40 A. S. R. 405, on corporation's right to lien on stock; 74 A. D. 541, on bank's lien on stock transferred by holder while indebted to bank.

Cited in note in 57 A. S. R. 395, on existence of lien as restraint upon alienation of corporate stock.

Right of holders of stock.

Cited in reference notes in 30 A. S. R. 668, on rights of holders of certificates of stock; 26 A. S. R. 658, on right of assignee of stock to compel transfer.

Corporate seal.

Cited in reference note in 33 A. D. 494, as to when acts of corporation are valid without corporate seal.

Cited in note in 50 A. S. R. 153, on necessity for corporate seal in the United States.

16 AM. DEC. 93, McALEXANDER v. WRIGHT, 3 T. B. MON. 189.

Assignments of error in granting or refusing new trial.

Cited in *Hawkins v. Phythian*, 8 B. Mon. 515, holding general assignment of error in denying motion for new trial presents questions as to ruling on separate demurrer of part of defendants.

Necessity of exhibiting warrant of attorney.

Cited in *McKiernan v. Patrick*, 4 How. (Miss.) 333, holding it necessary to produce authority where justice of case requires it; *Keith v. Wilson*, 6 Mo. 435, 35 A. D. 443, holding it necessary to produce some authority, verbal or written, upon suitable suggestion of the facts; *Ninety-Nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. 193, 4 Duer, 632, 10 How. Pr. 324, holding court has authority to require exhibition of authority where case is peculiar and rights of defendant seem to require it; *Bell v. Farwell*, 189 Ill. 414, 59 N. E. 955, holding reasonable probability of lack of authority upon motion to dismiss suit on certified foreign judgment necessitates proof of authority; *Belt v. Wilson*, 6 J. J. Marsh. 495, 22 A. D. 88; *Low v. Settle*, 22 W. Va. 387; *Tally v. Reynolds*, 1 Ark. 99, 31 A. D. 737,—holding appearance presumed regular but authority must be shown upon affidavit of facts showing reasonable presumption of lack of authority; *Lucky Queen Min. Co. v. Abraham*, 26 Or. 282, 38 Pac. 65, holding one elected president, general manager, and attorney for corporation presumed to have authority to commence suit, unless objecting party proves otherwise.

Cited in reference note in 16 A. D. 301, on warrant of attorney.

Employment of attorney.

Cited in *Caldwell v. Bigger*, 76 Kan. 49, 90 Pac. 1095, holding relation of assignor's attorney ceases upon assignment of judgment, unless he be re-employed by express or implied contract.

Authority of attorney generally.

Cited in reference notes in 22 A. D. 92; 31 A. D. 744,—on authority of attorney; 35 A. S. R. 588; 34 A. S. R. 520,—on presumption as to attorney's authority to act; 60 A. D. 178, on effect of authorized act of regular attorney; 52 A. S. R. 768, on attorney's authority to confess judgment for client.

Appearance by attorney.

Cited in reference notes in 35 A. D. 449; 52 A. D. 599,—on appearance by at-

torney; 39 A. D. 533; 96 A. D. 624,—on presumption as to authority of attorney to appear; 56 A. D. 549, on appearance by attorney as presumptive evidence of authority; 38 A. D. 566, on effect of unauthorized appearance of an attorney.

Cited in note in 75 A. D. 147, as to whether judgment by unauthorized appearance of attorney is void, voidable, or conclusive.

Jurisdiction over attorneys.

Cited in note in 2 A. S. R. 847, on summary jurisdiction of court over attorneys.

16 AM. DEC. 101, TERRY v. BLEIGHT, 3 T. B. MON. 270.

Statutory divestiture of title.

Cited in *Lyon v. Hunt*, 11 Ala. 295, 46 A. D. 216, holding title of purchaser not sustainable without affirmative proof of advertisement for statutory time, with description sufficient to identify the land; *Early v. Doe*, 16 How. 610, 14 L. ed. 1079, holding sale after being advertised for eighty-two days, void under statute requiring advertisement for at least twelve weeks.

—Tax sales.

Cited in *Currie v. Fowler*, 5 J. J. Marsh. 145, holding conveyance of land on different watercourse than that described in sale and auditor's list, void.

Cited in reference notes in 39 A. S. R. 210, on tax titles; 42 A. D. 484, on necessity of strict compliance with statute as to tax sale.

State courts following Federal decisions.

Cited in reference notes in 25 A. D. 78, as to when Federal decisions should be followed in state courts; 46 A. D. 646, on necessity for state court's following decisions of Supreme Court of United States upon questions of constitutional law.

Presumption of performance of official acts.

Cited in *Alexander v. Aud*, 121 Ky. 105, 88 S. W. 1103, holding return of sheriff presumed regular, in absence of negating averments; *Connelly v. American Bonding & T. Co.* 113 Ky. 903, 69 S. W. 959, holding lawful exercise of power of arrest presumed, in absence of negating averments.

Cited in reference notes in 67 A. D. 73, on presumption of regularity of official acts; 27 A. D. 126; 19 A. S. R. 143,—on presumption that officer does his duty; 34 A. D. 228, on presumption of regular performance of official duty; 64 A. D. 685, on presumption that acts of public officials are in accordance with law.

Sheriff's deed as evidence.

Cited in *Hobbs v. Shumates*, 11 Gratt. 516, holding deed of qualified officer authorized by law to sell and convey lands, prima facie evidence of compliance with requirements.

Cited in note in 43 A. D. 52, on admissibility of sheriff's deed as evidence of title.

—Foundation for.

Cited in *Leland v. Wilson*, 34 Tex. 79, on insufficiency of sheriff's deed, without execution and judgment, to sustain ejectment.

Cited in reference notes in 22 A. D. 489, on necessity of producing judgment and execution to support sheriff's deed; 44 A. D. 708, as to what purchaser under execution must show to recover in ejectment.

16 AM. DEC. 103, TRUMBO v. SORRENCY, 3 T. B. MON. 284.**Liability of property to payment of debts.**

Cited in *Broadwell v. Broadwell*, 4 Met. (Ky.) 290, holding personalty, slaves, and realty will be used in order named, in absence of clear contrary intention.

Subrogation of legatees to rights of creditors.

Cited in *Smith v. Cairns*, 92 Tex. 667, 51 S. W. 498, holding legatees may proceed against land in hands of heirs where personalty, the primary fund for payment of their legacies, has been used to discharge debts.

Cited in reference notes in 22 A. D. 732, on who are entitled to subrogation; 22 A. D. 744, on subrogation of legatees to rights of creditors; 8 A. S. R. 724, on right of specific legatees to be subrogated to rights of creditors.

Reimbursement of person paying decedent's debts.

Cited in *Smith v. Hoskins*, 7 J. J. Marsh. 502, holding executor removed after payment of intestate's debts with his own funds will be reimbursed from estate in hands of heirs.

Marshaling of assets.

Cited in reference note in 35 A. D. 291, on marshaling of assets.

Cited in note in 18 E. R. C. 213, as to right of mortgagee with other security for his demand to use his legal advantage in way to exclude demand of fellow creditor whose legal recourse is to but one of them.

16 AM. DEC. 107, McMILLAN v. RITCHIE, 3 T. B. MON. 348.**Nature of covenant of warranty.**

Cited in reference notes in 26 A. D. 322, on personal nature of covenant of warranty; 33 A. D. 346, on measure of damages for breach of covenant.

16 AM. DEC. 108, THOMPSON v. CLAY, 3 T. B. MON. 359.**Effect of dismissal of decree for want of parties.**

Cited in *Commercial Bank v. Meach*, 7 Paige, 448; *Van Epps v. Van Deusen*, 4 Paige, 64,—holding dismissal of bill for want of proper parties should be without prejudice to future litigation; *Martin v. Evans*, 85 Md. 8, 60 A. S. R. 292, 36 L.R.A. 218, 36 Atl. 258, holding failure to restrict scope of decree dismissing bill raises presumption of disposal on merits.

Cited in reference note in 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of.

Estoppel by judgment.

Cited in *Lindsley v. Thompson*, 1 Tenn. Ch. 272, refusing to enjoin judgment at law for defense not made upon suing out of certiorari and supersedeas.

Cited in reference notes in 24 A. D. 615; 26 A. D. 609; 44 A. D. 349,—as to when judgment is a bar or estoppel.

16 AM. DEC. 112, HARPER v. BAKER, 3 T. B. MON. 422.**Who may maintain replevin.**

Cited in reference note in 42 A. D. 60, on necessity of general or special property in plaintiff to maintenance of replevin suit.

Effect of general issue in replevin.

Cited in reference note in 40 A. D. 204, on general issue in replevin as admission of plaintiff's property in goods taken.

Doctrine of relation.

Cited in reference notes in 44 A. D. 708, on relation of sheriff's deed to time when party is entitled thereto; 49 A. S. R. 858, on liability as trespasser on part of one knowingly receiving property wrongfully taken.

Accessories in trespass.

Cited in note in 12 A. D. 287, as to whether there can be accessories in trespass.

Trespass by assent or participation.

Cited in *Sanders v. Hamilton*, 3 Dana, 550, holding action will lie against one who agrees to trespass committed for his benefit; *Justice v. Mendell*, 14 B. Mon. 12, holding subsequent assent to original taking for one's use is necessary to make a trespasser by relation, though property may have been received; *Barrett v. Warren*, 3 Hill, 348 (dissenting opinion), on nonliability as joint wrongdoer of one receiving goods not originally taken for his benefit by trespasser.

Cited in note in 73 A. D. 139, on ratification or adoption of trespass for one's benefit as making one a cotrespasser.

16 AM. DEC. 115, DURRETT v. SIMPSON, 3 T. B. MON. 517.**Prerequisites to rescission.**

Cited in reference note in 35 A. D. 132, on endeavor of courts of equity to place parties *in statu quo*.

Cited in notes in 33 A. D. 707, on vendor's duty to restore consideration on disaffirming fraudulent purchase of goods; 43 A. D. 654, on prerequisites to rescission for fraud of sale of property.

Alienation as defeating rescission.

Cited in *Edwards v. Hanna*, 5 J. J. Marsh. 18, holding conveyance of part of personalty and inability to restore it, a bar to bill for rescission of contract relating thereto; *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449, holding sale and conveyance by virtue of prior existing lien, no bar to rescission of contract.

Liability for deficiency in quantity of land sold.

Cited in *Harrell v. Hill*, 19 Ark. 102, 68 A. D. 202, holding purchaser deceived by misrepresentation, though innocently, entitled to proportionate abatement of purchase money and specific performance; *Trinkle v. Jackson*, 86 Va. 238, 4 L.R.A. 525, 9 S. E. 986, holding neither party can resort to other for deficiency or excess in number of acres where contract was fully understood to be for certain tract, more or less.

Abatement of action by death of party.

Cited in reference note in 56 A. D. 420, on abatement of action by death of party.

Revivor of actions.

Cited in *Morrow v. Mason*, 4 J. J. Marsh. 326, sustaining revivor by consent against parties and administrators, a guardian *ad litem* having been appointed for infant heirs.

16 AM. DEC. 125, THORNBERRY v. CHURCHILL, 4 T. B. MON. 29.**Fixing or relocation of boundaries.**

Cited in *Riley v. Griffin*, 16 Ga. 141, 60 A. D. 726, holding courses and distances depending for correctness on a variety of causes are subject to correction.

Cited in reference notes in 68 A. D. 130, on rules for completion of partial boundary lines; 67 A. D. 621, on control of boundary line marked part of way
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though not direct line from corner to corner; 53 A. D. 222, as to whether boundary line marked part of distance is presumed to continue in same direction.

Cited in notes in 22 A. D. 642, on boundaries; 30 A. D. 738, on preference of monuments to courses and distances in description of land; 30 A. D. 742, as to mode of finding lost corners.

— Closing of survey by projection.

Cited in *Davis v. Commonwealth Land & Lumber Co.* 141 Fed. 740, as an instance where a lost corner of a quadrangular tract was relocated by projecting the adjacent courses till they intersected; *Billingsley v. Bates*, 30 Ala. 376, 68 A. D. 126, holding survey presumed closed at point where all trace of marks fail, by running line straight to disputed corner.

— Running courses backwards or out of order.

Cited in *Bramblet v. Davis*, 72 C. C. A. 204, 141 Fed. 776; *Creech v. Johnson*, 116 Ky. 441, 76 S. W. 185; *Phillips v. Ayres*, 45 Tex. 601; *Pearson v. Baker*, 4 Dana, 321,—holding order given lines and corners in surveyor's certificate, of no importance in finding true position of survey; *Ayres v. Lancaster*, 64 Tex. 305, holding charge that courses may be reversed not error if coupled with rule that survey must be followed, if ascertainable.

Distinguished in *Davis v. Commonwealth Land & Lumber Co.* 141 Fed. 711, holding that in running calls backwards it is not permissible to disregard natural objects called for in description.

Conflict between patent and survey.

Distinguished in *Dimmitt v. Lashbrook*, 2 Dana, 1, holding calls of patent define boundary except and only so far as the lines originally and actually made by surveyor deviate from those calls.

Evidence as to survey.

Cited in *Booth v. Upshur*, 26 Tex. 64, holding testimony of surveyor who made survey admissible to establish initial point upon proof of discrepancy between calls.

Construction of deed as question for court.

Cited in *Terrell v. Huff*, 108 Ga. 655, 34 S. E. 345, holding construction of deed from language of parties, for the court.

Presumption as to other mistakes.

Cited in *McIntosh v. Livingston*, 41 Iowa, 219, holding evidence as to mistakes in count of vote for other candidates, immaterial in a contested election case.

16 AM. DEC. 130, HENDERSON v. PICKETT, 4 T. B. MON. 54.

Subpurchaser's right to specific performance.

Cited in reference note in 56 A. D. 508, on suit by subpurchaser for specific performance.

Parties in suit in equity.

Cited in reference note in 86 A. D. 625, as to who should be joined in suit in equity.

Compensation for improvements.

Cited in note in 15 A. D. 351, on bona fides as essential for recovery in ejectment of compensation for improvements.

Purchase or entry pendente lite.

Cited in *Graham v. Kitchen*, 118 Ky. 18, 80 S. W. 464, holding doctrine that

entry by stranger *pendente lite* is affected by judgment, inapplicable where stranger did not enter under party to suit.

Cited in reference notes in 20 A. D. 145; 25 A. D. 675; 48 A. D. 111; 11 A. S. R. 856,—on doctrine of *lis pendens*; 35 A. D. 155, on purchase *pendente lite*; 43 A. S. R. 246, on rights of purchaser *pendente lite*; 23 A. D. 186, on conclusiveness of result of suit as to purchaser pending same.

16 AM. DEC. 136, MORRISON v. BECKWITH, 4 T. B. MON. 73.

Estoppel from asserting defenses to note or demand.

Cited in *Watson v. McLaren*, 19 Wend. 557, holding debtor who declared note to be good to one about to purchase estopped to assert want of consideration; *Wooldridge v. Cates*, 2 J. J. Marsh. 221, holding same as to obligor in note for gaming consideration against one whom he induced to purchase; *Hamer v. Johnston*, 5 How. (Miss.) 698, holding same of maker, though ignorant of failure of consideration at time of statement of validity; *Swenson v. Walker*, 3 Tex. 93, holding administrator who declared claim good to one about to purchase, estopped to assert defense against such person.

Relief of purchaser when vendor cannot make title.

Cited in *Hunter v. Bradford*, 3 Fla. 269, holding purchaser in possession under bond for title may restrain collection of purchase money where vendor becomes insolvent and unable to give a clear title.

Cited in note in 7 L.R.A.(N.S.) 453, on insolvency or nonresidence of vendor as affecting injunction against collection of purchase money where title to land is defective.

Contribution to discharge encumbrance.

Cited in *Dickey v. Thompson*, 8 B. Mon. 312, holding owner of each share of encumbered real and personal estate must contribute his proportion according to value at date of foreclosure; *Kirksey v. Mitchell*, 8 Ala. 402, on duty of purchasers from mortgagor to contribute to discharge the mortgage.

Cited in reference notes in 31 A. D. 518; 50 A. D. 44,—on contribution among persons holding land affected by mortgage; 29 A. D. 747, on alienation of different parcels of mortgaged land; 43 A. D. 625, on effect of sale of mortgaged property and purchase of other property; 65 A. D. 780, on rights and liabilities of purchasers of mortgaged premises when mortgagor has conveyed to different ones at different times.

Cited in notes in 25 L. ed. U. S. 238, on order of sale of mortgaged premises; 78 A. D. 88, on effect of grantee of portion of mortgaged premises assuming entire debt.

Criticized in *Mobile Marine Dock & Mut. Ins. Co. v. Huder*, 35 Ala. 713, holding purchasers stand burden of mortgage in inverse order of their alienation, according to present value, with improvements; *Cumming v. Cumming*, 3 Ga. 460, denying contribution between purchasers with warranty upon good consideration; in succession at different times, of different parts of mortgagor's estate.

Parties to action involving land title.

Cited in *Simpson v. Hawkins*, 1 Dana, 303, holding vendees seeking rescission on account of paramount title should bring the holders thereof before the court.

Distinguished in *Poston v. Eubanks*, 3 J. J. Marsh. 42, holding *pendente lite* purchasers not necessary parties to bill to enforce equitable lien on estate.

Injunction against judgment.

Cited in note in 31 L.R.A. 749, on injunction against judgment for purchase money for defenses existing prior to rendition in case of insolvency.

Injunction conditioned upon giving of security.

Cited in *Golden v. Maupin*, 2 J. J. Marsh. 236, holding injunction may be granted on condition to be dissolved if proper security is given.

16 AM. DEC. 143, KIBBY v. CHITWOOD, 4 T. B. MON. 91.**Pleading contract required to be written.**

Cited in *Baker v. Jameson*, 2 J. J. Marsh. 547, holding averment that contract was in writing unnecessary in declaration for breach of land contract; *Crouch v. Briles*, 7 J. J. Marsh. 255, 23 A. D. 404, holding applicability of statute of frauds to counts for breach of oral contract as to lands cannot be raised by demurrer.

Cited in reference note in 40 A. D. 381, on pleading contract which law requires to be in writing.

Validity of laws authorizing sale of estate for debts.

Cited in *Shehan v. Barnett*, 6 T. B. Mon. 593, holding act appointing commissioners to sell decedent's lands for payment of his debts, valid; *Stewart v. Griffith*, 33 Mo. 13, 82 A. D. 148, holding act empowering guardian to sell ward's land and pay his debts under direction of court, valid; *Com. v. Whipples*, 80 Ky. 269, upholding act empowering debtor to sell his property by lottery at single drawing to satisfy his creditors; *Cargile v. Fernald*, 63 Mo. 304, upholding act empowering administrator to sell lands of decedent to satisfy debt, where execution had issued under foreclosure judgment.

Cited in reference notes in 73 A. S. R. 61, on validity of sales by executors and administrators under statutory authority; 36 A. D. 551, on validity of special act authorizing sale of decedent's property to pay debts.

Cited in notes in 79 A. S. R. 85, on causes for which legislature may authorize sale of real property of decedents; 16 L.R.A. 254, on power of legislature to pass private act authorizing disposal of decedents' estates; 24 A. D. 542, on due process of law in special statutes authorizing sale of property of decedents.

Distinguished in *Lane v. Dormau*, 4 Ill. 238, 36 A. D. 543, holding act authorizing sale of decedent's real estate for benefit of only two of his creditors, void.

Statutory alteration of effect of seal.

Cited in *Baird v. Matthews*, 6 Dana, 130; *Tribble v. Oldham*, 5 J. J. Marsh. 137,—holding warranty of soundness contained in bill of sale included within statute raising certain unsealed instruments to dignity of sealed ones.

16 AM. DEC. 150, WELLS v. WELLS, 4 T. B. MON. 152.**Conclusiveness of probate of will.**

Cited in *Reed v. Reed*, 91 Ky. 267, 11 L.R.A. 513, 15 S. W. 525, holding annulment of order of probate upon appeal by heirs within time allowed by law, of no effect on title under executor's deed pursuant to will.

Nature of statutory contest of will.

Cited in *Singleton v. Singleton*, 8 B. Mon. 340; holding statute giving bill in chancery to contest will does not permit of different trials between different parties as to same will.

Cited in reference notes in 69 A. S. R. 624, on parties to contest will; 90 A. D. 331, on contesting probate of will.

Right to join in appeal or error.

Cited in *Seward v. Johnson*, 27 R. I. 396, 62 Atl. 569, on right of party to join in probate appeal.

Cited in reference notes in 30 A. D. 561, on parties to writ of error; 23 A. D. 452; 28 A. D. 400,—on who must join in writ of error.

Partial revocation of will.

Cited in *Tudor v. Tudor*, 17 B. Mon. 383, holding a *pro tanto* revocation only takes place upon the striking out of one or more devises, the sense of will in other respects not being changed.

Cited in reference notes in 51 A. D. 386, on revocation of wills; 34 A. D. 139, on what amounts to revocation of will.

Cited in note in 25 A. R. 35, on alteration or revocation of will by obliteration.

16 AM. DEC. 153, MORGAN v. BOONE, 4 T. B. MON. 291.

Implied trusts in purchase of outstanding titles.

Cited in *Vanmetre v. Griffith*, 4 Dana, 89, holding vendee in possession cannot form any connection with holder of adverse title to disadvantage of vendor; *Roller v. Effinger*, 88 Va. 641, 14 S. E. 337, holding vendor entitled to outstanding title purchased by vendee in possession, upon reimbursement of amount paid; *Bush v. Adams*, 22 Fla. 177; *Harper v. Reno*, Freem. Ch. (Miss.) 323,—holding vendee in possession cannot set up outstanding title purchased by him, though he is entitled to compensation in equity; *Moore v. Simonson*, 27 Or. 113, 39 Pac. 1105, holding purchase of outstanding title by life tenant in possession inures to benefit of remaindermen; *Bowling v. Dobyns*, 5 Dana, 434; *Davies v. Myers*, 13 B. Mon. 511,—holding purchase of adversary claim by life tenant in possession inures to joint benefit of purchaser and remainderman; *Phelan v. Boylan*, 25 Wis. 679, holding tax title for taxes due before commencement of tenancy, if acquirable at all by life tenant, inures jointly to reversioner; *Janes v. Throckmorton*, 57 Cal. 368, holding title of trustee under conveyance from purchaser at foreclosure sale inures to benefit of *cestui que trust*; *Boskowitz v. Davis*, 12 Nev. 446, holding that a tenant in common who bought in a paramount title held it for all of his cotenants; *Sneed v. Atherton*, 6 Dana, 276, 32 A. D. 70, holding rule that purchase by one joint tenant inures to benefit of cotenant inapplicable to purchase before creation of tenancy.

Cited in notes in 47 A. S. R. 506, on effect of trustee's purchase of outstanding title; 12 L.R.A. 243, on effect of possession of vendee upon his right to specific performance; 9 L.R.A. 571, on cotenant's right to purchase outstanding title or encumbrance for his own behalf; 32 L.R.A. 805, on effect of tax sale on land held by life tenant.

Mortgagee as trustee.

Cited in *Fenwick v. Macey*, 1 Dana, 276, holding mortgagee is regarded in equity as trustee in whose favor statute of limitation does not apply until a satisfaction must be presumed.

16 AM. DEC. 160, LEIGH v. EVERHEART, 4 T. B. MON. 379.

Bill to remove cloud on title.

Cited in *Pettit v. Shepherd*, 5 Paige, 493, 28 A. D. 437, upholding jurisdiction to remove cloud on title or enjoin a conveyance about to operate as cloud; *Lyon v. Hunt*, 11 Ala. 295, 46 A. D. 216, holding equity has power to remove cloud on title and cancel the deed, especially where latter is *prima facie* valid; *Gerry v. Stimson*, 60 Me. 186, holding restraining administrator from casting cloud by fictitious sale upon property once held but subsequently bona fide sold by intestate; *Rowland v. Doty*, Harr. Ch. (Mich.) 3, upholding jurisdiction, either

with or without statute, to quiet title of legal owner in possession; *Teague v. Martin*, 87 Ala. 500, 13 A. S. A. 63, 6 So. 362, holding purchaser at execution sale of land fraudulently conveyed by judgment debtor has remedy at law and cannot maintain bill while not in possession.

Cited in reference notes in 99 A. D. 157, on power of equity to remove cloud on title by cancellation of instruments; 29 A. S. R. 59, on jurisdiction of equity to cancel deed for fraud.

Cited in note in 8 L.R.A. 727, on jurisdiction of equity to remove cloud on title.

Relief against forged instruments.

Cited in *Forbes v. Johnson*, 11 B. Mon. 48, on jurisdiction to cancel forged instrument or perpetuate evidence of forgery.

16 AM. DEC. 163, JOHNSON v. ELLISON, 4 T. B. MON. 526.

Descriptive additions to names.

Cited in *Thompson v. Thompson*, 4 B. Mon. 502, holding no variance between note and copy which omitted word "Sec'y." after name of one of obligors.

Cited in reference note in 27 A. D. 534, on term "junior" as part of one's name.

Cited in notes in 40 A. D. 240, as to whether "junior" is part of man's name in law; 14 L.R.A. 692, on "junior" or "senior" as part of name; 20 L. ed. U. S. 830, on "junior" or "senior" as no part of name.

16 AM. DEC. 165, DUBREUIL v. SOULIE, 4 MART. N. S. 91.

Estoppel by false representation.

Cited in *Laski v. Goldman*, 18 La. Ann. 294, holding that false representations, acted upon, cannot be denied by party making them so as to relieve him of liability.

Rights of debtor purchasing at his own execution sale.

Cited in *Dubreuil v. Soulie*, 4 Mart. N. S. 93, holding judgment debtor purchasing under execution sale, not entitled to injunction to prevent execution on bond for payment, because deed is not in statutory form.

Cited in note in 39 A. D. 60, on ratification of unauthorized execution sale.

16 AM. DEC. 166, MORGAN v. FURST, 4 MART. N. S. 116.

Estoppel in pais.

Cited in reference notes in 30 A. S. R. 330, on estoppel by signing redelivery bond; 26 A. D. 421, on estoppel by giving receipt of attachment.

Liability on bond for release of property.

Cited in *Clapp v. Seibrecht*, 11 La. Ann. 528, holding surety on bond for release of property liable where debtor permitted property to be seized for his subsequent unpaid rent.

Liability on purchaser's bond at sheriff's sale.

Cited in *Cayce v. Curtis*, Dallam (Tex.) 403, holding purchaser at sheriff's sale bound on his bond for purchase price, though sheriff's return on execution was irregular.

16 AM. DEC. 169, BALDWIN v. GRAY, 4 MART. N. S. 192.

Conflict of laws as to contracts.

Cited in *Milliken v. Pratt*, 125 Mass. 374, 28 A. R. 241, holding that validity of contract as to capacity of the parties is governed by the *lex loci contractus*.

Cited in reference note in 37 A. D. 420, on what law governs validity of contract.

Cited in notes in 5 E. R. C. 868, on universal validity of contract valid where made; 17 A. D. 182, on conflict of laws as to age of majority; 5 A. D. 741, on law of domicile; 12 A. D. 479, as to what law governs contract by married woman made in another state.

Effect of receipt to one codebtor.

Cited in *Benton v. Roberts*, 1 Rob. (La.) 101, holding that receipt to one codebtor for his part, severs the obligation and extinguishes it as to him who has paid; *Daigle's Succession*, 15 La. Ann. 594, holding that repurchase from one by vendor of one half of property conveyed to copurchasers jointly releases the other from liability as to that part.

Cited in reference note in 36 A. S. R. 375, on effect of payments severally by joint debtors on joint liability for residue of debt.

16 AM. DEC. 171, CECIL v. PREUCH, 4 MART. N. S. 256.

Duty and liability of bailee for hire.

Cited in reference notes in 22 A. D. 437, on duty of bailee for hire; 92 A. D. 185, on duty and liability of agister; 69 A. D. 446, on liability of agister of cattle for their safety; 75 A. D. 114, on agister of stock as insurer of their safety.

Cited in note in 2 E. R. C. 558, on liability of agister for negligence.

16 AM. DEC. 173, THORN v. MORGAN, 4 MART. N. S. 292.

Law governing conveyance by insolvent.

See *Kirkendall v. Weatherley*, 77 Neb. 421, 9 L.R.A.(N.S.) 515, 109 N. W. 757, holding voluntary assignment for creditors executed according to laws of state where made, ineffectual to convey land in other state unless executed as required by its laws.

16 AM. DEC. 175, BROWN v. SAUL, 4 MART. N. S. 424.

Right of intervention.

Cited in *Pool v. Sanford*, 52 Tex. 621; *New Orleans Canal & Bkg. Co. v. Beard*, 16 La. Ann. 345, 79 A. D. 582,—holding that one who has legal interest in defeating plaintiff's case may intervene; *Harlan v. Eureka Min. Co.* 10 Nev. 92; *Horn v. Volcano Water Co.* 13 Cal. 62,—holding that a direct and immediate interest which will be affected by the judgment is necessary to give right to intervene; *Wightman v. Evanston Varyan Co.* 217 Ill. 371, 108 A. S. R. 258, 75 N. E. 502, 3 A. & E. Ann. Cas. 1089, holding that to entitle party to intervene in equity, he must have a claim or lien upon the property in controversy; *Lincoln v. New Orleans Exp. Co.* 45 La. Ann. 729, 12 So. 937, holding that an ordinary creditor cannot intervene in suit against his debtor by another creditor.

Cited in reference notes in 18 A. D. 249; 39 A. D. 540; 60 A. D. 200,—on intervention; 64 A. S. R. 512, on origin and nature of intervention; 38 A. S. R. 501, as to who may intervene; 17 A. S. R. 198, on who may intervene in suit and rights of persons intervening; 44 A. S. R. 802; 46 A. S. R. 290; 108 A. S. R. 263,—on interest entitling persons to intervene; 123 A. S. R. 305, on intervention by creditors having no lien; 99 A. D. 722; 63 A. S. R. 410,—on rights of interveners; 79 A. D. 586, on rights and requisite interest of interveners; 79 A. S. R. 76, on time for application to intervene; 98 A. S. R. 854, on necessity of appli-

ation to intervene before trial; 26 A. S. R. 730, on sufficiency of application for intervention.

Cited in note in 15 A. D. 162, on who may become interveners.

Pleading peremptory exceptions.

Cited in *Phillips v. Preston*, 5 How. 278, 12 L. ed. 152, holding peremptory exceptions founded in law, admissible after pleadings have been read; *Union Bank v. Dunn*, 17 La. 234; *State v. Desforges*, 5 Rob. (La.) 253; *Kent v. Monget*, 4 Rob. (La.) 172,—holding that total want of legal right to sue may be taken advantage of at any stage of a cause; *Cure v. Porte*, 18 La. Ann. 456, on same point.

Distinguished in *Montfort v. Schmidt*, 36 La. Ann. 750, holding that peremptory exception of want of capacity to sue as representative cannot be taken after answer is filed.

Costs in absence of demand.

Cited in *The Harriet*, Fed. Cas. No. 6,095, on nonliability for costs of defendant who is willing and ready to pay debt sued upon.

Parties.

Cited in *Lockhart v. Harrell*, 6 La. Ann. 530, on necessary parties in suit for firm debt.

16 AM. DEC. 185, CLAMAGERAN v. BUCKS, 4 MART. N. S. 487.

Rights of intervener.

Cited in *West v. His Creditors*, 8 Rob. (La.) 123, holding that intervener cannot plead exceptions tending to dismissal of action; *Hoover v. York*, 30 La. Ann. 752, on same point; *Emerson v. Fox*, 3 La. 178, holding that intervener cannot take advantage of insufficiency of pleadings or proceedings; *People's Bank v. West*, 67 Miss. 729, 8 L.R.A. 727, 7 So. 513, on same point; *Hanchett v. Gray*, 7 Tex. 549, holding that intervener may interpose exceptions going to the merits of the action.

Cited in reference notes in 18 A. D. 249; 60 A. D. 200,—on intervention.

Cited in notes in 15 A. D. 163, on rights of interveners as parties to the suit; 16 A. D. 180, on necessity of intervener accepting suit as he finds it.

16 AM. DEC. 186, ROUQUIER v. ROUQUIER, 5 MART. N. S. 98.

What is wife's separate property.

Cited in notes in 39 A. D. 556; 40 A. D. 444,—as to what is wife's separate property; 16 A. D. 187, on separate ownership of spouse to whom property is given; 96 A. S. R. 916, as to whether real property granted by government to a citizen is separate or community property.

—Government grants of land as.

Cited in *Wilkinson v. American Iron Mountain Co.* 20 Mo. 122, holding land granted to husband by Spanish government, not community property; *Urquhart v. Sargent*, 2 La. Ann. 196, on same point; *Noe v. Card*, 14 Cal. 576, holding land granted by Mexican government to husband, under certain conditions as to improvements, not community property; *Pargoud v. Pace*, 10 La. Ann. 613; *Hughey v. Barrow*, 4 La. Ann. 248,—holding that land donated by government to husband, under Spanish law, is not community property.

16 AM. DEC. 188, PARKINS v. CAMPBELL, 5 MART. N. S. 149.

Sale under mortgage securing several notes.

Cited in *Soniat v. Miles*, 32 La. Ann. 164, holding purchaser's title under mortgage sale good as against one holding another note secured by the same mortgage; *Lovell v. Cragin*, 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024, holding that proceeds of mortgage sale, where mortgage secures a number of notes, should be divided *pro rata* between holders of notes; *Chaffraix v. Packard*, 26 La. Ann. 172 (dissenting opinion), on sale under mortgage extinguishing the mortgage.

Cited in note in 37 L.R.A. 754, on proceedings to enforce mortgage for part of mortgage debt after exhaustion of lien by prior proceedings.

16 AM. DEC. 189, MILNE v. DAVIDSON, 5 MART. N. S. 409.

Validity of ordinances.

Cited in *New Orleans & N. W. R. Co. v. Vidalia*, 117 La. 561, 42 So. 139, holding that question of reasonableness of municipal ordinance is for courts to decide; *Tacoma v. Lillis*, 4 Wash. 797, 18 L.R.A. 372, 31 Pac. 321; *Swindell v. State*, 143 Ind. 153, 35 L.R.A. 60, 42 N. E. 528,—on municipal ordinance being local law or statute.

Cited in reference notes in 19 A. D. 250, on municipal ordinances; 41 A. S. R. 673, on effect of municipal ordinance; 28 A. D. 264, on validity of municipal by-laws and ordinances; 41 A. S. R. 253, on injunction against passage of municipal ordinance; 24 A. S. R. 140, on discriminatory municipal ordinances; 39 A. D. 150, on municipal corporation's power to enact ordinances.

Cited in notes in 41 L. ed. U. S. 519, on authority to pass municipal ordinance; 34 A. D. 636, on invalidity of municipal ordinances in contravention of common or private rights.

Powers of municipalities.

Cited in *Monroe v. Gerspach*, 33 La. Ann. 1011, holding that municipal authorities have right to determine what shall constitute a nuisance.

Cited in reference notes in 22 A. D. 425; 28 A. D. 191; 34 A. D. 643; 38 A. D. 568; 4 A. S. R. 256; 49 A. S. R. 232; 65 A. S. R. 744; 119 A. S. R. 663,—on power of municipality to determine what is a nuisance; 26 A. D. 102, on remedies for public nuisances; 34 A. S. R. 25; 40 A. S. R. 778,—on municipalities' power to abate nuisance; 24 A. D. 197; 30 A. D. 572,—on power of municipal corporations to abate nuisances and to declare what is a nuisance; 90 A. D. 283, as to valid exercise of police power by municipal corporations; 20 A. D. 262, on delegation of power to municipal corporation.

Cited in notes in 38 L.R.A. 165, on extent of municipal power over buildings as nuisances; 39 L.R.A. 663, on municipal power over buildings and fences as nuisances affecting highways; 38 L.R.A. 321, on municipal power over nuisances relating to persons and things infected with disease; 1 L.R.A. 169, on power and authority of municipal corporations; 36 L.R.A. 596, on extent of municipal power to define nuisances; 40 A. D. 344, on power of municipal corporations to prohibit and prevent nuisances; 13 L.R.A. 481, on municipal control over erection of wooden buildings; 27 A. D. 98, on power of municipal corporations to remove nuisances and to determine what is a nuisance; 34 A. D. 632, on power of legislature to delegate authority to municipality to pass ordinance or by-laws.

Powers of boards of health.

Cited in *New Iberia v. Serrett*, 31 La. Ann. 719, 33 A. R. 229; *Warner v.*

Stebbins, 111 Iowa, 86, 82 N. W. 457,—holding that power of local boards of health under statute is broad and acts done under broad construction will be upheld by courts; *State v. Payssan*, 47 La. Ann. 1029, 49 A. S. R. 390, 17 So. 481, holding ordinance for removal and destruction of garbage valid as regulation for protection of health.

Annotation cited in *Montezuma v. Minor*, 73 Ga. 484, on right to abate as nuisance the use of property endangering public health.

Cited in notes in 47 A. S. R. 544, 545, 546, on validity of state quarantine and health regulations.

— As to hospitals.

Cited in *Smith v. Newbern*, 70 N. C. 14, 16 A. R. 766; *Mayo v. Washington*, 122 N. C. 5, 40 L.R.A. 163, 29 S. E. 343,—on city's right to erect public hospital under general power.

Illegal contracts.

Cited in reference notes in 76 A. S. R. 768, on validity of contracts for illegal purposes; 18 A. D. 403, on validity of contract prohibited by statute; 55 A. S. R. 66, on validity of contract to defeat policy of statute; 25 A. D. 79, on sufficiency of act forbidden by law as consideration for promise.

Cited in note in 12 L.R.A. (N.S.) 606, on ethics of lease in violation of law.

— Enforcement of.

Cited in *Butterly v. Blanchard*, 1 Rob. (La.) 340, on enforcement of unlawful contract.

16 AM. DEC. 199, CUCULLU v. LOUISIANA INS. CO. 5 MART. N. S. 464.

Followed without discussion in *Cucullu v. Orleans Ins. Co.* 5 Mart. N. S. 492.

Conclusiveness of decree in admiralty generally.

Cited in reference note in 48 A. D. 591, on conclusiveness of decree in admiralty.

Cited in note in 75 A. D. 723, on judgments and decrees in admiralty and their effect as *res judicata*.

Conclusiveness of foreign decree.

Cited in *Cucullu v. Orleans Ins. Co.* 6 Mart. N. S. 11, holding sentence of foreign court of admiralty conclusive as to facts decided, as between parties to insurance policy.

Cited in reference note in 20 A. D. 189, on effect of foreign judgment.

Cited in notes in 94 A. S. R. 551, on foreign judgments *in rem*; 5 E. R. C. 929, on conclusiveness of foreign judgment *in rem*; 20 L.R.A. 678, on necessity that foreign court have jurisdiction, to make decision conclusive.

— In admiralty.

Cited in note in 20 L.R.A. 669, on conclusiveness of sentences of foreign courts of admiralty in actions on marine insurance policies.

Judgment of foreign court as evidence.

Cited in *Glenn v. Thistle*, 1 Rob. (La.) 575, holding judgment of foreign tribunal admissible as evidence of the matters decided therein.

Jurisdiction over waters.

Cited in notes in 46 L.R.A. 265, on jurisdiction over oceans; 46 L.R.A. 271, on jurisdiction over coast water.

Construction of foreign statute.

Cited in reference note in 39 A. D. 50, on binding force in other state of construction of statute by enacting state.

Liability under warranties in insurance policies.

Cited in *Goicoechea v. Louisiana State Ins. Co.* 6 Mart. N. S. 51, 17 A. D. 175, holding assurers discharged where there was breach of a warranty, whether such breach was cause of condemnation or not; *Cucullu v. Orleans Ins. Co.* 6 Mart. N. S. 11, holding insurers liable in case of illegal seizure and detention, under policy with warranty against illicit trade.

Extent of belligerent rights.

Cited in reference note in 46 A. D. 558, on extent of belligerent rights.

Illicit trade.

Cited in reference note in 22 A. D. 136, on illicit trade.

16 AM. DEC. 212, SAUL v. HIS CREDITORS, 5 MART. N. S. 569.**Conflict of laws.**

Cited in *Kraemer v. Kraemer*, 52 Cal. 302; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417, 8 Abb. N. C. 363,—on the difficulty of questions involving conflict of laws; *Hill v. M'Dermot*, Dallam. (Tex.) 419; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139,—on courts giving preference to the laws of their own country in case of doubt as to which should control.

Cited in reference notes in 28 A. D. 135, on *lex domicilii*; 25 A. D. 178,—on conflict of laws as to transfers.

Cited in notes in 5 A. D. 741, on law of domicile; 9 E. R. C. 288, on determination of right of heirship by *lex rei sitæ*; 17 A. D. 180, 182, on conflict of laws as to age of majority.

— Policy of forum.

Cited in *Pittsburgh & S. Line R. Co. v. Rothschild*, 8 Sadler (Pa.) 83, 4 Atl. 385 (affirming 1 Pa. Co. Ct. 620), on states not being bound to enforce contracts, valid where made, if injurious to the state or its subjects; *Petit's Succession*, 49 La. Ann. 625, 62 A. S. R. 659, 21 So. 717; *Buckner v. Watt*, 19 La. 216, 36 A. D. 671,—holding that contracts are governed by the *lex loci contractus* except where injurious to the interests of state or people where sought to be enforced.

Cited in reference note in 65 A. D. 660, 682, on necessity that form of action or remedy be according to *lex fori*.

— Real and personal statutes.

Cited in *Bank of Columbia v. Walker*, 14 Lea, 299, on distinction between real and personal statutes as governing contracts; *Choppin v. Harmon*, 46 Miss. 304, holding that law of situs governs as to disposition of real property.

— As to contracts generally.

Cited in *Milliken v. Pratt*, 125 Mass. 374, 28 A. R. 241, holding contracts governed by the *lex loci contractus*; *Atwood v. Protection Ins. Co.* 14 Conn. 555, holding unrecorded assignment of debt due to citizen of foreign state, with view to insolvency, valid as against subsequent attachment by creditor in third state, though such assignment would be void under local law.

Cited in reference notes in 19 A. D. 184, on law governing construction and validity of contracts; 32 A. D. 310, on nonenforcement of contract made elsewhere for goods; 36 A. D. 673, on enforcement of foreign contracts injurious to nation where enforcement sought.

Cited in note in 5 E. R. C. 869, on universal validity of contract valid where made.

Disapproved in *Nichols & S. Co. v. Marshall*, 108 Iowa, 518, 79 N. W. 282,

holding that married woman's contract of suretyship, void where entered into, is void in another state, though such contract may be entered into there.

— **Marriage contracts.**

Cited in *Caballero v. The Executor*, 24 La. Ann. 573, holding contract of marriage governed by the *lex loci contractus*; *Gabisso's Succession*, 119 La. 704, 121 A. S. R. 529, 11 L.R.A. (N.S.) 1082, 44 So. 438, holding marriage in foreign state for purpose of evading local statutory prohibition, not valid in local state; *Hernandez's Succession*, 46 La. Ann. 962, 24 L.R.A. 831, 15 So. 461, on same point.

— **Marriage settlements and property arrangements.**

Cited in *Heine v. Mechanics & T. Ins. Co.* 45 La. Ann. 770, 13 So. 1, holding that foreign marriage contract relating to transfer of real property in Louisiana must be construed according to Louisiana law; *Long v. Hess*, 154 Ill. 482, 45 A. S. R. 143, 27 L.R.A. 791, 40 N. E. 335; *Pritchard v. Citizens' Bank*, 8 La. 130, 28 A. D. 132; *Fuss v. Fuss*, 24 Wis. 256, 1 A. R. 180; *Besse v. Pellochoux*, 73 Ill. 285, 24 A. R. 242,—holding marriage contract made in foreign country, with no intent to change domicil, not binding as to property acquired after change of domicil; *Hall v. Harris*, 11 Tex. 300; *Lyon v. Knott*, 26 Miss. 548,—on same point.

Cited in notes in 85 A. S. R. 576, on effect of change of domicil on law governing marriage settlements; 12 A. D. 478, on binding force of marriage contracts though parties subsequently become permanent residents of another state.

— **As to marital rights.**

Cited in *Dixon v. Dixon*, 4 La. 188, 23 A. D. 478; *Packwood's Succession*, 9 Rob. (La.) 438, 41 A. D. 341,—holding that law concerning community property is a real statute and operates only upon property acquired within the state; *Lizardi's Succession*, 7 Rob. (La.) 167, holding property in Louisiana acquired since marriage is presumed to be community property; *Williams v. Pope Mfg. Co.* 52 La. Ann. 1417, 78 A. S. R. 390, 50 L.R.A. 816, 27 So. 851, holding that a claim by married woman domiciled in another state, for tort arising in Louisiana, is not community property under laws of Louisiana; *Harrison v. Boyd*, 36 Ala. 203, holding that where parties marry and have intention to fix domicil in a certain state and carry out that intent, the law of the place of domicil governs their property rights; *McIntyre v. Chappell*, 4 Tex. 187, holding that, where place of marriage and domicil are the same, the law of domicil governs as to personal property, wherever situated or acquired; *Castrc v. Illies*, 22 Tex. 479, 73 A. D. 277; *State v. Barrow*, 14 Tex. 179, 65 A. D. 109,—holding that law of domicil governs as to after-acquired property.

Cited in reference note in 41 A. D. 348, on law governing rights of married persons on change of domicil after marriage.

Cited in notes in 85 A. S. R. 565, on conflict of laws as to community property; 39 A. D. 556, on laws governing wife's matrimonial rights upon removal to another country; 57 L.R.A. 366, on conflict of laws as to marriage property acquired after change of domicil; 57 L.R.A. 358, on conflict of laws as to matrimonial property when *lex domicilii* is opposed to *lex rei sitæ* or *lex fori*.

— **As to capacity or status of persons.**

Cited in *Walling v. Christian & C. Grocery Co.* 41 Fla. 479, 47 L.R.A. 608, 27 So. 46, holding that the *lex loci contractus* governs as to competency of married woman to contract; *Mitchell v. Wells*, 37 Miss. 235, holding emancipation of slave in one state not binding on another; *Neal v. Farmer*, 9 Ga. 553, on foreign states not recognizing master's right over person of slave, though respecting the

laws of other countries as to slavery; *Scott v. Key*, 11 La. Ann. 232, holding that act of legitimization of child is a personal one and follows the child in another state.

—As to remedies.

Cited in *Briggs, L. & Co. v. Campbell*, 19 La. 524, holding that statutes affecting remedies only have no extraterritorial operation.

Marital property rights and rights in succession.

Cited in *Stolenburg v. Diercks*, 117 Iowa, 25, 90 N. W. 525, distinguishing between rights to property under marriage contract and rights under positive law as to succession and inheritance.

Cited in reference note in 65 A. D. 168, on rights of spouses in community property.

Cited in note in 86 A. D. 628, as to what is community property.

Repeal by subsequent legislation.

Cited in *Welch v. Gossens*, 51 La. Ann. 852, 25 So. 472; *New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850,—holding special statute not repealed by general law unless so expressed or so conflicting that both cannot stand; *Bond v. Hiestand*, 20 La. Ann. 139; *State v. Lewis*, 3 La. Ann. 398,—holding that prior laws are not repealed by subsequent ones unless provisions therein are contrary to, or irreconcilable with, prior law; *State ex rel. Shakespere v. Patton*, 32 La. Ann. 1200, on same point.

Cited in reference notes in 22 A. D. 379, on repeals by implication; 34 A. D. 493, on effect of repeal of statute.

Cited in note in 20 L. ed. U. S. 236, on repeal of statute by implication.

Construction of statutes.

Cited in reference note in 58 A. D. 392, on construction together of statutes *in pari materia*.

Exchange of property.

Cited in *Saul v. His Creditors*, 7 Mart. N. S. 594, holding that property exchanged cannot be recovered back from insolvent party, though other party loses what he was to receive in exchange.

Rights of pledgee under void contract.

Cited in *Tayloe v. Whittemore*, 2 Rob. (La.) 99, holding that, where money is advanced upon a void pledge, the creditor may yet come in to recover his debt with other creditors; *Brother v. Saul*, 11 La. Ann. 223 (dissenting opinion), on invalid pledge conferring no privilege on pledgee.

Unauthenticated writing as evidence.

Cited in *Morfit v. Fuentes*, 27 La. Ann. 107, on admissibility of act not authenticated as private writing.

Spanish law in Louisiana.

Cited in *Kunemann's Succession*, 115 La. 604, 39 So. 702, on Spanish jurisprudence being in force in Louisiana except where changed by positive law; *Newcomer v. Orem*, 2 Md. 297, 56 A. D. 717; *Nixon v. Piffet*, 16 La. Ann. 379,—on Spanish law being in force in Louisiana until its repeal in 1828.

16 AM. DEC. 233, EMERY v. GOWEN, 4 ME. 33.

Measure of damages for seduction.

Cited in reference notes in 28 A. S. R. 91, on injury to family as element of

damage; 35 A. D. 634, as to when feelings of parent are considered in action for injury to child.

Cited in notes in 44 A. D. 178; 53 A. D. 350,—on damages in case of seduction.

Loss of service as gravamen of seduction.

Cited in *Magee v. Holland*, 27 N. J. L. 86, 72 A. D. 341, holding loss of services is in all cases indispensable.

Cited in note in 76 A. S. R. 660, on foundation of civil action for seduction.

Distinguished in *Blanchard v. Ilsley*, 120 Mass. 487, 21 A. R. 535, holding action for seduction does not lie by one other than father, where it does not appear that father had parted with the right to his daughter's services.

Right of action for seduction of daughter.

Cited in *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23, holding father may maintain action, though the daughter is of age if she is of his family and performs even slight services.

Cited in notes in 53 A. D. 348, as to who may sue for seduction; 20 A. D. 643; 44 A. D. 166, 741,—on parent's right to sue for seduction of daughter; 14 L.R.A. 703, on parent's action for seduction of daughter as affected by relinquishment of right to her services.

Father's right to services of minor child.

Cited in *Gilley v. Gilley*, 79 Me. 292, 1 A. S. R. 307, 9 Atl. 623, on right of father to services of minor child.

—Assignment of services.

Cited in *Doane v. Corel*, 56 Me. 527, holding father's indenture a good assignment of right to service, though not in statutory form.

Averment of loss of service.

Cited in *Dunn v. Cass. Ave. & F. G. R. Co.* 21 Mo. App. 188, holding declaration in action *per quod servitium amisit* must aver loss of services.

16 AM. DEC. 237, ANDERSON v. ANDERSON, 4 ME. 100.

Records as evidence.

Cited in reference notes in 82 A. S. R. 939; 84 A. S. R. 349,—on records of conviction or acquittal as evidence.

Cited in note in 11 L.R.A.(N.S.) 656, on conclusiveness in civil action of judgment in criminal action to prove marriage or marital offenses.

Amendments.

Cited in note in 34 A. D. 160, on amendments in equitable suits.

16 AM. DEC. 238, WAITE v. MERRILL, 4 ME. 102.

Implied promise to pay money.

Cited in *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 581, 25 A. S. R. 783, 22 Atl. 575, holding that implied promise to pay for property transferred does not arise against contrary understanding.

Cited in reference notes in 23 A. D. 662; 26 A. D. 555,—on exclusion of implied contract by express contract; 60 A. D. 629, on nonimplication of promise where express contract exists.

Validity of agreements to hold property in common.

Cited in *Burt v. Oneida Community*, 137 N. Y. 346, 19 L.R.A. 297, 33 N. E. 307, holding a communistic association, viewed as a business concern, lawful; *State v. Amana Society*, 132 Iowa, 304, 8 L.R.A.(N.S.) 909, 109 N. W. 894, hold-

ing communistic life by the members of a religious corporation is not contrary to public policy; *Benziger v. Steinhauser*, 154 Fed. 151, sustaining an agreement between a Catholic charitable order and a member, wherein the member agreed to deliver all his property to the order in consideration of support and maintenance; *Davis v. Dyer*, 56 N. H. 143, on secular articles of association of Shakers; *Gasely v. Separatists Soc.* 13 Ohio St. 144, denying the right to an accounting of property held in common, based on articles of association.

Cited in reference notes in 26 A. D. 459, on validity of covenant of society of Shakers; 30 A. D. 334, on covenant of member of society of Shakers never to claim compensation for services.

Cited in note in 8 L.R.A. (N.S.) 910, on public policy as related to communistic life or tenure of property.

Enforcement of illegal contract.

Cited in reference notes in 20 A. D. 611, on action founded on illegal contract; 26 A. D. 532, on interference by courts with executed illegal contract.

Right to recover back money paid.

Cited in reference note in 40 A. D. 581, as to whether payments voluntarily made can be recovered.

Cited in note in 6 E. R. C. 490, on right of party to recover money paid under an illegal contract.

16 AM. DEC. 249, JORDAN v. JORDAN, 4 ME. 175.

When limitation begins to run.

Cited in *Dee v. Hyland*, 3 Utah, 308, 3 Pac. 388, holding in the absence of proof of fraud by defendant, the time of limitation runs from time of wrongful act, or the right of action accrued.

Cited in reference note in 96 A. D. 299, as to whether relief will be granted from bar of statute of limitations on ground of mistake.

Cited in notes in 51 A. D. 584, on statute of limitations in case of fraud; 16 E. R. C. 262, as to when statute of limitations runs against cause of action for fraud.

Ignorance or concealment as tolling statute of limitations.

Cited in *Campbell v. Roe*, 32 Neb. 345, 49 N. W. 452, holding that mere silence or concealment by the defendant, without affirmative misrepresentation, will not toll the statute; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 A. S. R. 828, 23 S. E. 681, holding statute begins to run from breach of warranty, unless ignorance of rights was owing to the conduct of the defendant.

Cited in reference notes in 22 A. D. 435; 36 A. D. 107; 34 A. S. R. 556,—on effect of ignorance on running of limitations; 66 A. D. 183, as to when statute of limitations begins to run in case of person ignorant of his rights.

Cited in note in 55 A. S. R. 515, on effect of ignorance of one's rights on running of limitations.

Action for use and occupation.

Cited in reference notes in 20 A. D. 447, as to when action for use and occupation lies; 23 A. D. 407, on assumpsit for use and occupation.

16 AM. DEC. 253, SMALL v. SMALL, 4 ME. 220.

Execution and publication of will.

Cited in reference notes in 39 A. D. 592, on publication of will; 37 A. D. 260,

on necessity and sufficiency of publication of will; 20 A. S. R. 230, on testator's mark to will.

Cited in note in 40 A. D. 231, on execution, publication, and attestation of wills.

Distinguished in *Heyer v. Burger*, Hoffm. Ch. 1, holding will void by statute, where testator after affixing his mark, died without publication.

Undue influence with respect to will.

Cited in *Kempsey v. Maginnis*, 2 Mich. N. P. 49, holding influence gained over another by acts of kindness and attention and correct conduct, not improper; *Gilbert v. Gilbert*, 22 Ala. 529, 58 A. D. 268, holding undue influence must destroy, in some measure, free agency and prevent exercise of testamentary discretion; *Barnes v. Barnes*, 66 Me. 286, holding influence must amount either to deception or else to force and coercion; *Potts v. House*, 6 Ga. 324, 50 A. D. 329, holding the influence must amount to moral coercion; *Seguine v. Seguine*, 2 Ves. 663, 35 How. Pr. 336, 4 Abb. App. Dec. 191, holding undue influence is not such as arises by reason of gratitude, affection, or esteem, but must be an exercise of coercion, imposition, or fraud; *Re Darst*, 34 Or. 58, 54 Pac. 947, holding influence arising from gratitude, affection, or esteem, not undue, unless it destroys free agency; *Moore v. Blauvelt*, 15 N. J. Eq. 367, holding whatever destroys the free agency of testator constitutes undue influence, and it may be effected by physical force or mental coercion; *Re Jackman*, 26 Wis. 104, holding the influence must be such as to constrain testator to do what is really against his will so as virtually to render act that of another; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98,—holding it must appear that the influence was exercised upon the very act of making the will, to invalidate it.

Cited in reference notes in 34 A. D. 354; 49 A. D. 633; 58 A. D. 271,—on what constitutes undue influence invalidating will; 39 A. S. R. 834, on testamentary capacity and undue influence; 56 A. D. 429, on undue influence affecting validity of wills; 31 A. S. R. 670, on influence or importunity sufficient to invalidate will; 25 A. D. 301, as to when importunity and undue influence invalidate will.

Cited in notes in 19 A. D. 408, on undue influence affecting testamentary capacity; 31 A. S. R. 676, on influence of kinship or companionship which invalidates will; 31 A. S. R. 674, on necessity that undue influence destroy free agency to invalidate will.

—Presumption from relation to or character of testator.

Cited in *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44, holding suspicion usually attaches to a bequest to a mistress, especially if it be unnatural; *Shipman v. Furniss*, 69 Ala. 555, 44 A. R. 528, holding bequest of property of considerable value to one living in illicit sexual relations with donor puts burden upon such one of proving gift was result of free volition.

Cited in reference note in 1 A. S. R. 720, on presumption of undue influence in case of spiritual advisers.

Cited in note in 21 A. S. R. 98, 100, on presumption of undue influence.

—Burden of proof.

Cited in *Baldwin v. Parker*, 99 Mass. 79, 96 A. D. 697, holding upon the separate issue of undue influence the burden of proof is upon the party alleging it; *Zimmerman v. Zimmerman*, 23 Pa. 375, holding presumption of competency in testator, not destroyed by showing testator was a feeble, easy, good-natured old man; *Penn Mut. L. Ins. Co. v. Union Trust Co.* 83 Fed. 891, holding proof

necessary when it is attempted to set aside an act of assignment apparently done deliberately and executed formally.

Cited in reference note in 36 A. S. R. 235, on burden of proving undue influence in execution of will.

— Wife's or child's influence.

Cited in *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Re Donovan*, 140 Cal. 390, 73 Pac. 1081,—holding wife's influence over husband in the conduct of home and business affairs, not in itself evidence of undue influence; *Roberts v. Trawick*, 13 Ala. 68, holding it competent to show that the ascendancy exercised by the wife was but that which her virtues gained over testator; *Perry v. Perry*, 94 Tenn. 328, 29 S. W. 1, holding undue influence is not to be presumed from fact that wife has opportunity and inducement to exert such influence; *Mackall v. Mackall*, 135 U. S. 167, 34 L. ed. 84, 10 Sup. Ct. Rep. 705, holding the confidential relation between father and son who remains with him after separation of wife does not tend to prove undue influence if no imposition or fraud be practised; *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031, holding a will in favor of the protegee of testator, who had lived with him since infancy, cannot be impeached for undue influence without evidence to support it.

Jurisdiction as to wills and probate thereof.

Cited in *Moore v. Smith*, 5 Me. 490, holding by statute, proof of revocation of a will must be presented to the judge of probate by way of objection to the probate, and question cannot be settled in any court of common law; *Mears v. Mears*, 15 Ohio St. 90, holding the jurisdiction of the court of probate is limited to the probate of wills, its construction being left to other tribunals.

Cited in reference notes in 22 A. D. 652, on jurisdiction of equity court in will cases; 72 A. S. R. 215, on jurisdiction of equity in will contest; 57 A. D. 144, on jurisdiction over construction of will.

16 AM. DEC. 263, THOMPSON v. SNOW, 4 ME. 264.

Liability of shipowner or master for supplies, etc.

Cited in *Skolfield v. Potter*, 2 Ware, 394, Fed. Cas. No. 12,925; *Winsor v. Cutts*, 7 Me. 261,—holding owner not liable for supplies furnished master who was to victual and man vessel for share of earnings; *Sproat v. Donnell*, 26 Me. 185, 45 A. D. 103, holding same as to lumber used as fuel on voyage, where master chartered the vessel for an indefinite period, giving a portion of earnings as hire; *Giles v. Vigoreux*, 35 Me. 300, 58 A. D. 704; *Holden v. French*, 68 Me. 241,—holding master liable as owner to the seamen for their wages; *Annett v. Foster*, 1 Daly, 502, holding the owner liable where he had not given up all control of the vessel and her employment.

Cited in reference notes in 27 A. D. 323, on owner's liability for contracts of master; 45 A. D. 106, as to when general owner of vessel is not liable for loss of goods.

Cited in notes in 16 A. D. 271; 16 A. D. 440,—on owner's liability for master's contracts; 5 E. R. C. 630, on liability of owner of chartered ship.

Distinguished in *Saxton v. Read*, Hill & D. Supp. 323, holding the owner liable for supplies where master was to devote all his time for the benefit of the owners, hiring and paying crew and furnishing provisions, with an equal division of profits.

Chartering master as owner of ship.

Cited in *Noyes v. Staples*, 61 Me. 422, holding master sailing on shares must Am. Dec. Vol. III.—14.

have exclusive control for time being to make him owner *pro hac vice*; *Wickersham v. Southard*, 67 Me. 595, holding it must affirmatively appear that master had entire control; *Marshall v. Boardman*, 89 Me. 87, 56 A. S. R. 392, 35 Atl. 1024, holding the letting of a vessel on shares implies giving control and management exclusively to the master; *The Tribune*, 3 Sumn. 144, Fed. Cas. No. 14,171, holding the master, as such, would be entitled to let or charter or otherwise employ the vessel during the time he was deemed owner; *McLellan v. Reed*, 35 Me. 172, holding hirer who is to sail at his own expense and under his own control succeeds to all the rights and liabilities of the general owner for the time; *Jones v. Sims*, 9 Port. (Ala.) 236, 33 A. D. 313, holding shipper who agrees with one owner that certain freight is to be paid to that owner only for carriage of goods cannot recover a loss from their owners.

Cited in note in 37 L.R.A. 59, on whose servants, crew of chartered vessel are where charterer is captain.

Distinguished in *Emery v. Hersey*, 4 Me. 407, 16 A. D. 268, holding that if owner retains right to, and does, interfere with management of ship, the master is not liable to a shipper, though he have right to a portion of freight.

Power of master to purchase cargo.

Cited in *Hewett v. Buck*, 17 Me. 147, 35 A. D. 243, holding the master may bind the owners by his contracts relating to the usual employment of the vessel in the carriage of goods, but has no power to purchase a cargo on their account.

Sharing profits as indicium of partnership.

Cited in *Loomis v. Marshall*, 12 Conn. 69, 30 A. D. 596, holding agreements to furnish wool and to manufacture same into cloth, with a division of net proceeds, do not constitute partnership.

Cited in note in 18 L.R.A. (N.S.) 1045, on creation of partnership liability by taking profits as compensation for use of ships.

— Sharing earnings of vessel.

Cited in *The Crusader*, 1 Ware, 437, Fed. Cas. No. 3,456, holding a participation in the gross earnings of a voyage does not make the master and owner partners; *The Phebe*, 1 Ware, 263, Fed. Cas. No. 11,064, holding same of division of profits by charterer and owners; *Webb v. Peirce*, 1 Curt. C. C. 104, Fed. Cas. No. 17,320; *Bridges v. Sprague*, 57 Me. 543, 99 A. D. 718,—holding it no partnership where master of vessel is to man and victual her with an equal division of earnings; *Bird v. Hall*, 73 Me. 73, holding same where vessel is let on shares and master has control for the time being; *Joy v. Allen*, 2 Woodb. & M. 303, Fed. Cas. No. 7,552, holding where master divides the profits of a common voyage with the owners there is a special contract, though an imperfect partnership; *Wingate v. King*, 23 Me. 35, on letting a vessel for a share of the profits.

Distinguished in *Williams v. Williams*, 23 Me. 17, holding as between owner and master, who is to account for half the earnings, the earnings when collected are equally the owner's and master's, and the latter becomes a trustee of the owner's share.

Competency of master of vessel as witness.

Cited in *Hewitt v. Lovering*, 12 Me. 201, holding master sailing on shares not competent witness to show contract with owner of vessel, where purchase is made in his own name and his own draft given for value.

16 AM. DEC. 266, KING v. UPTON, 4 ME. 387.**Sufficiency of consideration generally.**

Cited in reference note in 26 A. D. 109, on sufficiency of consideration for promise.

Cited in note in 95 A. D. 263, on consideration in new promise to take case out of statute of frauds.

Forbearance to sue as consideration.

Cited in *Calkins v. Chandler*, 36 Mich. 320, 24 A. R. 593, holding agreement to forbear for an indefinite time, followed by forbearance for a reasonable time, good; *Brown v. Buford*, 3 B. Mon. 508, 39 A. D. 477, holding forbearance for a reasonable or convenient time is sufficient; *Searsmont v. Lincolnville*, 83 Me. 75, 21 Atl. 747; *Morgan v. Park Nat. Bank*, 44 Ill. App. 582,—holding forbearance good consideration, though no definite time be given; *Marshall v. Old*, 14 Colo. App. 32, 59 Pac. 217, holding executed agreement to forbear foreclosure for indefinite time, good consideration for a promise to turn over rents; *Glasscock v. Glasscock*, 66 Mo. 627, holding giving further time to pay note means only for a reasonable time and is a sufficient consideration; *Ballard v. Burton*, 64 Vt. 387, 16 L.R.A. 664, 24 Atl. 769, holding forbearance to draw money from bank, though for no definite time, is sufficient to support new certificate of deposit; *Cox v. Mobile & G. R. Co.* 37 Ala. 320, holding an agreement which legally prevents the creditor, for a single day, from enforcing collection, is a contract; *New York Mut. L. Ins. Co. v. Smith*, 23 Hun, 535, holding forbearance of several years, based on an agreement to allow a loan to remain uncollected, was good consideration to support second bond and mortgage; *Burns v. Harding*, 5 Luzerne Leg. Reg. 217, holding delay which is real and not merely colorable sufficient consideration for payment of forbearance money.

Cited in reference note in 23 A. S. R. 756, on forbearance to sue as valid consideration.

Cited in notes in 21 A. D. 394; 60 A. D. 524, 526,—on forbearance to sue as consideration for promise.

—For guarantor's or surety's promise.

Cited in *Rood v. Jones*, 1 Dougl. (Mich.) 188, holding promise by a third person to a creditor to pay debt, in consideration of forbearance to sue debtor, is good; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415, 29 N. E. 1094; *Hockenbury v. Meyers*, 34 N. J. L. 346,—holding forbearance to sue based upon agreement between payee and surety is valid, though not definite time is stated; *Strong v. Sheffield*, 144 N. Y. 392, 39 N. E. 330, holding forbearance for a reasonable time, request of debtor, sufficient consideration to support suretyship by third person though there was no enforceable agreement of forbearance.

Cited in reference note in 69 A. S. R. 534, on consideration for promise to answer for debt of another.

Cited in note in 105 A. S. R. 511, on forbearance as consideration for guaranty.

Necessity of expressing consideration in memorandum of contract.

Cited in *Williams v. Robinson*, 73 Me. 186, 40 A. R. 352, holding statute of frauds does not require the consideration to be recited; *How v. Kemball*, 2 McLean, 103, Fed. Cas. No. 6,748, holding that guaranty of note by indorsement imports a consideration.

Cited in note in 21 A. D. 556, on parol undertaking to answer for debt or default of another.

Mode of proving interest of witness.

Cited in *Southard v. Wilson*, 21 Me. 494, holding interrogation of witness whether defendant had given him a discharge in full is an election, and no other proof can be resorted to.

Cited in reference note in 49 A. D. 233, on admissibility of witness's own testimony on question of his competency to testify.

16 AM. DEC. 268, EMERY v. HERSEY, 4 ME. 407.**Customary liability of vessel owner for carrier's default.**

Cited in *The Hendrik Hudson*, 17 Law Rep. 93, Fed. Cas. No. 6,358, holding under custom giving master full authority, on receipt of goods, to contract with shipper to sell the cargo for cash and to bring back the money, owners are liable, though there was to be no commission received; *Hart v. Leech*, 21 Fed. 77, holding the above not applicable to vessels chartered for a lump sum.

Cited in reference note in 27 A. D. 323, on owner's liability for contracts of master.

Cited in notes in 16 A. D. 440, on owner's liability for master's contracts; 50 A. D. 100, on customs of common carriers and their validity; 58 A. D. 705, on liability of general owner who has let vessel, for nondelivery of goods shipped by her; 37 L.R.A. 55, on whose servants, crew of chartered vessel are.

Distinguished in *Herbert v. The James Leakman*, Fed. Cas. No. 6,397a, holding contract to sell cargo and transmit proceeds to shipper, for which service master is to be paid in freight received, is not a maritime contract binding on the vessel, where the proceeds of shipment were not actually placed on board; *The New Hampshire*, 21 Fed. 924, holding on similar contract with owner and master to carry cargo, sell it, and return proceeds, the vessel was not liable and admiralty had no jurisdiction upon conversion of proceeds; *The Waldo*, 2 Ware, 165, Fed. Cas. No. 17,056, holding that where master is made by shippers the consignee of cargo, he acts, after arrival at destination, as agent of shipper and cannot bind the owner or ship.

Carrier's liability for proceeds of shipment.

Cited in *Harrington v. M'Shane*, 2 Watts, 443, 27 A. D. 321, holding that carriers who bring back other property in the same vessel as proceeds of shipment, whether specific money or goods, do so as carriers and not merely as factors.

Ownership of vessel pro hac vice.

Cited in *Wickersham v. Southard*, 67 Me. 595, holding that it must affirmatively appear that master had entire control to exonerate the owners from liability for disbursements; *Sims v. Howard*, 40 Me. 276, holding that owners may recover for her freight if master sails on shares without entire control; *Giles v. Vigoreux*, 35 Me. 300, 58 A. D. 704, holding the general owner not liable for seamen's wages, where hirer of vessel on shares uses and controls the vessel under contract; *Windsor v. Cutts*, 7 Me. 261; *The Tribune*, 3 Sumn. 144, Fed. Cas. No. 14,171,—holding master to be owner for the season of hiring, where he takes vessel upon shares, victualing, manning, and paying all expenses; *Saxton v. Read*, Hill & D. Supp. 323, holding contract for division of earnings, which in terms recognizes one as captain and the other as owner, does not relieve the owner from liability for supplies.

Distinguished in *Bronzey v. Hodgkins*, 55 Me. 98, holding master sailing vessel on shares and in control, liable for freight lost; *Skolfield v. Potter*, 2 Ware, 394, Fed. Cas. No. 12,925, holding as to vessel let to master for portion of earnings

the owners are liable for the wages of the seamen, who had no knowledge of the contract.

—As between owner and charterer.

Cited in *Grimberg v. Columbia Packers' Asso.* 47 Or. 257, 114 A. S. R. 927, 83 Pac. 194, 8 A. & E. Ann. Cas. 491, holding where the general owner retains the possession, command, and navigation of the ship, the charterer is not held as a special owner for the voyage; *The Phebe*, 1 Ware, 263, Fed. Cas. No. 11,064, holding charterer alone liable when by charter party he takes possession of vessel as his own and controls and navigates her by his own master and crew; *Sheriffa v. Pugh*, 22 Wis. 273, 94 A. D. 600, holding where the general owner, notwithstanding the charter party, retains the possession of the vessel so far as to run it by his own captain and seamen, he is liable.

Authority of master of ship.

Cited in *The Illinois*, 2 Flipp. 383, Fed. Cas. No. 7,005, on the authority of a master to fasten a lien on his ship.

Distinguished in *Newhall v. Dunlap*, 14 Me. 180, 31 A. D. 45, holding power of purchasing and selling has been regarded as not within the power usually incident to the office of master.

When maritime lien exists.

Cited in note in 70 L.R.A. 435, on what contract to act as agent for ship will support maritime lien.

16 AM. DEC. 271, LOW'S CASE, 4 ME. 439.

Grand jurors as witnesses to impeach indictment.

Cited with special approval in *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768, holding individual grand jurors may be questioned under oath whether or not twelve or more concurred in finding the indictment.

Cited in *State v. Wood*, 53 N. H. 484, holding grand juror may be compelled to testify what witnesses before the grand jury testified to, where it seems necessary to promote the cause of justice; *United States v. Farrington*, 5 Fed. 343, holding any person may testify as to what transpired before a grand jury, when necessary to protection of public or private rights; *United States v. Terry*, 39 Fed. 365, holding grand juror may disclose proceedings of the jury or impeach its findings, only in extraordinary cases, where manifest injury would otherwise result; *State v. Benner*, 64 Me. 267, holding grand jurors competent witnesses for purpose of contradicting and impeaching testimony of witness who was before them; *Taylor v. State*, 49 Fla. 69, 38 So. 380 (dissenting opinion), on testimony of grand jurors as to transactions occurring in their body.

Cited in reference notes in 45 A. D. 511, on testimony of grand jurors; 17 A. D. 405, on grand juror's testimony in impeaching indictment; 57 A. S. R. 156, on right to impeach indictment by testimony of grand jurors; 47 A. D. 246, on impeaching indictment by oath of grand jurors.

Cited in notes in 16 A. D. 282, on admissibility of grand jurors' testimony collaterally to impeach indictment; 16 A. D. 285, on admissibility of grand jurors' testimony to show that indictment was not found by legal number.

Distinguished in *People v. Hulbut*, 4 Denio, 133, 47 A. D. 244, holding indictment, when presented in due form and filed, is record and cannot be impeached unless upon motions; *Gitchell v. People*, 146 Ill. 175, 37 A. S. R. 147, 33 N. E. 757 (affirming 45 Ill. App. 116), holding affidavits of grand jurors ought not to be

received for the purpose of showing that twelve of their number were not in favor of finding bill.

Disapproved in *State v. Grady*, 84 Mo. 220, holding grand juror not competent to prove that indictment was found without any evidence.

— As to votes of individual jurors.

Cited in *Elbin v. Wilson*, 33 Md. 135, holding grand juror cannot be compelled to state what opinions were expressed or what action was taken by himself or any other juror to procure an indictment; *Ex parte Sontag*, 64 Cal. 525, 2 Pac. 402, holding grand juror cannot be required to answer how he voted.

Distinguished in *Hooker v. State*, 98 Md. 145, 56 Atl. 390, 1 A. & E. Ann. Cas. 644, holding upon motion to quash, members of grand jury which found the indictment cannot state how they voted or show indictment was not a true bill by a majority of jury.

Disapproved in *State v. Baker*, 20 Mo. 338, holding members of grand jury cannot, under statute, be permitted to testify how they or their fellow members voted.

Nature of caption of indictment.

Cited in *State v. Conley*, 39 Me. 78, holding the caption of an indictment makes no part of the finding of the grand jury.

Presence of improper persons in grand jury room.

Cited in *Clare v. State*, 30 Md. 163, holding indictment void where persons selected as grand jurors were not qualified to act; *State v. Lawrence*, 12 Or. 297, 7 Pac. 116, holding same where a grand jury is not selected as required by law; *State v. Clough*, 49 Me. 573, holding same where an unauthorized person is present and participates in the proceedings.

Distinguished in *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500, 16 N. Y. Crim. Rep. 321, holding an indictment will not be vacated because two members of grand jury were nonresidents of the county in which the indictment was found, where it appears regular in every other way; *State v. Brewster*, 70 Vt. 341, 42 L.R.A. 444, 20 Atl. 1037, holding presence of the state's attorney's stenographer during the taking of testimony will not abate the indictment, where not prejudicial to accused.

Number of grand jurors.

Cited in note in 27 L.R.A. 850, on power of legislature to change number of grand jurors required at common law.

Concurrence by twelve grand jurors.

Cited in *State v. Hartley*, 22 Nev. 342, 28 L.R.A. 33, 40 Pac. 372, holding indictment cannot be found under the common law or Constitutions where less than twelve concur.

Cited in notes in 28 L.R.A. 36, on impeaching indictment by showing that twelve grand jurors did not concur; 28 L.R.A. 37, on concurrence by proper number of grand jurors as to parties, crimes, counts, and degree of crime charged.

Recommittal of finding.

Cited in *Byers v. State*, 63 Md. 207, holding imperfect finding may be recommitted to grand jury while in session.

Objection to indictment.

Cited in *People v. Shattuck*, 6 Abb. N. C. 33; *People v. Naughton*, 38 How. Pr. 435, 7 Abb. Pr. N. S. 421,—holding the court, on the suggestion of the defendant, may take action to determine whether twelve assented to the bill; *State v. Sy-*

monds, 36 Me. 128, holding an objection that less than twelve grand jurors found the indictment may be taken, on motion, after arraignment.

Distinguished in *Byrne v. State*, 12 Wis. 519, holding objection that a grand juror was an alien cannot be raised after plea, though such disqualification was not known when plea was made.

Motion to quash.

Cited in *State v. Maher*, 49 Me. 569, holding a motion to quash an indictment, because the grand jury was illegally drawn, may be reserved for the full court, on a motion signed by the presiding judge.

Distinguished in *State v. Burlingham*, 15 Me. 104, holding motion to quash because illegal testimony was admitted, too late after plea; *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134, holding motion to quash will not be entertained upon the ground of insufficient proof.

Presumption in favor of an indictment.

Cited in *English v. State*, 31 Fla. 356, 12 So. 689 (denying rehearing of 31 Fla. 340), holding the legal presumption is that when the grand jury finds and returns a bill their whole number concurred therein.

16 AM. DEC. 285, GREELEY v. THURSTON, 4 ME. 479.

Suing on day of dishonor of note or before receipt of notice.

Cited in *Flint v. Rogers*, 15 Me. 67; *Bell v. Hagerstown Bank*, 7 Gill, 216,—holding that after legal notice right of action accrues without waiting for the notice to reach destination; *Staples v. Franklin Bank*, 1 Met. 43, 35 A. D. 345, holding demand, at any seasonable hour of the last day of grace, upon maker of note, enables holder to sue on that day; *Gordon v. Parmelee*, 15 Gray, 413, holding there must be a previous special demand, at a reasonable time and place; *Sabin v. Burke*, 4 Idaho, 111, 37 Pac. 357 (affirming on rehearing, 4 Idaho, 28), holding suit may be brought on note without grace, after banking hours of the day it falls due, where note made payable at bank was left there for collection and banking hours were known to maker.

Cited in reference note in 45 A. D. 617, as to time when action on promissory note can be brought.

Cited in note in 58 A. D. 412, on right to sue maker of note on third day of grace.

Distinguished in *Lunt v. Adams*, 17 Me. 230, holding suit brought upon a note after demand made at eight o'clock on the morning of day note became payable, was prematurely brought, as time of demand was not reasonable; *Green v. Darling*, 15 Me. 139, holding the right of action does not accrue against the drawer or indorser until due diligence has been used to give them notice; *Vandesande v. Chapman*, 48 Me. 262; *Veazie Bank v. Winn*, 40 Me. 62,—holding action premature against maker, where note payable at bank was put in suit on last day of grace, without demand at a reasonable hour, and it not appearing that suit was brought after banking hours; *Humphreys v. Sutcliffe*, 192 Pa. 336, 73 A. S. R. 819, 43 Atl. 954, 44 W. N. C. 266, holding note made payable at bank payable by attachment after bank hours the same day that the note matures and is dishonored.

Disapproved in *Oothout v. Ballard*, 41 Barb. 33, holding a suit prematurely brought if commenced on the third day of grace.

Time for demand and notice of dishonor.

Cited in *King v. Crowell*, 61 Me. 244, 14 A. R. 560, holding notice to indorser given on last day of grace, not premature; *Manchester Bank v. Fellows*, 28 N. H.

302, holding that holder may forward notice on day of dishonor and any prior party receiving notice may transmit notice on the day he receives it, and by doing so the time allowed any other party is not enlarged.

Distinguished in *Dennie v. Walker*, 7 N. H. 199, holding notice of nonpayment of note given to the indorser prior to a demand on the last day of grace is of no effect.

Timeliness of tender of payment.

Distinguished in *Wing v. Davis*, 7 Me. 31, holding a tender delayed to so unusual an hour that creditor and family were asleep and lights extinguished is too late; *Whitwell v. Brigham*, 19 Pick. 117, holding payment by acceptor for accommodation of drawer, before the last day of grace, will take effect as payment at commencement of the last day, as against drawer.

Demand to support suit on non-negotiable promise.

Distinguished in *Zachery v. Brown*, 17 Ark. 442, holding maker of bond has the whole of the day on which it falls due to pay it and cannot be sued until the day following; *Harris v. Blen*, 16 Me. 175; *Knowlton v. Tilton*, 38 N. H. 257, holding where payment for labor performed is to be made on a certain day, suit brought upon that day is immature, though a demand has been made.

16 AM. DEC. 290, RUFF v. BULL, 7 HARR. & J. 14.

Accrual of action to start limitations.

Cited in *Larason v. Lambert*, 12 N. J. L. 247, holding statute runs from the making of a note payable on demand; *Hirst v. Brooks*, 50 Barb. 334, holding it runs from date of such note; *Dempsey v. McNabb*, 73 Md. 433, 21 Atl. 378, holding claim for services rendered in the lifetime of intestate because payable *in present* and statute ran from that time; *McDonnell v. Branch Bank*, 20 Ala. 313, holding as to money collected to use of plaintiff, limitations run from time of conversion, or from time of refusal to pay on demand; *Payne v. Gardiner*, 29 N. Y. 146 (dissenting opinion), on the time at which an action accrues.

Cited in reference notes in 42 A. D. 551; 60 A. S. R. 676,—as to when statute of limitations begins to run; 36 A. D. 107, on running of statute of limitations where person is ignorant of rights.

Distinguished in *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 A. D. 603, holding as to certificate of deposit payable on demand, on return of same, statute runs from time of demand.

—Tolling the statute generally.

Cited in *State use of Henderson v. Henderson*, 54 Md. 332, holding no circumstance will stop its progress when the statute once begins to run; *Gibson v. Ruff*, 8 App. D. C. 262, holding statute once begins to run, continues, notwithstanding subsequent disability; *Young v. Mackall*, 4 Md. 362, holding bar commenced in lifetime of obligee, not interrupted by death and abatement of action; *De Mill v. Moffat*, 49 Mich. 125, 13 N. W. 387, holding limitations in ejectment not arrested by the devolution of estate; *Gibbons v. Heiskell*, 90 Md. 6, 44 Atl. 996, holding statute not suspended by suit instituted in foreign jurisdiction and dismissed before judgment.

Cited in reference notes in 18 A. D. 649; 28 A. D. 467,—on effect of subsequent disability to stop running of limitations; 25 A. D. 432, on nonsuspension of statute of limitations by subsequent disability; 44 A. D. 159, on continuance of running of statute of limitations notwithstanding intervening disability; 44 A. D. 329, on necessity that disability to prevent running of limitations existed at

time cause of action accrued; 28 A. D. 468, on necessity of some person competent to sue before statute of limitations begins to run.

Cited in notes in 16 E. R. C. 153, on disability to sue as affecting running of statute of limitations; 25 L. ed. U. S. 318, on effect of disability occurring after statute of limitations begins to run; 11 A. S. R. 342, on effect of subsequent disability upon running of statute of limitations.

—Effect of death of party.

Cited in *Everett v. Smith*, 62 N. H. 386, holding statute does not run until there is some person in being, not under legal disability, who may sue or be sued; *Doe ex dem. Cofer v. Roe*, 1 Ga. 538, holding statute does not run against administrator until grant of letters.

Cited in notes in 65 A. D. 596, on effect of death to suspend running of statute of limitations; 65 A. D. 595, on commencement of running of statute of limitations on grant of administration; 6 A. D. 594, on statute of limitations against estate of decedent before grant of administration.

Disapproved in *Tynan v. Walker*, 35 Cal. 634, 95 A. D. 152, holding statute not tolled where cause of action accrued after the death of the party who would have been entitled to sue.

16 AM. DEC. 292, EDELEN v. HARDEY, 7 HARR. & J. 61.

First raising objections on appeal.

Cited in reference note in 34 A. D. 279, on waiver of objection to evidence not made at the trial.

Cited in note in 27 A. D. 487, on raising on appeal objections not taken at the trial.

Former judgment as a bar.

Cited in reference note in 52 A. D. 225, as to when judgments are not a bar to subsequent actions.

Attestation of will.

Cited in *Reed v. Roberts*, 26 Ga. 294, 71 A. D. 210; *Robinson v. King*, 6 Ga. 539,—holding attestation good where testator, in his actual position, might have seen the act; *Moore v. Moore*, 8 Gratt. 307, on attestation of will out of the actual presence of testator.

Cited in reference notes in 35 A. D. 370, on sufficiency of attestation of will; 49 A. S. R. 156, on necessity that attestation should occur in testator's presence; 1 A. D. 386, as to when will is attested in testator's presence; 40 A. D. 602, as to what is attestation "in presence of testator."

Cited in notes in 40 A. D. 231, on execution, publication, and attestation of will; 114 A. S. R. 228, on presence of testator at attestation of will where he is within clear vision.

Distinguished in *Cook v. Winchester*, 81 Mich. 581, 8 L.R.A. 822, 46 N. W. 106, upholding attestation where witnesses signed in another room, but within the hearing, knowledge, and understanding of testator and later informed him that they had signed, at which he expressed approval; *Sturdivant v. Birchett*, 10 Gratt. 67, holding same where witnesses signed will in another room, and at once returned to testator, one in the presence of all saying, "Here is your will witnessed."

Presumption of testator's presence at attestation of will.

Cited in note in 114 A. S. R. 229, on presumption of testator's presence at attestation of will from position in same or another room.

16 AM. DEC. 294, CLOPPER v. UNION BANK, 7 HARR. & J. 92.**Accommodation party as principal debtor.**

Cited in *Wilson v. Isbell*, 45 Ala. 142, holding acceptor for accommodation is principal debtor; *Farmers' & M. Bank v. Rathbone*, 26 Vt. 19, 58 A. D. 200, holding parties for accommodation bound by charter which they assume upon the face of the instrument.

Cited in notes in 51 A. D. 303, on rights and liabilities of accommodation indorsers, acceptors, and makers; 4 E. R. C. 564, on right of holder with notice to sue acceptor of accommodation bill.

New agreement as discharging debt.

Cited in *Lee v. Fontaine*, 10 Ala. 755, 44 A. D. 505, holding account not extinguished by acceptance of promissory note, unless received in payment; *Peter v. Beverly*, 10 Pet. 532, 9 L. ed. 522, holding acceptance of note for an antecedent debt will not extinguish debt unless so intended; *Re Hurst*, 1 Flipp. 462, Fed. Cas. No. 6,925, holding resolution of composition will not discharge debtor until the dividend is paid to creditor; *Washington Bank v. Krum*, 15 Iowa, 53, holding transfer of an accommodation note, as collateral for antecedent debt by the holder, is no defense to the maker.

Cited in reference notes in 27 A. D. 641, on presumption of payment arising from taking of note; 24 A. D. 640; 27 A. D. 192,—as to when note given by debtor or third person operates as payment.

Cited in notes in 20 A. D. 462, on payment by note; 37 A. D. 48, on extinguishment of debt by note or order.

Discharge by giving time.

Cited in *Yates v. Donaldson*, 5 Md. 389, 61 A. D. 283, holding giving of time to maker of note, without consent of accommodation comaker, which fact was known to the payee, is no defense; *Hawkins v. Thompson*, 2 McLean, 111, Fed. Cas. No. 6,246, holding release by holder of a remote indorser discharges subsequent indorsers.

Cited in notes in 37 A. D. 544, on discharge of accommodation acceptor by indulgence to drawer; 37 A. D. 725, on release of surety or accommodation indorser or acceptor by neglect or indulgence as to debtor; 61 A. D. 294, as to when time given to indorser of accommodation note does not release maker; 30 A. D. 257, on release of surety or indorser by indulgence to principal.

Distinguished in *Walter v. Fister*, 4 Legal Gaz. 204, holding joint maker signing for accommodation discharged by extension of time of payment without his knowledge.

Covenant not to sue as a defense.

Cited in *Howland v. Marvin*, 5 Cal. 501, holding a covenant not to sue for five years is no bar to the action but the covenant must be relied upon by the defendant for his remedy; *Commercial & F. Nat. Bank v. McCormick*, 97 Md. 703, 53 Atl. 439, holding a covenant not to sue one of two or more joint debtors does not release the others.

Cited in reference note in 29 A. D. 602, on effect of covenant not to sue one of two obligors or promisors.

Cited in note in 36 A. S. R. 146, 147, on promise not to sue for limited time.

Criticized in *Robinson v. Godfrey*, 2 Mich. 408, holding agreement not to sue upon a particular demand for a specified time is bar to action before the time expires.

Demand and notice to drawer of bill.

Cited in *Despard v. Norris*, 38 Md. 487, holding drawer who has no effects in

the hands of the drawee, is not entitled to notice; *Orear v. McDonald*, 9 Gill, 350, 52 A. D. 703, holding drawer entitled to demand and notice, where bill was drawn under the authority of the drawee, upon the faith of consignments to be made by the drawer.

16 AM. DEC. 300, HENCK v. TODHUNTER, 7 HARR. & J. 275.

Presumptive authority of appearing attorney.

Cited in *Dorsey v. Kyle*, 30 Md. 512, 96 A. D. 617; *Thornburg v. Macauley*, 2 Md. Ch. 425; *African Methodist Bethel Church v. Carmack*, 2 Md. Ch. 143; *McCauley v. State*, 21 Md. 556,—holding that presumption is that appearance entered, was by authority of client and whatever is done in the cause is esteemed as his act; *United States Electric Lighting Co. v. Leiter*, 8 Mackey, 575, holding authority of an attorney to confess judgment cannot be questioned in a collateral proceeding.

Cited in reference notes in 89 A. D. 534, on presumption that attorney's appearance was authorized; 39 A. D. 533, on presumption of attorney's authority to appear in cause.

Distinguished in *Beiswanger v. American Bonding & T. Co.* 98 Md. 287, 57 Atl. 202, denying presumption when attorney appears in criminal proceeding, that he appeared by authority of prosecuting witness.

—Necessity of warrant of attorney.

Cited in *Tyrrell v. Hilton*, 92 Md. 176, 48 Atl. 55; *Ward v. Hollins*, 14 Md. 158,—holding warrant of attorney not necessary.

Cited in reference note in 75 A. D. 151, on necessity of warrant of attorney to authorize appearance of defendant by attorney.

Appearance by attorney.

Cited in *Aukam v. Zantzinger*, 94 Md. 421, 51 Atl. 93, on appearance either *in propria persona* or by attorney.

Cited in reference notes in 35 A. D. 448; 52 A. D. 599,—on appearance by attorney.

Cited in note in 21 L.R.A. 848, on effect of judgment obtained on unauthorized appearance by attorney.

Withdrawal of attorney of record.

Cited in *Field v. Fowler*, 92 Tex. 65, holding an attorney may withdraw an appearance and leave his client to the mercy of his adversary, but the records should show it positively.

Cited in note in 33 L.R.A. 516, on power of defendant's attorney to withdraw answer or appearance and permit default judgment.

—As ground for continuance.

Cited in *McInnes v. Sutton*, 35 Wash. 384, 77 Pac. 736, holding withdrawal by attorney after case is regularly set for trial, not ground for continuance.

Acts of attorney binding client.

Cited in *Jones v. Horsey*, 4 Md. 306, 59 A. D. 81, holding act of attorney for foreign creditor, in uniting in the recommendation of trustee for insolvent, binds the client; *Kent v. Ricards*, 3 Md. Ch. 392, holding agreement between attorney and other party, that suit should await result of certain assignments, bound the client; *Shields v. Burns*, 31 Ala. 535, holding loss of defense, by neglect or mistake of attorney, is in effect loss in proper person; *Harper v. Cunningham*, 5 App. D. C. 203, holding parties bound by judgment reciting appearance entered and

judgment confessed by attorney, in the absence of proof that he acted without authority; *Farmers' Bank v. Sprigg*, 11 Md. 389, holding agreement permitting entry of judgment, subject to credits ascertained by referees, may be entered into by counsel; *Strong v. District of Columbia*, 3 MacArth. 499, holding appearance of an attorney entered on record is always considered as by authority, but stipulations to bind the client must be in writing.

Distinguished in *Re Young*, 3 Md. Ch. 461, holding employment to collect money does not confer authority to proceed after client dies and right to the claim devolves on another.

16 AM. DEC. 302, RIGGIN v. PATAPSCO INS. CO. 7 HARR. & J. 279.

Deviation and its effect.

Cited in reference note in 39 A. D. 550, on what constitutes deviation.

Cited in notes in 5 E. R. C. 280, on duty of carrier to proceed by usual route; 33 A. D. 60, on effect of deviation of vessel from route; 58 A. D. 674, on effect on marine insurance policy of necessary deviation; 9 E. R. C. 363, on deviation from course of insured voyage as discharging underwriters; 9 E. R. C. 418, on unavoidable necessity as excusing deviation from insured voyage.

Construction of insurance policy.

Cited in *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295, 46 Phila. Leg. Int. 488, holding policy having indemnity for its object is to be construed liberally to that end; *Teutonia F. Ins. Co. v. Mund*, 102 Pa. 89, 14 Pittsb. L. J. N. S. 27, 40 Phila. Leg. Int. 142, holding it presumably intention of insurer that insured shall understand that in case of loss he is protected to the full extent which a fair interpretation will give.

Cited in reference note in 52 A. D. 199, on construction of bill of exceptions.

Instructions on weight or effect of evidence.

Cited in *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Adams v. Capron*, 21 Md. 186, 83 A. D. 566,—holding instruction that recovery may be had on certain facts, withdraws from jury any other fact that would warrant or defeat the right asserted; *Haines v. Pearce*, 41 Md. 221, refusing instruction withdrawing from jury facts bearing directly on the issue before the parties; *Winner v. Penniman*, 35 Md. 163, 6 A. R. 385, on limiting the jury by instruction by the court.

Questions of law and fact.

Cited in *Augusta Ins. & Bkg. Co. v. Abbott*, 12 Md. 348, holding actual cause of delay in sailing, question for the jury, while the legal sufficiency of such cause to justify or excuse it is for the court; *Maltby v. Northwestern Virginia R. Co.* 16 Md. 422, holding evidence of corporation's calling for instalments on capital stock and of notice of the call was for the jury; *Williams v. McGehee*, 2 Fla. 58, holding evidence of payment for jury where evidence is conflicting.

Cited in reference notes in 36 A. D. 144, on leaving question to jury where there is no color of proof; 49 A. D. 392, on leaving finding of fact to jury without color of proof as error; 33 A. D. 60, on what is a deviation as a question of law.

Construction of bill of exceptions reciting facts "proved."

Cited in *Doe ex dem. Commyns v. Latimer*, 2 Fla. 71, holding statement in bill of exceptions, that certain facts were "proved," equivalent to statement that evidence was offered of them.

16 AM. DEC. 312, EICHELBERGER v. FINLEY, 7 HARR. & J. 381.

Necessity of presentment and notice to charge drawer.

Cited in *Grant v. MacNutt*, 12 Misc. 20, 33 N. Y. Supp. 62, holding them not necessary where he had insufficient funds in the bank when check was drawn and bank failed within the time allowable for presentment; *Sterrett v. Rosencrantz*, 3 Phila. 54, 15 Phila. Leg. Int. 53, holding same where drawer had not sufficient funds in the bank to meet check; *Harker v. Anderson*, 21 Wend. 372, on same point; *Orear v. McDonald*, 9 Gill, 350, 52 A. D. 703, holding same where drawer had no effects in the hands of drawee at any time before bill became due; *Shuchardt v. Hall*, 36 Md. 590, 11 A. R. 514, holding same where drawer had no right to expect bill would be accepted; *Foard v. Womack*, 2 Ala. 368, holding fact that it was drawn in good faith and, if duly presented, would have been honored, is no defense; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 23 L.R.A. 177, 28 Atl. 563, holding failure of bank on which check is drawn and deposited "for collection and credit," to give notice to the drawer of nonpayment, does not discharge him from liability, where no injury resulted; *Norris v. Despard*, 38 Md. 487, on notice of nonpayment of a check to the drawer.

Cited in reference note in 45 A. D. 778, as to when notice of dishonor of bill is excused.

Cited in note in 41 L. ed. U. S. 856, on presentment and notice of nonpayment of check.

Liability on overdrafts.

Cited in *Foster v. Swasey*, 3 Woodb. & M. 364, Fed. Cas. No. 4,985, holding bank discharged where payment of check larger than deposit was made by teller on same day but before service of trustee process against the depositor; *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126, holding bank president liable where bank paid overdrafts at his direction, as part of a method inaugurated by him.

Nature of drawing on bank.

Cited in note in 27 A. D. 197, on resemblance between drawing on bank and on individual.

16 AM. DEC. 317, NEWSON v. DOUGLASS, 7 HARR. & J. 417.

Construction of clause, "For whom it may concern," in insurance policies.

Cited in *Crosby v. New York Mut. Ins. Co.* 19 How. Pr. 312, 5 Bosw. 369, holding such words must be applied to the interest of the parties for whom it was intended by the person who affects or orders the insurance; *Augusta Ins. & Bkg. Co. v. Abbott*, 12 Md. 348, holding policy "for whom it concerns," is for benefit of the ones intended, when obtained, by the party obtaining it, and whether it was so intended is always a question of fact.

Cited in reference notes in 33 A. D. 37, on insurance, for whom it may concern; 22 A. D. 574; 33 A. D. 733,—on meaning of term "to whom it may concern" in insurance policy.

Who may recover on a policy of insurance.

Cited in *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6; *Clinton v. Hope Ins. Co.* 45 N. Y. 454,—holding insurance applies to the interests intended to be covered by it, and they are deemed to be those in the minds of the parties when the contract was made; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468, holding party cannot take out insurance on his own property and then appropriate it to the use of someone else not intended when policy was issued; *Callahan v. Linthicum*, 43

Md. 97, 20 A. R. 106, holding subsequent adoption of a policy by a party interested is equivalent to his prior order.

Cited in reference note in 29 A. D. 447, on who may maintain action on policy for benefit of "whom it may concern."

Cited in note in 25 L. ed. U. S. 219, on who may recover on policy "for whom it may concern."

Estoppel of privity of fraudulent grantor.

Cited in *Shuman v. Peddicord*, 50 Md. 560, holding wife cannot set aside an assignment for creditors as fraudulent, where she united in it; *Cushwa v. Cushwa*, 5 Md. 44, holding heirs cannot, in ejectment, plead an outstanding title by deed of their ancestor, in fraud of his creditors.

Cited in note in 3 A. S. R. 739, on grantee's right to lay claim to property on ground that conveyance to him was in fraud of creditors.

Insurance effected by agent of insured.

Cited in reference notes in 29 A. D. 567, on insurance effected by agent for insured; 53 A. D. 686, as to when interest is recoverable.

Cited in notes in 13 L.R.A. (N.S.) 152, on principal's right to proceeds of insurance policy taken by agent in his own name; 99 A. D. 63, on defense against recovery of money, collected by agent, on ground that it was collected on unlawful contract or for illegal purpose; 51 A. D. 277, on allowance of interest.

Interest as of right.

Cited in *Frank v. Morrison*, 55 Md. 399, holding interest not recoverable as of right on subscription for stock in a corporation, to be paid for in instalments; *Hammond v. Hammond*, 2 Bland, Ch. 306, on the recovery of interest as of right.

Distinguished in *Dennison v. Lee*, 6 Gill & J. 383, holding interest is recoverable as of right upon rent in arrear.

— On obligations certain.

Cited in *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*), 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557, holding judgments in tort do not bear interest by force of law, on the principal sum due, until the judgment shall be satisfied.

Distinguished in *Wallis v. Dilley*, 7 Md. 237, holding in suit on an injunction bond interest is recoverable, as of right, on the sum recoverable, up to the time it was paid into court; *Baltimore City Pass. R. Co. v. Sewell*, 37 Md. 443, holding a verdict does not finally establish the claim so as to draw interest.

— On moneys used.

Cited in *Winter v. Gittings*, 102 Md. 464, 62 Atl. 1033, holding interest payable from decree only, not from husband's death, where securities of which husband while living took income were adjudged to belong to wife.

Distinguished in *Gott v. State*, 44 Md. 319, holding a trustee bound to pay interest upon money received and applied to his own use; *Comegys v. State*, 10 Gill & J. 175, holding where funds are retained for a long period by a trustee, without an account furnished, he is chargeable as a matter of right with interest.

— As matter of discretion for jury.

Cited in *Curtis v. Gibney*, 59 Md. 131, holding that in absence of contract to pay interest, or of custom, interest is to be left to the jury's discretion; *Fridge v. State*, 3 Gill & J. 103, 20 A. D. 463, holding the question of interest on a balance found to be due is one for the jury to determine; *Karthauss v. Owings*, 2 Gill & J. 430, holding the question of interest on the amount of the value of replevied goods

is one for the jury; *Carter v. Cross*, 7 Gill, 43, holding in action on receipt for money, right to interest before date of writ, question for jury.

Affirmance of judgment by dismissal of appeal.

Cited in *Kansas City, Ft. S. & G. R. Co. v. Hammond*, 25 Kan. 208, holding a party appealing from the judgment of a justice of the peace may dismiss such appeal and the judgment of the justice is restored.

16 AM. DEC. 325, THOMPSON v. LAY, 4 PICK. 48.

Ratification of infants' contracts.

Cited in *Fant v. Cathcart*, 8 Ala. 725, holding contract not for necessities, voidable and must be ratified after majority; *American Mortg. Co. v. Wright*, 101 Ala. 658, 14 So. 399, on nonliability until ratification after majority, by express promise.

Cited in reference notes in 7 A. D. 234, on validity of contracts of infants; 36 A. D. 298, on ratification of contract by infant; 34 A. D. 150, as to what amounts to ratification of infants' contracts; 25 A. R. 30, as to what constitutes ratification after majority of contract made during infancy.

Cited in notes in 21 A. D. 86, on validity and ratification of infants' contracts; 21 A. D. 161, on ratification of infant's voidable contracts; 18 A. S. R. 709, 712, 713, on ratification of contracts, executory on infants' part, by new promises or acknowledgments.

—Sufficiency of ratification.

Cited in *Gay v. Ballou*, 4 Wend. 403, 21 A. D. 158; *Wilcox v. Roath*, 12 Conn. 550,—holding that there must be an express promise to pay the debt after he attains majority; *Fetrow v. Wiseman*, 40 Ind. 148, holding that there must not only be an acknowledgment of liability, but an express promise, with knowledge that he is not legally liable; *Tibbets v. Gerrish*, 25 N. H. 41, holding that there must be either an express ratification by a new promise, or such acts, after age, as amount to same; *Conklin v. Ogborn*, 7 Ind. 553; *Benham v. Bishop*, 9 Conn. 330, 23 A. D. 358,—holding that note of infant cannot be ratified by merely acknowledging that he made it, or that it is due, but there must be a promise to pay; *Reed v. Batchelder*, 1 Met. 559, holding note made by infant voidable but, if, after coming of age, he promises payee that it shall be paid, the payee may negotiate it, and the maker is then liable; *Hale v. Gerrish*, 8 N. H. 374, holding it no ratification where infant admitted he owed the debt and said that the plaintiff "would get his pay;" *Kimmel's Case*, 1 Walk. (Pa.) 290, holding failure to disaffirm, while retaining property acquired thereunder, affirms contract; *Emmons v. Murray*, 16 N. H. 385, holding six years in action after coming of age and declaring to stranger that deed had been made and that grantee could occupy according to its terms, as he had done, amounted to ratification; *Tobey v. Wood*, 123 Mass. 88, 25 A. R. 27; *Henry v. Root*, 33 N. Y. 526,—holding entry upon real estate purchased and after attaining majority continuing in possession, exercising acts of ownership, amounts to ratification.

Cited in note in 23 A. D. 361, on sufficiency of ratification of infant's contract.

—Conditional new promise.

Cited in *Proctor v. Sears*, 4 Allen, 95, holding conditional promise, when of age, to perform contract made during minority, will not sustain an action thereon, without proof that condition has been fulfilled; *Edgerly v. Shaw*, 25 N. H. 514, 57 A. D. 349, holding promise to pay in labor, in a specified time, or else in money, a ratification.

Liability of infant for rent.

Cited in *Flexner v. Dickerson*, 72 Ala. 318, denying liability of infant in suit for rent brought during his minority and during term of lease.

New promise to pay unenforceable debt.

Cited in *Stark v. Stinson*, 23 N. H. 259, holding partial payments are not evidence from which a new promise can be inferred to revive a debt discharged in bankruptcy.

16 AM. DEC. 326, COOLEY v. DEWEY, 4 PICK. 93.**Inheritable capacity of bastards.**

Cited in *Porter v. Porter*, 7 How. (Miss.) 106, 40 A. D. 55, holding bastards are not comprehended under the word "children" in statute of descents and distributions; *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180, on bastard's right of inheritance at common law; *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407, holding under statute, that illegitimate children may inherit from father when they have been recognized by him as his children; *Monson v. Palmer*, 8 Allen, 551, on statutory provision for inheritance by illegitimate children; *Pratt v. Atwood*, 108 Mass. 40; *Reynolds v. Hitchcock*, 72 N. H. 340, 56 Atl. 745,—holding a bastard and his issue have no right of inheritance from his mother's collateral kindred; *Re Mericlo*, 63 How. Pr. 662, holding an illegitimate child cannot receive, by descent, the real estate of the ancestor of her deceased mother; *Northrop v. Hale*, 76 Me. 306, 49 A. R. 615, holding under statute, that declarations of members of family of father of bastard are admissible to show illegitimacy as affecting right inherit.

Cited in reference notes in 40 A. D. 495, on right of bastard to inherit at common law; 27 A. D. 537, on right of inheritance by or from illegitimate children.

Cited in notes in 56 A. D. 264, on right of inheritance from or through bastards; 23 L.R.A. 757, on inheritance by brothers and sisters of mother or father of illegitimate.

Bastards as stock of inheritance.

Cited in *Hughes v. Decker*, 38 Me. 153, holding that mother of an illegitimate child is not "lawful kindred;" *Bent v. St. Vrain*, 30 Mo. 268, holding statutory provision that bastards shall inherit or transmit inheritance on the part of their mother as if lawfully begotten does not render one capable of transmitting an estate to his mother or illegitimate brothers; *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268, holding statutes do not apply to distribution of estate of child of an illegitimate child theretofore deceased.

Disapproved in *Dickinson's Appeal*, 42 Conn. 491, 19 A. R. 553, holding a bastard has inheritable blood for purposes of collateral as well as lineal descent through him.

"Children" or like word as excluding illegitimates.

Cited in *Re Magee*, 63 Cal. 414, holding the word "kindred" in statute to mean lawful kindred; *Hall v. Cressey*, 92 Me. 514, 43 Atl. 118, holding the word "children" in a deed to take effect on decease of grantor and his wife does not include illegitimate children; *Kent v. Barker*, 2 Gray, 535, holding an illegitimate child unintentionally omitted from will of its mother is not entitled under statute giving intestate share to pretermitted "children;" *Hiram v. Pierce*, 45 Me. 367, 71 A. D. 555, holding statute requiring kindred by consanguinity to contribute to support of paupers does not include an illegitimate child who has become a

pauper; *Hayden v. Barrett*, 172 Mass. 472, 70 A. S. R. 295, 52 N. E. 530, holding "heirs by blood" in will designating those whose relationship was by some tie of consanguinity includes an illegitimate child.

16 AM. DEC. 329, CRANE v. MARCH, 4 PICK. 131.

Levy and sale of equity of redemption to satisfy mortgage debt.

Cited in *Coggswell v. Warren*, 1 Curt. C. C. 223, Fed. Cas. No. 2,958, holding that holder of mortgage note may attach equity of redemption and sell it on execution; *Andrews v. Fiske*, 101 Mass. 422, holding holder of one of several promissory notes, without assignment of the mortgage securing them, may levy on the equity of redemption, to satisfy a judgment recovered by him on the note; *Johnson v. Stevens*, 7 Cush. 431, holding first mortgagee may, to satisfy the mortgage debt sell the mortgagor's right to redeem a second mortgage of the same land.

Cited in notes in 11 A. D. 193, 197, on execution sale of equity of redemption; 37 L.R.A. 755, on proceedings to enforce mortgage for part of mortgage debt after exhaustion of lien by prior proceedings.

Distinguished in *Washburn v. Goodwin*, 17 Pick. 137, holding a mortgagee cannot cause a sale of the equity of redemption for the purpose of paying the debt secured by the mortgage.

Nature of estates created by mortgage.

Cited in *Johnson v. Candage*, 31 Me. 28, holding mortgagees or their assignees hold for the benefit of the owners of the debts secured; *Bassett v. Daniels*, 136 Mass. 547; *Breen v. Seward*, 11 Gray, 1218,—on same point; *Moore v. Ware*, 38 Me. 496, holding in case of several mortgage notes that mortgagee holds in trust for the mortgagor, charged with the mortgage debt; *Belcher v. Costello*, 122 Mass. 189, holding that pledgee of a note secured by mortgage might have required foreclosure for his benefit; *Smith v. People's Bank*, 24 Me. 185, holding interest of mortgagee, after entry for and before foreclosure has taken place, cannot be transferred by levy thereon as the real estate of the mortgagee; *Rice v. Dewey*, 13 Gray, 47, holding property mortgaged to secure mortgagee as accommodation indorser for the mortgagor will be applied in equity as trust property, upon the insolvency of both maker and indorser, to the payment of the notes.

Separate assignment of debt or mortgage.

Cited in *Clark v. Levering*, 1 Md. Ch. 178, holding debt and mortgage given to secure its payment so inseparably united that a separate and independent alienation of them cannot be had; *Strong v. Jackson*, 123 Mass. 60, 25 A. R. 19, holding the taker of a note bearing a memorandum that it was a mortgage note was not a bona fide holder as against one who held the mortgage and the real debt.

Effect of assignment of one of several mortgage notes.

Cited in *Page v. Pierce*, 26 N. H. 317, holding such an assignment is *pro tanto* an assignment of the mortgage; *Young v. Miller*, 6 Gray, 152, holding indorsee of one of two notes secured by a mortgage which is not assigned to him cannot have writ of entry in his own name to foreclose; *Haynes v. Wellington*, 25 Me. 458, holding assignee of one note then overdue acquired complete title by entry and possession, though mortgagees held the other.

Cited in reference note in 30 A. S. R. 442, on right of assignee of mortgage note.

Distinguished in *Fowler v. Bush*, 21 Pick. 230, holding that the giving of a
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new note for one of the instalments of the mortgage debt presently due was a discharge *pro tanto*.

Form of obligation to pay mortgage debt.

Cited in *Murphy v. Barnard*, 162 Mass. 72, 44 A. S. R. 340, 38 N. E. 29, historically as to the former usual practice in regard to mortgages to give a bond evidencing the debt.

16 AM. DEC. 333, WATERS v. LILLEY, 4 PICK. 145.

Right to fish or hunt in private lands.

Cited in *Griffith v. Holman*, 23 Wash. 347, 83 A. S. R. 821, 54 L.R.A. 178, 63 Pac. 239, holding riparian proprietor of non-navigable, fresh-water stream owns the exclusive right of fishery in the waters flowing opposite his land, to middle of the stream; *Com. v. Alger*, 7 Cush. 53, on same point; *State v. Mallory*, 73 Ark. 236, 67 L.R.A. 773, 83 S. W. 955, 3 A. & E. Ann. Cas. 852, holding owner has right to fish upon his own land, subject to state's ownership and title, held for regulation and preservation for the common use; *Sterling v. Jackson*, 69 Mich. 488, 13 A. S. R. 405, 37 N. W. 845, holding owner of the fee, whether it be up-land or covered with water, has the exclusive right of fowling upon his own land; *Cobb v. Davenport*, 33 N. J. L. 223, 97 A. D. 718, holding the right to fish and take fish is not an easement, but a right of profit in lands; *Beach v. Morgan*, 67 N. H. 529, 68 A. S. R. 692, 41 Atl. 349; *Cobb v. Davenport*, 32 N. J. L. 369,—holding a right of fishery in private waters cannot be claimed by custom, but must be prescribed for in a *que estate*; *Barrows v. McDermott*, 73 Me. 441, holding colonial ordinance giving right to go to any pond of more than 10 acres through unenclosed woodlands of another, and to fish therein, does not give right to trespass on the cleared and cultivated lands on the shore of such pond.

Cited in reference notes in 92 A. D. 148; 81 A. S. R. 512,—on right to fish in unnavigable stream; 58 A. S. R. 187, on riparian owner's exclusive right to fish in non-navigable stream; 100 A. D. 609, as to right of several and exclusive fishery in unnavigable streams; 97 A. D. 722, on right to fish in unnavigable stream being in owner, to exclusion of public; 7 A. S. R. 798, on fishing rights of public in uninclosed flats between high and low water mark of sea.

Cited in notes in 13 A. S. R. 418, 420, on right to hunt or fish on land of another; 60 L.R.A. 487, on public right of fishery; 60 L.R.A. 514, on right to fish in mill ponds; 39 L.R.A. 584, on governmental control over right of individuals as to fishery.

Custom and usage against law or right.

Cited in *Barlow v. Lambert*, 28 Ala. 704, 65 A. D. 374, holding custom inadmissible to contravene public policy; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65, on inadmissibility of custom contrary to law; *Delaplane v. Crenshaw*, 15 Gratt. 457, holding custom for the inspector of flour to take the draft flour, although immemorial bad.

— To use or enjoy another's lands.

Cited in *Albright v. Cortright*, 64 N. J. L. 330, 81 A. S. R. 504, 48 L.R.A. 616, 45 Atl. 634; *Littlefield v. Maxwell*, 31 Me. 134, 50 A. D. 653,—holding custom to take or have a profit in another's land, illegal; *Perley v. Langley*, 7 N. H. 233, holding right to take away sand not derivable from custom; *Kenyon v. Nichols*, 1 R. I. 106, holding seaweed thrown up upon the shore belongs to owner of adjoining land, and, therefore, a customary right in all the citizens of the state to take the seaweed cannot be sustained; *Hill v. Lord*, 48 Me. 83, holding

the right to take seaweed from another's beach is a right to take a profit in the soil, and cannot be acquired by custom; *Adams v. Morse*, 51 Me. 497, holding custom at a sawmill and other mills near it, to leave slabs as belonging to the mill, the owners of the logs never claiming them, does not establish a legal right in the mill to the slabs sawed; *Codman v. Evans*, 5 Allen, 308, 81 A. D. 748, holding inadmissible evidence of a custom to erect bay windows over the land of an adjoining owner.

Cited in note in 8 E. R. C. 347, 348, on right to claim profit in land of another by custom.

Profits a prendre.

Cited in *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294, on possibility of granting *profit à prendre* severed from estate to which it was attached; *Bingham v. Salene*, 15 Or. 208, 3 A. S. R. 152, 14 Pac. 523, holding grant of the sale and exclusive privilege and easement to shoot and take wild fowl on the lakes, sloughs, and waters of the grantor is of a *profit à prendre*, and not a mere license.

Cited in reference note in 100 A. D. 609, on prescription of *profit à prendre* in *que* estate.

Prescriptive rights.

Cited in *Watson v. Chicago, M. & St. P. R. Co.* 46 Minn. 321, 48 N. W. 1129, holding a common-law dedication of land cannot be made to a railroad company for public use for railroad purposes; *Post v. Pearsall*, 22 Wend. 425 (affirming 20 Wend. 111), denying right of public to use and occupy soil adjoining navigable waters as public landing, although such user has continued for more than twenty years, with knowledge of the owner.

Cited in notes in 23 E. R. C. 791, on right to acquire by prescription the right to take seaweed from the beach; 60 L.R.A. 498, on prescriptive right to fish by way of custom; 14 L.R.A. 387, on prescriptive rights of fishery in private waters.

Public or private ownership of bed of waters.

Cited in *McFarlin v. Essex County*, 10 Cush. 304, recognizing the rule that, if same person owns both sides of an unnavigable stream, the property in the soil is wholly in him.

— Of lake bed.

Cited in *Com. v. Vincent*, 108 Mass. 441, holding pond of more than 20 acres, connected with the sea only by narrow channel, partly artificial, not suited to any other use than the passage of fish and not navigable stream under the statute, is a great pond.

Distinguished in *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509, holding a railroad company has no right to possession of lands submerged beneath Lake Michigan where its charter authorized it to take possession of all lands and streams for complete operation of its road and granted to it "all such lands, waters, materials, and privileges belonging to the state."

Pleading justification in trespass.

Cited in *Carter v. Wallace*, 2 Tex. 206, holding all matters of justification or excuse must be specially pleaded in an action of trespass; *Central R. Co. v. Hetfield*, 29 N. J. L. 206 (dissenting opinion), on same point; *Ruggles v. Lesure*, 24 Pick. 187, holding in trespass a license or easement must be pleaded, and cannot be given in evidence under the general issue.

16 AM. DEC. 335, CUSHING v. HURD, 4 PICK. 253.

Notice of unrecorded transfer of title.

Cited in *Hewes v. Wiswell*, 8 Me. 94, holding an innocent recorded grantee of a

fraudulent purchaser shall prevail against the first purchaser who has not recorded his deed, though having notice of possession.

Cited in reference note in 38 A. D. 130, on effect of actual or constructive notice of unrecorded deed.

Cited in note in 21 A. D. 315, on actual or constructive notice of unrecorded conveyance.

Notice of impending transfer of title not yet made.

Cited in *Ladue v. Detroit & M. R. Co.* 13 Mich. 380, 87 A. D. 759, holding notice that a mortgage is about to be made is not enough to bind a party with notice of the mortgage; *Clarke v. Minot*, 4 Met. 346, holding garnishee who pays to creditor the amount of the judgment, before publication of notice of assignment, will be protected against the assignee, although he had personal notice, before payment, of the issuing of the warrant.

Fraudulency of deed taken with actual notice.

Cited in *Crosby v. Huston*, 1 Tex. 203; *Kimball v. Houston Oil Co.* 100 Tex. 336, 99 S. W. 852,—on fraudulency of deed taken with notice of prior one not recorded.

Priority of transfers or liens as dependent on inception or completion.

Cited in *Briggs v. Parkman*, 2 Met. 258, 37 A. D. 89, holding mortgage made before, but not recorded till after, notice, which vested mortgagor's property in an assignee, was superior to assignee's title; *Watkins v. Wassell*, 15 Ark. 73, holding conveyance under imperfect title later made perfect superior to judgment rendered against grantor in the interim.

Priority between levy or lien and unrecorded deed.

Cited in *United States v. Canal Bank*, 3 Story, 79, Fed. Cas. No. 14,715, holding attaching creditor without notice can hold against prior purchaser whose deed is not recorded until after the attachment; *Reed v. Austin*, 9 Mo. 713, 45 A. D. 336, holding the lien of a judgment will hold against a prior unrecorded deed.

Cited in note in 11 A. D. 158, on attachment before deed recorded.

— Notice of unrecorded deed.

Cited in *Daniel v. Sorrells*, 9 Ala. 436, holding title of purchaser at execution sale will not be prejudiced, though he have notice, if the plaintiff in execution was ignorant.

Inception of lien of attachment.

Cited in *Martin v. Dryden*, 6 Ill. 187, holding an attachment is a lien from the date of the levy, when followed by a judgment, which relates back to it; *Waggoner v. Cooley*, 17 Ill. 239, on priority by diligence in making levy; *M'Gregor v. Brown*, 5 Pick. 170, holding priority of record determines the title as between two creditors attaching at different times.

Present title in debtor to support levy.

Cited in *Coggsell v. Warren*, 1 Curt. C. C. 223, Fed. Cas. No. 2,958, holding mortgagee may extend on the land mortgaged an execution issuing on a judgment for the debt secured by the mortgage.

Time for recording deed.

Cited in *Reed v. Austin*, 9 Mo. 722, on duty to put deed on record within a reasonable time.

Interest in mortgagee.

Cited in *Calvert v. Bradley*, 16 How. 580, 14 L. ed. 1066, on lack of interest in a mortgagee out of possession.

Levy on equity of redemption to satisfy mortgage debt.

Cited in *Andrews v. Fiske*, 101 Mass. 422, holding that holder of one of notes who had recovered judgment thereon could levy on equity of redemption.

Cited in note in 11 A. D. 197, on execution sale of equity of redemption.

16 AM. DEC. 338, BORDEN v. SUMNER, 4 PICK. 265.

Assignments preferring certain creditors.

Cited in *Adams v. Blodgett*, 2 Woodb. & M. 233, Fed. Cas. No. 46, holding assignment of all property to certain creditors, debtor to continue responsible for any balance, is valid against other creditors.

Cited in reference note in 63 A. D. 252, on debtor's right to give preference to particular creditors.

Priorities between attachment and assignment for creditors.

Cited in *Bradford v. Tappan*, 11 Pick. 76, holding attaching creditor of property not yet in assignee's hands, superior to assenting creditors who come in thereafter.

Assignments containing reservations or conditions.

Cited in *Albert v. Winn*, 7 Gill, 446, holding deed which does not fairly devote property of debtor to the payment of creditors, but prescribes the terms upon which they shall receive part payment, is void; *Atkinson v. Jordan*, 5 Ohio, 293, 24 A. D. 281, holding assignment conditioned on release, void; *The Watchman*, 1 Ware, 233, Fed. Cas. No. 17,251; *Grover v. Wakeman*, 11 Wend. 187, 25 A. D. 624,—holding void an assignment preferring certain creditors, upon condition that they execute a release of all claims against the debtor; *Howell v. Edgar*, 4 Ill. 417, holding void an assignment requiring all creditors wishing to become parties to the assignment, to sign it within twelve months, the debtor not to be liable to any creditors so signing for any deficiency of their respective demands that shall remain unsatisfied.

Cited in reference notes in 34 A. D. 144, on effect of clause in assignment for creditors, exacting release from creditor of all demands against debtor; 31 A. D. 657, on validity of provision in deed of assignment exacting release as condition precedent to enjoying benefits; 30 A. D. 657, on invalidity as against dissenting creditor, of assignment for benefit of creditors assenting to its terms; 60 A. D. 276, on invalidity of provision in assignment for creditors for repayment to assignor of surplus after payment of assenting creditors.

Cited in notes in 24 A. D. 293, on effect of exacting release in assignment for creditors; 58 A. S. R. 86, on effect of exacting releases on validity of assignment for creditors.

Foreign assignments.

Cited in *Fall River Iron Works Co. v. Croade*, 15 Pick. 11, holding assignment between citizens of another state invalid as against an attachment, after the assignment was executed, of one resident against another, for assignor's debt.

16 AM. DEC. 342, INGRAHAM v. WILKINSON, 4 PICK. 268.

Ownership of bed of stream.

Referred to as leading case in *Hopkins Academy v. Dickinson*, 9 Cush. 544, holding that if a river not navigable changes and cuts off a point of land, making an island, such island still belongs to the original owner.

Cited in *Pratt v. Lamson*, 2 Allen, 275, holding opposite proprietors each own one half of the bed of the stream; *Com. v. Alger*, 7 Cush. 53, on ownership of

opposite proprietors to middle of stream; *Morgan v. Reading*, 3 Smedes & M. 366, holding same applicable to fresh-water rivers, whatever their magnitude, subject only to right of passage thereon as a highway, where the stream admits it; *Benner v. Platter*, 6 Ohio, 504, holding boundary of land upon an unnavigable stream is in the middle of such stream; *The Magnolia v. Marshall*, 39 Miss. 109, holding grant bounded "by" or "on" a fresh-water stream, whether capable of navigation or not, conveys to the middle of the stream; *Shaw v. Oswego Iron Co.* 10 Or. 371, 45 A. R. 146, holding that title to bed of river capable of floating logs and small boats for part of the year, is in the riparian owners; *Clement v. Burns*, 43 N. H. 609, holding riparian owner may maintain trespass for entry upon the shore, unconnected with the right of navigation or fishery, and removing therefrom soil between high and low water mark; *Backus v. Detroit*, 49 Mich. 110, 43 A. R. 447, 13 N. W. 380, holding a city has right to build a wharf for public purposes where a public street abuts upon a navigable stream; *Hodges v. Williams*, 95 N. C. 331, 39 A. R. 242, holding where the bed of an unnavigable stream has been granted, a riparian proprietor is not entitled to land made by a withdrawal of the waters; *Middleton v. Pritchard*, 4 Ill. 510, on common-law right to center of stream navigable in fact, subject only to right of passage; *Canal Appraisers v. People*, 17 Wend. 571 (reversing 14 Wend. 355), on inapplicability of the common law to navigable rivers.

Cited in reference notes in 29 A. D. 503, on non-navigable waters as boundaries; 30 A. D. 286; 72 A. D. 368,—on water courses as boundaries; 35 A. D. 640, on grantee of land bounded by non-navigable stream taking to thread of stream; 26 A. D. 530, on nature of non-navigable rivers.

Cited in notes in 23 E. R. C. 189, on riparian rights, titles, and boundaries; 10 A. D. 386, 389, on navigable river as boundary; 42 L.R.A. 170, on title to land under nontidal rivers; 60 L.R.A. 501, on public regulation of right to fishery.

— Islands and the like.

Cited in *McCullough v. Wall*, 4 Rich. L. 68, 53 A. D. 715, holding an island lying on one side of stream belongs to owner of bank on that side, and island lying in middle of river belongs to owner of the land on the two banks; *Branham v. Bledsoe Creek Turnp. Co.* 1 Lea, 704, 27 A. R. 789, holding a conveyance of land bounded by a creek extends to the center of the main branch, if an island divides it into unequal branches; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277, 16 N. W. 645, holding riparian rights, unless expressly limited, extend to middle of the navigable channel, and cover any shallows or middle ground not shown in the government surveys, but lying between such channel and the shore; *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 A. S. R. 150, 37 N. W. 603, holding patentee of an island in the Platte river will become the owner of any accretions to such island formed by avulsion from the upper part of the island and the sudden formation of new land on the lower end thereof; *Atty. Gen. v. Herrick*, 190 Mass. 307, 76 N. E. 1045, on right to islands; *Tappan v. Boston Water Power Co.* 157 Mass. 24, 16 L.R.A. 353, 31 N. E. 703, holding flats in tidal fresh-water stream, divisible by lines at right angles from tidal channel at ordinary stage to ends of division lines on banks.

Cited in reference notes in 53 A. D. 727, on title to islands in unnavigable rivers; 28 A. D. 281, on division between opposite owners of island forming in non-navigable rivers.

Cited in notes in 33 A. D. 281, on islands; 58 L.R.A. 674, on title to islands as between opposite owners; 5 L.R.A. 687, defining "alluvion," "accretion," and "dereliction;" 12 L.R.A. 637, on effect on title of accretion to islands in river; 23

L. ed. U. S. 59, on right to and ownership of alluvion or accretion and reliction, and the law determining title thereto.

What is a navigable stream.

Cited in notes in 13 L.R.A. 828, on what constitutes navigable stream; 3 L.R.A. 406, on definition of navigable stream.

16 AM. DEC. 347, TENNEY v. PRINCE, 4 PICK. 385.

Liability of signer or indorser of note.

Cited in reference notes in 92 A. D. 102, on presumption where name of party not payee is on back of note; 45 A. D. 235, on effect of blank indorsement of note by third person; 56 A. D. 359, on liability on indorsement of negotiable paper by one not holder or payee.

Cited in note in 29 A. D. 298, on indorsement in blank of note by person other than payee or holder.

—Before maturity.

Cited in *Badger v. Barnabee*, 17 N. H. 120, discharging as surety one writing name on back of note, after delivery to, and acceptance by, payee, for want of consideration; *Briggs v. Downing*, 48 Iowa, 550, sustaining answer alleging defendant signed note in suit after execution and acceptance by payee at his and makers' request, and without agreement or consideration; *Hopkins v. Richardson*, 9 Gratt. 485, holding assignor, without consideration, of bond denying knowledge of facts affecting his liability, to transferer of assignee, not liable on ground of want of consideration; *Potter v. Earnest*, 45 Ind. 416, holding note given for support of son's illegitimate child, to one surrendering no legal rights under bastardy act, void as gratuitous; *Fuller v. Scott*, 8 Kan. 25, holding indorsers of note in blank, after execution, liable as presumed guarantors, and burden of proof on them to show want of consideration; *Stone v. White*, 8 Gray, 589, holding one signing demand note as surety six months after date, and while in payee's hands, liable on proof of good consideration; *Ellis v. Clark*, 110 Mass. 389, 14 A. R. 609, denying liability of one signing, after date of making note, as surety, in ignorance of new consideration agreed upon by maker and payee; *Harwood v. Johnson*, 20 Ill. 367, holding one signing note, as "security," in hands of payee, and in consideration of payee's abandoning recovery of property fraudulently obtained, liable to payee in action on note; *Monson v. Drakeley*, 40 Conn. 552, 16 A. R. 74, holding one signing demand note after execution and delivery, for consideration, becomes cosurety with other signers, and liable for contribution to one paying note; *Rogers v. Gibbs*, 24 La. Ann. 467, holding one not party to note, who writes name on back at time of execution, liable as original promisor; *Killian v. Ashley*, 24 Ark. 511, 91 A. D. 519, holding that one indorsing in blank a writing obligatory, at the time of execution, thereby becomes security for the maker, and in an action thereon is properly joined with the payee as assignor and properly declared against as maker; *Massey v. Turner*, 2 Houst. (Del.) 79, holding one indorsing in blank and receiving, as part payment due from maker, proceeds of note from payee, before maker completed note by inserting time of payment, liable as joint maker to payee; *Ives v. McHard*, 2 Ill. App. 176, holding one signing note for consideration, after inception, under maker's name, as "security," is a guarantor and not liable as joint maker; *Camden v. McKoy*, 4 Ill. 437, 38 A. D. 91, denying recovery, for variance between pleadings and proof, against parties sued as makers of note, who wrote names in blank on back, over which guaranty was written by holder; *Hayden v. Weldon*, 43 N. J. L. 128, 39 A. R. 551, denying

liability as joint maker, guarantor, or indorser, to payee's indorsees for value of one writing name on back of note, before name of payee was written thereon, after execution and delivery to payee, and without consideration; *Irish v. Cutter*, 31 Me. 536, denying liability of guarantor purchasing unindorsed negotiable note and indorsing, for consideration, with the word "holder," to purchaser from guarantor's assignee before maturity; *Stagg v. Tinnenfelser*, 59 Mo. 336, denying liability of widow not qualifying as executrix, who indorsed estate notes as "sole legatee," contrary to statute, requiring assignment of estate notes to be by legal executor; *Powell v. Com.* 11 Gratt. 822, to point that liability of indorser in blank of negotiable note to which he is not a party is same as that of indorser, under similar circumstances, of non-negotiable note.

Cited in reference note in 35 A. D. 503, on declaring against one writing name on back of note at time of execution as an original promisor.

— After maturity.

Cited in *Leavitt v. Putnam*, 1 Sandf. 199, holding indorsement of note, after dishonor, is new contract distinct from the original note, and in its effect distinct from the negotiable character of such note; *Rivers v. Thomas*, 1 Lea, 649, 27 A. R. 784, holding liable as guarantor, one writing name on back of note under seal, past due, in consideration of forbearance of suit by payee against maker; *Moor v. Folsom*, 14 Minn. 340, Gill, 260, 100 A. D. 227, holding one indorsing demand note, past due, at maker's request, but ignorant of extension of time to be thus obtained, not liable in any capacity; *Clopton v. Hall*, 51 Miss. 482, discharging guarantor signing note in blank under maker's name, eighteen months after maturity, for failure to prove consideration; *Tiller v. Shearer*, 20 Ala. 596, (dissenting opinion), on necessity of showing consideration for guaranty of debt past due.

— Superscription of guaranty or warranty.

Cited in *Seymour v. Mickey*, 15 Ohio St. 515, holding one writing name in blank on back of note, at time of inception, for purpose of securing purchase of goods for maker, not discharged from liability to payees by their unauthorized superscription of contract of warranty; *Orrick v. Colston*, 7 Gratt. 189, holding payee of note, signed and indorsed in blank for amount to be inserted by payee, not precluded from holding indorser as collateral promisor by superscribing contract of surety; *Peterson v. Russell*, 62 Minn. 220, 54 A. S. R. 634, 29 L.R.A. 614, 64 N. W. 555, holding after indorsement of negotiable note by third person with intent to become guarantor, payee may write contract of guaranty over signature; *Scott v. Calkin*, 139 Mass. 529, 2 N. E. 675, holding contract of guaranty may be written over indorsement of grantee of estate assuming payment of, and indorsing, note secured by mortgage thereon in consideration of forbearance to foreclose; *Needhams v. Page*, 3 B. Mon. 465, discharging, as surety, indorser of note in blank, which was subsequently filled up as guaranty without his knowledge.

— Demand and notice.

Cited in *Martin v. Boyd*, 11 N. H. 385, 35 A. D. 501, holding one writing name on back of note, for valuable consideration, on day of inception, liable, after notice of dishonor, as original promisor; *Wylie v. Lewis*, 7 Conn. 301, 18 A. D. 108, discharging indorser in blank at inception of note, because of payee's failure to demand payment from maker and notify indorser; *Smith v. Ide*, 3 Vt. 290, holding one giving separate guaranty for note of another, after delivery and acceptance, but before, and to induce, transfer of property covered by note, liable as on absolute contract, without demand on payee or notice of default to himself;

Cooper v. Page, 24 Me. 73, 41 A. D. 371, holding third person guaranteeing to pay balance of past-due note at specified time, liable, without notice to him, or previous demand on maker; *Partridge v. Davis*, 20 Vt. 499, holding payee indorsing note, "I guarantee payment within note," a month after date, liable, without demand and notice on maker; to any subsequent holder; *Union Bank v. Willis*, 8 Met. 504, 41 A. D. 541, holding one indorsing note in blank, over name of payee, presumed to indorse at time of inception, and discharging payee for holder's failure to present to indorser; *Fowler v. Fleming*, McMull. L. 282, denying liability of payee of note indorsing in blank, to holder filling blank with waiver of notice of demand and refusal, in absence of sufficient evidence of consent.

Liability as joint promisor of one signing lease.

Cited in *Smith v. Loomis*, 72 Me. 51, denying liability as joint promisor of one signing lease at inception, and agreeing to be responsible for lessee's faithful performance.

Parol evidence to show that one signed as indorser.

Cited in *Lewis v. Harvey*, 18 Mo. 74, 59 A. D. 286, allowing evidence to show that third party, signing on back of note, and so held to be maker, signed as indorser.

Distinguished in *Lewis v. Harvey*, 18 Mo. 74, admitting parol evidence to show that parties, by writing on back of nonnegotiable note, not indorsed by payee, after inception but before completion, were indorsers instead of makers.

Indorsement as written promise.

Cited in *Thompson v. High*, 13 Ga. 311, holding indorsement in blank of note is "written promise" of "some description," allowing right of action under statute to simplify pleadings.

Verbal promise to convey land.

Cited in *Bumford v. Purcell*, 4 G. Greene, 488, holding verbal promise by principal to surety, to transfer to latter lots purchased, void under statute of frauds.

Amendment of pleading or account.

Cited in *Bishop v. Williamson*, 11 Me. 495, allowing amendment of declaration containing counts stating illegal refusal to deliver letter, first by one, then by other persons; *Brewer v. East Machias*, 27 Me. 489, allowing account charged against one town by another, for care of latter's pauper, containing simply items furnished, to be amended by inserting facts constituting cause of action.

16 AM. DEC. 349, *STONE v. SWIFT*, 4 PICK. 389.

Elements of malicious prosecution.

Cited in *Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472, holding termination in favor of accused, lack of probable cause, and that prosecutor was actuated by legal malice, are essential; *Rice v. Day*, 34 Neb. 100, 51 N. W. 464, holding action for wrongfully suing out an attachment, under which the property of the debtor was seized is one for malicious prosecution.

Cited in reference notes in 22 A. D. 336, on action for malicious prosecution; 86 A. D. 215, on actions for prosecution of civil suit or process; 28 A. D. 258, on necessity of both malice and want of probable cause to maintain action for malicious prosecution.

Cited in notes in 81 A. D. 478, on malicious attachments; 93 A. S. R. 462, on existence of malice as essential to liability for malicious prosecution of civil

action; 16 E. R. C. 756, on burden of proving malice and want of probable cause in action for malicious prosecution.

— Advice of counsel.

Cited in *Potter v. Seale*, 8 Cal. 217, holding advice of counsel before whom defendant has fully and fairly laid his case is a good defense; *Le Clair v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357, holding same in malicious attachment; *Senecal v. Smith*, 9 Rob. (La.) 418; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494; *Hill v. Palm*, 38 Mo. 13; *Alexander v. Harrison*, 38 Mo. 258, 90 A. D. 431; *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Smith v. Davis*, 3 Mont. 109; *Turner v. O'Brien*, 5 Neb. 542; *Bartlett v. Brown*, 6 R. I. 37, 75 A. D. 675; *St. Johnsbury & L. C. R. Co. v. Hunt*, 59 Vt. 294, 7 Atl. 277; *Forbes v. Hagman*, 75 Va. 168; *Center v. Spring*, 2 Iowa, 393,—holding same if party acts in good faith upon the opinion given, though it is erroneous; *Pullen v. Glidden*, 68 Me. 559, on same point; *Cooper v. Flemming*, 114 Tenn. 40, 68 L.R.A. 849, 84 S. W. 801, holding same of advice of the public prosecutor based upon an erroneous construction of the statute; *Gould v. Gardner*, 8 La. Ann. 13, holding that defendants were not without probable cause for arrest of plaintiff where they acted by advice of learned counsel, though his opinion was erroneous; *Wilder v. Holden*, 24 Pick. 8, holding one honestly and justly taking the advice of counsel, not liable; *Vinal v. Core*, 18 W. Va. 1, holding advice of counsel should be considered to determine whether defendant was actuated by malice, but not in determining whether there was probable cause; *Griffin v. Chubb*, 7 Tex. 603, 58 A. D. 85, holding same admissible under the general issue, for the purpose of rebutting malice; *Monaghan v. Cox*, 155 Mass. 487, 31 A. S. R. 555, 30 N. E. 467, holding evidence that defendant acted upon advice of magistrate who received the complaint is admissible upon question of probable cause.

Cited in notes in 93 A. S. R. 461, on advice of counsel as probable cause for malicious prosecution of civil action; 26 A. S. R. 144; 25 L. ed. U. S. 117,—on advice of counsel as defense in action for malicious prosecution; 18 L.R.A.(N.S.) 67, on correctness of advice given by counsel as affecting right to rely on the same as defense to action for malicious prosecution.

Distinguished in *Olmstead v. Partridge*, 16 Gray, 381, holding it incompetent to show that defendant, in commencing the prosecution complained of, acted upon advice of person not a councilor or attorney at law.

Bill of lading as effecting transfer of property.

Cited in *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, on inefficacy of bill of lading sent unindorsed through the mail, containing no words of transfer, to give party receiving it a claim to the property.

Cited in reference note in 23 A. D. 614, on rights conveyed by delivery of bill of lading without indorsement or words of transfer.

Cited in notes in 55 A. D. 300, on mode of transferring bill of lading; 38 A. D. 420, on indorsement and transfer of bills of lading.

Distinguished in *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 A. D. 363, holding delivery of bill of lading for value, though unindorsed, carries with it the property in the goods covered thereby, as against consignor's factor, though a consignee is named therein.

16 AM. DEC. 353, BAGLEY v. WHITE, 4 PICK. 395. Subsequent suit between same parties in 7 Pick. 288.

Second levy on same goods.

Cited in *Whitney v. Farwell*, 10 N. H. 9, holding possession, by receipt, is so far the possession of sheriff that the latter may make a second attachment, upon another writ, by making a return to that effect, and giving receipt notice with directions to hold the property.

Cited in note in 7 A. D. 121, on power to make successive attachments on the same goods.

Custody essential to levy.

Cited in *Wilson v. Powers*, 21 Minn. 193, holding under the statute, that officer levying upon personal property must keep it under his control as well as take possession of it; *Crisman v. Dorsey*, 12 Colo. 567, 4 L.R.A. 664, 21 Pac. 920, holding attachment of certain stacks of wheat by service made on defendant, who was notified that the stacks were then levied upon, there being no notice to any other person, and no control exercised by officer, was not a sufficient levy; *Bryant v. Osgood*, 52 N. H. 182, 5 Legal Gaz. 253, holding statutory notice to dispense with actual custody of bulky goods must be so explicit in description as to afford notice to subsequent claimants.

Cited in reference note in 25 A. D. 413, on loss of attachment by not retaining possession.

Cited in notes in 23 A. D. 691, on loss of attachment lien by loss of possession; 43 A. D. 264, on necessity for sheriff's possession of attached property to preserve lien.

Surrender or abandonment of levy.

Cited in *Rowe v. Page*, 54 N. H. 190; *Dunklee v. Fales*, 5 N. H. 527,—holding that if sheriff or his bailee permit goods to return to possession of debtor, the attachment is, with respect to other creditors, dissolved; *Young v. Walker*, 12 N. H. 502, holding second levy improper where sheriff knows that there is a subsisting attachment and an unrescinded bailment of the property, by another sheriff; *Re Hymes Buggy & Implement Co.*, 130 Fed. 977, holding surrender by sheriff to receiver in bankruptcy, of property seized on replevin, before he has made his return, is an abandonment; *Jones Lumber & Mercantile Co. v. Faris*, 6 S. D. 112, 55 A. S. R. 814, 60 N. W. 403, holding levy abandoned where attaching officer left property in debtor's building, surrendering the key to him, and did not look after the property for three months and a half; *Boynton v. Warren*, 99 Mass. 172, holding same where attached property was left in defendant's house without his consent, in custody of keeper, and defendant notified the officer to remove the keeper and forbade him to remove the property, and the keeper thereupon left; *Field v. Fletcher*, 191 Mass. 494, 78 N. E. 107, holding same where officer allows goods to remain a long time on defendant's premises, without doing anything to retain custody or keep the property under his control; *Com. v. Brigham*, 123 Mass. 248, holding mere access by another to locked place where levied goods were stored, not evidence of abandonment.

Liability of sheriff for loss of levy.

Cited in *Russell v. Lawton*, 14 Wis. 203, 80 A. D. 769, holding sheriff not liable where he levied upon gold coin belonging to defendant and paid it over in good faith without notice that prior execution in favor of another against same defendant had been delivered to one of his deputies.

16 AM. DEC. 355, WHITWELL v. VINCENT, 4 PICK. 449.**Passing of title on conditional sale of goods.**

Cited in *Newell v. Grant Locomotive Works*, 50 Ill. App. 611; *Gibson v. Chicago Packing & Provision Co.* 108 Ill. App. 100; *Luey v. Bundy*, 9 N. H. 298, 32 A. D. 359,—holding that where property is sold and delivered on condition, property does not pass unless the condition is complied with; *Draper v. Jones*, 11 Barb. 263, holding title of seller not divested by receipt of goods by purchasers, where it is apparent that such was not intention of parties; *Brownville Maine Slate Co. v. Hill*, 175 Mass. 532, 56 N. E. 706; *McGraw v. Pulling*, *Freem. Ch.* (Miss.) 357; *Strauss v. Hirsch*, 63 Mo. App. 95; *Weeks v. Pike*, 60 N. H. 447; *Kraft v. Dulles*, 2 Cin. Sup. Ct. Rep. 116; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545,—holding sale and delivery, on condition that the title shall not vest until payment, passes no title until then; *Haggerty v. Duane*, 1 Paige, 321, on same point; *Furniss v. Hone*, 8 Wend. 247 (dissenting opinion), on necessity of express declaration in order to make delivery conditional; *Silsby v. Boston & A. R. Co.* 176 Mass. 158, 57 N. E. 376, holding on sale of merchandise conditioned on the sending of note by buyer to seller, the question whether there was a waiver of the condition is one of fact; *Fuller v. Bean*, 34 N. H. 290, holding sale not complete, so as to pass property, while anything remains to be done to ascertain the price, nor until the price is paid or secured, unless the parties intended the property should pass at once; *Leven v. Smith*, 1 Denio, 571, holding on sale for cash no title passed where the defendant offered note of plaintiff, due and payable, for nearly the amount, and cash for the residue, which plaintiff declined to receive; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311, holding delivery and payment simultaneous acts, and delivery with expectation of receiving immediate payment, not absolute, but conditional until payment is made; *Harding v. Metz*, 1 Tenn. Ch. 610, holding same where delivery is made on the faith that the condition will be performed at once, and performance is refused upon demand within a reasonable time; *Saunders v. Keber*, 28 Ohio St. 630, holding sale with delivery of goods to be paid for in future instalments, but, until payment title to remain in seller, is on condition precedent and title does not pass; *Refining & Storage Co. v. Miller*, 7 Phila. 97, 25 Phila. Leg. Int. 228, holding in a cash sale and delivery of goods, where payment is immediately demanded, title does not pass until payment; *Chalmers v. McAuley*, 68 Vt. 44, 33 Atl. 767, holding same where property is sold at auction for cash or approved paper; *Lees v. Richardson*, 2 Hilt. 164, holding it must appear that it was the intent of the parties that delivery should be conditional; *Sawyer v. Spofford*, 4 Cush. 598, holding burden is upon the party alleging sale to prove either an absolute one, or a sale upon condition performed.

Cited in reference notes in 20 A. D. 547, on conditional sales; 31 A. D. 36, on what is a conditional sale; 40 A. D. 92, on conditional sales title of goods to remain in vendor; 16 A. D. 366, on title to goods remaining in the vendor after delivery; 66 A. D. 369, on title passing by conditional sale and delivery of chattel before condition is performed; 31 A. D. 36, on effect of sale by conditional vendee; 17 A. D. 372, on validity of conditional sales as against vendee's creditors and purchasers.

Cited in notes in 13 A. D. 451, on effect of conditional sale of goods to pass title; 10 L.R.A. 234, on effect of conditional delivery of goods to purchaser with reservation of title in seller; 21 A. D. 262, on delivery without payment or performance of conditions.

Rescission of conditional sale for fraud.

Cited in *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 277, holding vendor fraudulently given worthless security may rescind conditional sale.

Waiver of tort to sue for money had and received.

Cited in *Gibson v. Stevens*, 3 McLean, 551, Fed. Cas. No. 5,401, holding the bank may sue for money advanced by it on forged note; *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, holding bank bills delivered as money and received as money may be pleaded as so much money had and received; *Richardson v. Kimball*, 28 Me. 463, holding plaintiff may waive tort and recover in assumpsit any money in hands of tortfeasor, as the fruits derived from wrongful act.

— Money received as proceeds of goods.

Cited in *Mann v. United States*, 32 Ct. Cl. 580, holding waiver of conversion to sue for money had, proper only where goods have been sold by defendant; *Burton Lumber Co. v. Wilder*, 108 Ala. 669, 18 So. 552, holding same if converted goods have been sold at a fixed price, payable in future; *Strickland v. Burns*, 14 Ala. 511, holding assumpsit proper where an agent to collect notes purchases land and personal property, with proceeds; *Merchants' Bank v. Rawls*, 71 Ga. 191, 50 A. D. 394, holding principal whose agent sells property and receives the money therefor may waive the tort and proceed in assumpsit; *Barnum v. Stone*, 27 Mich. 332, holding evidence that defendant came into possession of bonds as gratuitous bailee, and delivered the same over without receiving anything therefor; to third person who claimed title, will not support a count for money had and received.

Distinguished in *Dresser v. West Virginia Transp. Co.* 8 W. Va. 553, holding action for money had and received not proper where property of plaintiff came into possession of defendant as a common carrier and the latter had not sold or tortiously disposed of it.

16 AM. DEC. 358, JONES v. BOSTON MILL CORP. 4 PICK. 507, Appeal from decision on hearing after filing of answer in 6 Pick. 148.**Jurisdiction of equity to enforce awards.**

Cited in *Hodges v. Saunders*, 17 Pick. 470; *Penniman v. Rodman*, 13 Met. 382,—holding equity will compel specific performance of an award to which the parties have submitted their conflicting claims to certain real estate; *Caldwell v. Dickinson*, 13 Gray, 365, holding bill lies to compel the execution of a deed of land, ascertained by an award of arbitrators agreed upon to settle boundary line; *Howe v. Nickerson*, 14 Allen, 400, holding equity will not enforce specific performance of an award to pay a certain number of dollars in gold; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320, holding equity has power to compel specific performance of awards, where there is no adequate remedy at law; *Orr v. Cox*, 61 W. Va. 361, 56 S. E. 522, holding an award whereby an uncertain division line between adjoining owners is ascertained, is not a contract for conveyance of land, and equity will not decree specific performance; *Stearns v. Bedford*, 21 Pick. 114, on jurisdiction to compel specific performance of decision of an ecclesiastical council on a matter submitted to it.

Cited in reference note in 62 A. D. 771, on specific performance of awards.

Distinguished in *Bubier v. Bubier*, 24 Me. 42, denying decree where other matters than conveyance of land were involved and parties had resorted to legal remedy.

Power of equity to enforce its decrees.

Cited in *Shainwald v. Lewis*, 69 Fed. 487, holding courts of equity have plenary power to issue all processes necessary to carry their decrees or orders into execution.

Cited in note in 4 L.R.A. (N.S.) 1003, on punishment of corporation for contempt.

Validity of award of real estate.

Cited in *Crabtree v. Green*, 8 Ga. 8, holding award of land by arbitrators, not invalidated by failure to direct conveyance.

Effect of award of real estate.

Cited in *Furber v. Chamberlain*, 29 N. H. 405; *Carey v. Wilcox*, 6 N. H. 177,—holding an award, duly made, in pursuance of a submission by which title to real estate is left to decision of arbitrators, is conclusive; *Akely v. Akely*, 16 Vt. 450, holding award concerning title of land, if made upon a submission under seal, as much binding upon the parties as any contract under seal made upon the same subject; *Myers v. Easterwood*, 60 Tex. 107, holding arbitration submitted to during the pendency of a suit, by which parties agree in writing to have their rights to land determined by an arbitrator, is effective in court; *Page v. Foster*, 7 N. H. 392, holding title to real estate may be settled by arbitration; *Ford v. Burleigh*, 60 N. H. 278, holding authority to assign to one of the parties the other's interest in a building, for a certain consideration, though not conferred in express terms, may be inferred from the general object of submission.

Enforcement of decree against corporation.

Cited in *Desper v. Continental Water Meter Co.* 137 Mass. 252, on power to compel corporation specifically to perform a contract.

Jurisdiction of equity to compel specific performance.

Cited in *C. H. Little Co. v. Woodward Ave. Cemetery Asso.* 135 Mich. 248, 97 N. W. 682, holding equity has jurisdiction, independent of statute, to compel the payment of subscriptions to the capital stock of a corporation, for benefit of its creditors; *Foss v. Heynes*, 31 Me. 81, holding a court of equity has jurisdiction to decree specific performance where there is a breach of an agreement to convey real estate; *Jones v. Newhall*, 115 Mass. 244, 15 A. R. 97, holding equity will take jurisdiction only when the parties have not a plain, adequate, and complete remedy at law.

16 AM. DEC. 365, PATTEN v. CLARK, 5 PICK. 5.**Validity of conditional sale.**

Cited in *Moore, Fraud. Conv. Vol. 1, § 4*, to point that conditional sales of personal property are valid between the parties and as against creditors of, and subsequent purchasers from, grantee, in absence of fraud.

16 AM. DEC. 367, CHESTERFIELD MFG. CO. v. DEHON, 5 PICK. 7.**Reserving title in assignment for creditors.**

Cited in note in 22 L.R.A. 851, on reservation of title in assignments.

Right of principal to reclaim goods or proceeds from factor's assignee.

Cited in *Terry v. Bamberger*, 14 Blatchf. 234, Fed. Cas. No. 13,837, 44 Conn. 558, holding consignor entitled to trover against assignee of his factor, who had sold the goods, with notice, after demand and tender of amount of factor's lien; *Vail v. Durant*, 7 Allen, 408, 83 A. D. 695, holding that consignors could not

maintain an action for the proceeds of sale while consignee's liability continued; *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529, holding balance of account recoverable where factor guaranteed sales, making payments from time to time, and was continually indebted to principal; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 A. R. 150, 2 N. E. 452, 16 Abb. N. C. 458, holding sum deposited by consignee on sale of principal's goods, and appropriated by bank to indebtedness of consignee, was recoverable.

Cited in note in 58 A. D. 169, on principal's right to follow goods or their proceeds.

Distinguished in *Hutchinson v. Reed*, Hoffm. Ch. 316, where several consignors employed the same factor, who mingled the goods and proceeds.

Principal's right to funds or securities held by or for agent.

Cited in *Merrill v. Bank of Norfolk*, 19 Pick. 32, holding principal entitled to recover from bank where agent discounted note indorsed in blank in his own name and proceeds were placed to his credit in bank, where they were attached as his property; *Thompson v. White*, 45 Me. 445, holding administrator personally liable for proceeds of note payable to his testate which belonged to plaintiff; *Lee v. Hennick*, 52 Ohio St. 177, 39 N. E. 474, on rights of principal to recover securities in agents hands for principal's use; *Henderson v. Lauck*, 21 Pa. 359, on right of principal to follow debts due him but mixed by agent with his own.

Effect of custom or usage of factors on right of consignors.

Cited in *Duguid v. Edwards*, 50 Barb. 288, holding custom among factors not binding on consignors who have not assented thereto; *Roosevelt v. Doherty*, 129 Mass. 301, 37 A. R. 356, on customary right of factor to mingle goods of different consignors in the same sale.

Liability for loss of credits allowed by factor.

Cited in *Beckwith v. Sibley*, 11 Pick. 482, holding consignee who had accepted and paid bills drawn upon him by consignor might, on the insolvency of buyer, to whom the goods had been sold on their notes, recover back from the consignor without waiting until notes were dishonored.

Liability of third person for conversion of trust property.

Cited in *Andrews v. Tuttle-Smith Co.* 191 Mass. 461, 78 N. E. 99, holding that one who stood as the receiver, with knowledge, of goods converted by a trustee, is accountable for their value to their owner.

16 AM. DEC. 369, MANUFACTURERS' BANK v. WINSHIP, 5 PICK. 11.

Liability of dormant partner on note in name of active partner.

Cited in *Winship v. Bank of United States*, 5 Pet. 529, 8 L. ed. 216, holding silent partner not bound by indorsement of active member for his own benefit; *Palmer v. Elliot*, 1 Cliff. 63, Fed. Cas. No. 10,690, holding dormant partner not liable on individual note by other member of firm, in payment of goods put into firm, payee being ignorant of relationship of parties; *National Bank v. Ingraham*, 58 Barb. 290, holding same as to note of partner in whose name business was conducted, given to enable him to pay in his share of capital; *Fosdick v. Van Horn*, 40 Ohio St. 459, on how dormant partner may be bound on partnership note.

Partner's prima facie liability on note executed or indorsed in firm name.

Cited in *Olipphant v. Mathews*, 16 Barb. 608, presuming, where partnership is carried on in the name of one partner, that note by him is individual note; *Burrough's Appeal*, 26 Pa. 264, on whether a partnership carried on in individual name is bound on note by individual; *Byington v. Woodward*, 9 Iowa, 360, denying presumption of execution of note in partnership business where there is a denial thereof, by other partners.

Cited in note in 4 E. R. C. 278, on presumption that negotiable paper is that of individual signer.

Distinguished in *Barrett v. Swann*, 17 Me. 180, holding note given by in dividual partner in name of partnership is prima facie on partnership account.

Liability of partners on note in firm name for third person's benefit.

Cited in *Rollins v. Stevens*, 31 Me. 454, holding one partner not bound by other's indorsement of the firm name for benefit of third persons.

Cited in reference notes in 31 A. D. 623, on note of one member of partnership; 43 A. D. 685, on partner's power to bind firm on negotiable instrument.

Rights and liabilities of silent partner.

Cited in *Baring v. Crafts*, 9 Met. 380, holding party liable on firm contracts in which he was interested by agreement with the firm, although his name did not appear and he was not regular partner; *Gage v. Rollins*, 10 Met. 348, holding that in action by firm it was necessary that silent partner be joined as plaintiff.

Cited in note in 56 A. D. 149, on liability of dormant partners upon contracts made while they participated in profits.

Liability of undisclosed principal carrying on business in agent's name.

Cited in *Chandler v. Coe*, 54 N. H. 561, holding principal liable on contract made by agent in agent's name; *Bank of Rochester v. Monteath*, 1 Denio, 402, 43 A. D. 681, holding acceptance of bill by agent in his own name bound the principals.

16 AM. DEC. 372, HOLYOKE v. HASKINS, 5 PICK. 20.**Domicil of person not sui juris.**

Cited in *Waterville v. Benton*, 85 Me. 134, 26 Atl. 1089, holding settlement of person *non compos mentis* established in the town where he resided for five years, under care of mother, after coming of age; *Concord v. Rumney*, 45 N. H. 423, holding person actually insane might acquire a settlement in the place of her actual residence, if she has sufficient capacity to choose her residence; *Re Fidelity Trust Co.* 27 Misc. 118, 57 N. Y. Supp. 361, holding ability of incompetent person having no committee to choose domicil, question of fact.

Cited in reference note in 39 A. D. 148, on domicil.

—Domicil as of father's last settlement.

Cited in *Harkins v. Arnold*, 46 Ga. 656, holding domicil of child upon death of father, not necessarily changed by the removal of family from state; *Hyndman v. State*, 9 Utah, 23, 33 Pac. 227, holding property rights of a minor in a state, not forfeited by the removal of the father from the state, taking the minor with him.

—Change of domicile.

Cited in *Harding v. Weld*, 128 Mass. 587, on right of ward to change his residence.

Cited in note in 89 A. S. R. 278, on change of ward's domicile within jurisdiction of guardianship.

—Effect of removal by guardian or public authority.

Cited in *Hill v. Horton*, 4 Dem. 88, holding lunatic became domiciled anew where guardian took him to new county; *Anderson v. Anderson*, 42 Vt. 350, 1 A. R. 334, holding domicile of lunatic changed where he was placed by guardian in asylum and his family and effects moved to another town; *Mason v. Thurber*, 1 R. I. 481, holding on change of lunatic's residence for his benefit, he became assessable at new residence; *Wheeler v. Hollis*, 19 Tex. 522, 70 A. D. 363, holding domicile of ward changed by removal with guardian to another state; *Townsend v. Kendall*, 4 Minn. 412, Gil. 315, 77 A. D. 534, affirming right of guardian to change residence of his ward from one state to another, when beneficial to ward; *Leeds v. Freeport*, 10 Me. 356, holding orphan minor who became a charge on the town and was bound out in another town acquired a settlement in the latter; *Seiter v. Straub*, 1 Dem. 264; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221,—on right of guardian to change domicile of ward.

Cited in note in 58 L.R.A. 936, on right of statutory or testamentary guardian to remove incompetent or infant from state.

Jurisdictional residence to support guardianship.

Cited in *Sears v. Terry*, 26 Conn. 273, holding appointment of guardian by court of probate, over a person where domicile was within the district, but whose actual residence was elsewhere, was void.

Residence or property essential to give jurisdiction of estates.

Cited in *Pinney v. McGregory*, 102 Mass. 186, holding residence of debtor in his district gave judge of probate jurisdiction to administer on the estate of a creditor living out of the state; *Territory v. Klee*, 1 Wash. 183, 23 Pac. 417, holding as to nonresident who died intestate, leaving property in several counties, decrees first rendered in county where land lay would be prior.

Right to attack jurisdiction of probate court.

Cited in *Beckett v. Selover*, 7 Cal. 215, 68 A. D. 237, holding that heirs might attack jurisdiction on the ground that the deceased did not die in county where estate was administered; *Holmes v. Oregon & C. R. Co.* 6 Sawy. 275, 5 Fed. 523, holding want of jurisdiction which decree showed could not be shown in collateral attack on letters of administration; *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 A. S. R. 894, 3 Atl. 211, holding jurisdiction of appointing court might be attacked in a bill to determine which of two administrators was entitled to assets, although decree described intestate as of that town; *Olmstead's Appeal*, 43 Conn. 110, on right to question jurisdiction of probate court.

Distinguished in *Emery v. Hildreth*, 2 Gray, 228, holding regularity of appointment of administrator, the probate court having jurisdiction, could not be attacked in an action to recover debt due estate.

Disapproved in *Record v. Howard*, 58 Me. 225, holding jurisdiction could not be attacked when the record showed it; *Holmes v. Oregon & C. R. Co.* 7 Sawy. 380, 9 Fed. 229, denying right to attack collaterally decree in the inhabitancy of intestate.

Effect of want of jurisdiction on acts of probate court.

Cited in *Sprague v. Litherberry*, 4 McLean, 442, Fed. Cas. No. 13,251; Lang-
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worthy v. Baker, 23 Ill. 484; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 A. D. 41; Schultz v. Schultz, 10 Gratt. 358, 60 A. D. 335, on effect of want of jurisdiction on probate court's decrees; Moore v. Philbrick, 32 Me. 102, 52 A. D. 642, holding administration granted by judge having no jurisdiction, void; Northampton v. Smith, 11 Met. 390; Re Marston, 79 Me. 25, 8 Atl. 87, on necessity of judge of probate having jurisdiction on administration of estates; Morgan v. Dodge, 44 N. H. 255, 82 A. D. 213, holding that probate court might revoke letters issued without jurisdiction.

Cited in notes in 33 A. D. 241, 242, as to when probate of will or letters of administration are void for want of jurisdiction; 21 L.R.A. 150, on validity of acts done by executor or administrator under letters testamentary or of administration in cases where the court had no jurisdiction because of the residence of the deceased.

When statute retrospective in action.

Cited in Price v. Hopkin, 13 Mich. 318, on validity of statutes affecting already acquired rights.

Cited in reference note in 61 A. S. R. 940, on effect of retroactive statutes.

Disapproved in Beal v. Nason, 14 Me. 344, holding limitation on time in which heirs might begin suit to recover real estate sold by executors, administrators, and guardians, applied alike to prior and subsequent sales.

Operation of statute of limitations.

Cited in Keyser v. Lowell, 54 C. C. A. 574, 117 Fed. 400, holding the essential element of a statute of limitation is that it accords and limits a reasonable time in which suits may be brought upon causes it affects; Cleveland Ins. Co. v. Reed, 1 Biss. 180, Fed. Cas. No. 2,889, on operation of statute of limitations.

Presumption as to grant from lapse of time.

Cited in Crawford v. Neff, 3 Grant. Cas. (Pa.) 175, 3 Walk. Pa. 57, holding that where statute of limitations gives title to land, rules for presuming a conveyance cannot be substituted by the court.

Limited in White v. Loring, 24 Pick. 319, holding that a conveyance of land may be presumed from long continued possession.

Rights and status of persons under guardianship.

Cited in Macready v. Wilcox, 33 Conn. 321, holding the right of a mother, as natural guardian of her minor child upon the death of father, inferior to that of guardian appointed by probate court; Garnett v. Garnett, 114 Mass. 379, 19 A. R. 369, on rights of party under guardianship as *non compos mentis*.

Collateral attack on administrator.

Cited in notes in 18 L.R.A. 242, on collateral impeachability of findings as to inhabitancy of county in granting administration on deceased estate; 81 A. S. R. 556, on collateral attack on right of acting administrator where decedent left a will; 81 A. S. R. 559, on effect of lapse of time to prevent collateral attack on right of acting administrator.

Administration on living person's estate.

Cited in note in 30 A. R. 749, on effect of administration on estate of living person.

16 AM. DEC. 377, BALLARD v. CARTER, 5 PICK. 112.

After-acquired real estate passing by will.

Cited in Frazier v. Boggs, 37 Fla. 307, 20 So. 245, holding that real estate ac-

quired subsequent to execution did not pass; *Brewster v. McCall*, 15 Conn. 274, holding same even though will provided as to improvement of any after-acquired lands; *Webster v. Wiggin*, 19 R. I. 73, 28 L.R.A. 510, 31 Atl. 824, holding that they would not pass by a will which did not expressly so provide, as required by statute; *Taylor v. Benham*, 5 How. 233, 12 L. ed. 130, on what may pass by will; *Fay v. Winchester*, 4 Met. 513, on passing of after-acquired property by will.

Distinguished in *Byrnes v. Baer*, 86 N. Y. 210; *Loveren v. Lamprey*, 22 N. H. 434,—holding that because of statutory enactment, after-acquired property would pass, where such intention was clearly expressed; *Pray v. Waterston*, 12 Met. 262, where it appeared to be the intention of testator that after-acquired real estate should pass under a devise, by virtue of statute.

—Lands bought in on foreclosure.

Cited in *Brigham v. Winchester*, 1 Met. 390, holding land on which testator at time of making will held mortgage, afterwards foreclosed, did not pass.

What passes under residuary devise.

Cited in *Taylor v. Benham*, 5 How. 233, 12 L. ed. 130, on trust estates as passing to residuary legatees, to be held for eventual beneficiary.

Interest of mortgagee before foreclosure.

Cited in *Ewer v. Hobbs*, 5 Met. 1, holding estates of mortgagees in land, not subject to partition until after foreclosure; *Oakham v. Rutland*, 4 Cush. 172, holding mortgagee who has entered for condition broken acquires such a title that mortgagor in possession by permission of a lessee could not acquire a settlement by occupation; *Southerin v. Mendum*, 5 N. H. 420, on interest of mortgagee in real estate before foreclosure.

Implied revocation of will by alienation or change of property.

Cited in *Coulson v. Holmes*, 5 Sawy. 279, Fed. Cas. No. 3,274, holding conveyance of property previously devised worked a revocation; *Cozzens v. Jamison*, 12 Mo. App. 452, holding alienation of devised property by the testator during his life renders the will void *pro tanto*; *Warner v. Beach*, 4 Gray, 162, holding revocation of will would not be implied where testator became insane and continued insane for years, his wife and one of children dying and the property changing greatly in value.

16 AM. DEC. 383, *HEATH v. WELLS*, 5 PICK. 140.

Time for application for sale of decedent's lands for debts.

Cited in *McCrary v. Tasker*, 41 Iowa, 255, holding application by administrator *de bonis non* thirteen years after executor had given notice of his appointment was not made within reasonable time; *Re Godfrey*, 4 Mich. 308, holding that license would not be granted where claims of creditors against administrator had been barred by lapse of time; *Dorman v. Lane*, 6 Ill. 143, holding that final settlement would bar sale commenced more than a year afterwards.

Cited in note in 26 A. S. R. 27, on laches in applying for order to sell real property of decedent to pay debts.

—Avoidance of sale made after statutory time.

Cited in *Campau v. Gillett*, 1 Mich. 416, 53 A. D. 73, holding sale by an administratrix under a license, more than four years after the granting of letters, was void; *Tarbell v. Parker*, 106 Mass. 347, holding license from probate court more than two years after the administrator gave his bond and notice to sell real estate was void; *Thayer v. Hollis*, 3 Met. 369, holding levy on real estate on judg-

ment against estate, commenced more than four years after the executor gave notice of his appointment, was void as to all devisees except executor.

Enforceable debts as basis of sale of lands of decedent.

Cited in *Lamson v. Schutt*, 4 Allen, 359, holding administrator could not maintain petition to sell real estate for payment of debts, where there were no debts due and enforceable at law; *Howard v. Moore*, 2 Mich. 226, on statute of limitation barring administrator's sales of real estate.

Cited in reference note in 53 A. D. 77, on invalidity of authority of administrator to sell real estate of decedent to pay barred debts.

Bar of claims against estate.

Cited in *M'Broom v. The Governor*, 6 Port. (Ala.) 32, holding statute of nonclaim a complete bar to action against executor; *Fretwell v. McLemore*, 52 Ala. 124, holding claims of heir or legatees against estate of surety, growing out of misfeasance of his principal, barred if not presented within eighteen months to administrator of surety; *Winchell v. Sanger*, 73 Conn. 399, 66 L.R.A. 935, 47 Atl. 706, on when claim barred by statute limiting time for presentment of claims; *Carrington v. Manning*, 13 Ala. 611, holding that where will made provision for payment of debts it did not create a trust in favor of creditors which would take a barred debt out of the statute of limitations, or prevent the bar of the statute of nonclaim.

Right or duty of administrator to plead statute of nonclaim or limitations.

Cited in *Willcox v. Smith*, 26 Barb. 316; *Sanderson v. Sanderson*, 17 Fla. 820,—holding on necessity of administrator's pleading statute of limitations to claims barred; *Smith v. Huie*, 14 Ala. 201, holding in an action by administrator, to a plea of set-off he might set up the statute of nonclaim or limitations; *Ames v. Jackson*, 115 Mass. 508, holding payments made by administrator after two years from appointment, in pursuance of promises made upon a valid consideration within two years, should be allowed; *Aiken v. Morse*, 104 Mass. 277; *Studley v. Josselyn*, 5 Allen, 118,—on when debts chargeable against estate.

Cited in note in 61 L.R.A. 751, on right to open default judgment to let in defense of statute of limitations.

Right of ousted claimant to value of improvements on land.

Cited in *Wales v. Coffin*, 100 Mass. 177; *Plimpton v. Plimpton*, 12 Cush. 458,—holding party claiming under a warranty deed and divested of title was entitled to compensation for improvements; *Sunter v. Sunter*, 190 Mass. 449, 77 N. E. 497, holding same of party who had held real estate for more than six years before writ of entry under claim of title.

Authority of probate court.

Cited in *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 A. D. 41, holding on validity of acts of probate court.

—As to sale of lands.

Cited in *Merrill v. Harris*, 26 N. H. 142, 57 A. D. 359, holding on authority of probate court to order sale of real estate.

Cited in reference note in 86 A. D. 653, on validity of order of sale by probate court in absence of circumstances giving it jurisdiction.

Conclusiveness of decree of probate court.

Cited in *Allen v. Ashley School Fund*, 102 Mass. 262, holding decree of probate judge unappealed from, conclusive as to advisability of selling whole real estate of deceased.

16 AM. DEC. 386, COM. v. CHAPIN, 5 PICK. 199.**What are navigable rivers.**

Cited in *Veazie v. Dwinel*, 50 Me. 479, holding river not navigable stream above the tide, but, being capable of floating logs, boats, and rafts, was subject to the public use; *Parsons v. Clark*, 76 Me. 476, holding stream subject to the tide and of sufficient size to give passage to boats, navigable; *Charlestown v. Middlesex County*, 3 Met. 202, holding that tidal stream did not cease to be navigable because legislature had authorized erection of a bridge across it; *Murdock v. Stickney*, 8 Cush. 113, on what was a navigable river.

Cited in reference notes in 38 A. D. 727; 58 A. D. 53,—on what are navigable rivers; 84 A. D. 540, on what were navigable rivers at common law; 84 A. D. 540, on rule that rivers navigable in fact are navigable at law; 26 A. D. 530, on nature of non-navigable rivers.

Cited in notes in 3 L.R.A. 406, on definition of navigable stream; 13 L.R.A. 828, on what constitutes navigable stream; 42 L.R.A. 313, on what waters are navigable; 21 A. D. 712, on what are navigable rivers; 19 A. D. 502, on navigable rivers and rights of fishery therein; 3 L.R.A. 611, on what are private streams.

Disapproved in *Shaw v. Oswego Iron Co.* 10 Or. 371, 45 A. R. 146, holding stream navigable which was of sufficient size to float logs and small boats a part of the year.

Power of state to make regulations for protection of fish.

Cited in *State, Weller, Prosecutor, v. Snover*, 42 N. J. L. 341, holding that state had a right, by legislation, to protect fish in non-navigable streams and rivers; *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, 2 A. & E. Ann. Cas. 226, 19 N. Y. Crim. Rep. 27, holding on right of state to legislate for the protection of game and fish.

Cited in reference notes in 37 A. D. 59, on legislative regulation of public rights in navigable streams; 85 A. D. 658, on right of state to regulate rights and privileges of fishing.

Cited in notes in 7 L.R.A. 135, on power of state legislature to regulate fisheries; 39 L.R.A. 587, on right of government to prevent obstruction of stream in control over right of fishery.

Public right as to fishing.

Cited in reference notes in 23 A. S. R. 399, on right of fishery in public waters; 38 A. D. 727; 54 A. D. 769,—on public right of fishery in navigable waters; 42 A. D. 160, on common right of fishing in navigable stream; 7 A. S. R. 798, on fishing rights of public in uninclosed flats between high and low water mark of sea.

Cited in notes in 60 L.R.A. 487, on public right of fishery; 107 A. S. R. 235, on matters affecting fishing rights of public as public nuisance.

Rights of riparian owners in non-navigable rivers.

Cited in *Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 A. D. 444, holding railroad company building bridge across non-navigable stream, liable in damages for obstructing flow of water away from mill of plaintiff; *McFarlin v. Essex County*, 10 Cush. 304, on rights of riparian owners in non-navigable streams.

Cited in note in 5 L.R.A. 61, on riparian rights of owners bounding on navigable stream.

—Rights of fishery.

Cited in *Griffith v. Holman*, 23 Wash. 347, 83 A. S. R. 821, 54 L.R.A. 178, 63 Pac. 239, holding that riparian owners on a non-navigable stream owned the exclu-

sive right of fishery in the waters flowing along their land, to the middle of the stream; *Cole v. Eastham*, 133 Mass. 65; *Backus v. Detroit*, 49 Mich. 110, 43 A. R. 447, 13 N. W. 380; *Com. v. Alger*, 7 Cush. 53,—holding on right of riparian owner to fishing privileges in non-navigable streams; *Com. v. Look*, 108 Mass. 452, holding statute forbidding the taking of certain fish at certain seasons was binding on riparian owners of non-navigable streams.

Cited in reference notes in 92 A. D. 148, on right to fish in unnavigable waters; 58 A. S. R. 187, on riparian owner's exclusive right to fish in non-navigable stream; 97 A. D. 722, on right to fish in unnavigable stream being in owner, to exclusion of public; 100 A. D. 609, as to several and exclusive fishery in navigable waters.

Cited in notes in 13 A. S. R. 418, on right to hunt or fish on land of another; 60 L.R.A. 508, on interference with other fishery rights in exercising right to fish.

—As to passage of fish.

Cited in *Vinton v. Welsh*, 9 Pick. 87; *Com. v. Essex Co.* 13 Gray, 239; *Swift v. Falmouth*, 167 Mass. 115, 45 N. E. 184; *Parker v. People*, 111 Ill. 581, 53 A. R. 643,—on right of riparian owner to prevent the free passage of fish; *Barden v. Crocker*, 10 Pick. 383, holding that an action might be maintained against a riparian owner for blocking the passage of fish; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 A. R. 247,—holding that a corporation authorized to maintain a dam on paying damages to owners of fishing rights above was not exempt from maintaining a fishway.

Cited in reference note in 84 A. S. R. 349, on requiring fishways in dam.

Indictable obstruction of stream.

Cited in *State v. Webb's River Improv. Co.* 97 Me. 559, 55 Atl. 495, holding dam erected by corporation in accordance with its charter, injuring riparian owners, not indictable as nuisance; *Renwick v. Morris*, 3 Hill, 621, on right to indict for nuisance.

Remedy for violation of fish regulations.

Cited in *West Point Water Power & Land Improv. Co. v. State*, 49 Neb. 218, 66 N. W. 6, holding that mandamus would lie to compel owners of mill-dams to construct and maintain fishways; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, affirming right of state in the protection of fish, to authorize any person to seize and destroy nets maintained in waters of the state; *Bearce v. Fossett*, 34 Me. 575, holding that private parties had no right to make fishways in a private dam, when statute authorized the regulation of such fishways by a committee.

Cited in note in 60 L.R.A. 524, on penalties for illegal fishing.

Public easement of passage in non-navigable river.

Cited in *Gaston v. Mace*, 33 W. Va. 14, 25 A. S. R. 848, 5 L.R.A. 392, 10 S. E. 60; *Brown v. Chadbourne*, 31 Me. 9, 50 A. D. 641, holding non-navigable stream on which logs, boats, and rafts might be floated, though it was private property, was subject to a public easement of passage; *The Magnolia v. Marshall*, 39 Miss. 109; *Morgan v. Reading*, 3 Smedes & M. 366,—on right of public in non-navigable rivers.

Cited in notes in 9 L.R.A. 807, on common and paramount right of navigation; 81 A. D. 583, on right of public or of individuals to use water courses as highways and remedies available to vindicate right.

Right of public in navigable waters.

Cited in *Sutter v. Heckman*, 1 Alaska, 81, holding right of fishery in navigable waters of the United States, common to all; *Moor v. Veazie*, 32 Me. 343, 52 A. D. 665, on the public right of navigation on navigable rivers; *Sterling v. Jackson*, 69 Mich. 488, 13 A. S. R. 405, 37 N. W. 845 (dissenting opinion), on rights of public in navigable waters.

Power of state over waterways.

Cited in *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867, on power of state over waterways.

Cited in note in 39 L.R.A. 683, on municipal power over water and water courses as nuisances.

16 AM. DEC. 391, WAIT v. MAXWELL, 5 PICK. 217.**New trial on grounds not urged below.**

Cited in *State v. Hascall*, 6 N. H. 352; *Moore v. Ross*, 11 N. H. 547,—holding failure to give an instruction not requested at the trial, no ground; *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217, holding same where no objections were raised to questions asked by jury on trial; *State v. Camp*, 23 Vt. 551, holding same where inadvertently witness for prosecution testified to material facts, it not being shown that defendant was ignorant of the fact or that he has sustained any injury; *Belmont v. Morrill*, 69 Me. 314, granting new trial where cause was determined on statute which was afterwards discovered to have been repealed.

Cited in reference notes in 35 A. D. 107, on necessity of raising objections on trial; 68 A. S. R. 899, on waiver of incompetency of evidence; 63 A. S. R. 433, on objections to competency of witnesses; 29 A. D. 470, on waiver of objection to incompetency of witness; 34 A. D. 279, on waiver of objection to evidence not made at the trial.

Cited in note in 27 A. D. 487, on raising on appeal objections not taken at the trial.

Effect of failure to object to evidence.

Cited in *Bond v. Baldwin*, 9 Ga. 9, holding admission of illegal testimony on the trial, not objected to at time, not good ground for new trial; *Com. v. Johnson*, 3 Del. Co. Rep. 117, holding admission of improper evidence not objected to, not ground for setting aside verdict; *Burnside v. Grand Trunk R. Co.* 47 N. H. 554, 93 A. D. 474, holding special objections to evidence being overruled, the party cannot raise the incompetency of such evidence as a new ground; *Wheeler v. Rice*, 8 Cush. 205, holding where evidence was offered for a specific purpose and rejected, the party offering could not, on exceptions, maintain its admissibility on a ground not stated at the trial.

Invalidity of conveyance of non compos mentis under guardianship.

Cited in *Elston v. Jasper*, 45 Tex. 409; *Redden v. Baker*, 86 Ind. 191,—holding deed of person duly adjudged insane, void absolutely; *Rannells v. Gerner*, 80 Mo. 474 (reversing 9 Mo. App. 506), holding the deed of a *non compos mentis*, with guardian's consent, absolutely void; *Pinkston v. Sample*, 92 Ala. 564, 9 So. 329, holding same as to inebriate who had been deprived of the control of his estate and a trustee appointed; *Fitzhugh v. Wilcox*, 12 Barb. 235, holding contract for the sale of land executed by adjudicated lunatic, absolutely void.

Cited in reference note in 52 A. S. R. 87, on validity of lunatic's deed.

Cited in notes in 70 A. D. 492, on deeds void and voidable; 71 A. S. R. 430, 431; 19 L.R.A. 489,—on validity of a deed made by an insane person; 19 L.R.A. 490, on validity of deed by insane person when under guardianship.

— Of persons not adjudged lunatics or not under guardianship.

Cited in *Crouse v. Holman*, 19 Ind. 30; *Nichol v. Thomas*, 53 Ind. 42; *Wolcott v. Connecticut General L. Ins. Co.* 137 Mich. 309, 100 N. W. 569; *Coburn v. Raymond*, 76 Conn. 484, 100 A. S. R. 1000, 57 Atl. 116,—holding deed of a person *non compos mentis*, not under guardianship, voidable; *Freed v. Brown*, 55 Ind. 310; *Moran v. Moran*, 106 Mich. 8, 58 A. S. R. 462, 63 N. W. 989,—holding deed of mental incompetent, executed before he had been adjudicated as such, voidable only; *Evans v. Horan*, 52 Md. 602, holding unrecorded deed for valuable consideration, voidable only because grantor was *non compos mentis*; *Riley v. Carter*, 76 Md. 581, 35 A. S. R. 443, 19 L.R.A. 489, 25 Atl. 667,—holding deed of lunatic in trust for creditors, merely voidable; *Allis v. Billings*, 6 Met. 415, 39 A. D. 744, holding unrecorded deed of *non compos mentis*, voidable only and capable of ratification when he was of sound mind; *Blakeley v. Blakeley*, 33 N. J. Eq. 502, refusing to avoid a deed made by lunatic before unsoundness was established by inquisition; *Wagener v. Harriott*, 20 Abb. N. C. 283, holding fact that person had been judicially committed to insane asylum did not of itself, without inquisition found, avoid a voluntary transfer made while in asylum.

Distinguished in *Lewis v. Jones*, 50 Barb. 645, holding that the will of a habitual drunkard subject to a commission, not necessarily void, the commission being only *prima facie* evidence of incapacity.

— Of contracts of insane persons.

Cited in *Tolson v. Garner*, 15 Mo. 494; *Hall v. Butterfield*, 59 N. H. 354, 47 A. R. 209; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460 (dissenting opinion); *Allen v. Berryhill*, 27 Iowa, 534, 1 A. R. 309 (dissenting opinion),—on validity of contracts of insane persons.

Cited in reference note in 83 A. D. 523, on validity of contracts of insane persons.

Cited in notes in 15 A. D. 364, as to whether contracts of lunatics are void or voidable; 16 E. R. C. 739, on avoidance of contract of alleged insane person; 19 A. D. 408, on insanity affecting testamentary capacity or capacity to contract.

When parties dealing with lunatics protected.

Cited in *Odum v. Riddick*, 104 N. C. 515, 17 A. S. R. 686, 7 L.R.A. 118, 10 S. E. 609, holding purchaser from a *non compos mentis*, without knowledge or notice of it, would be protected; *Hovey v. Hobson*, 53 Me. 451, 89 A. D. 705, holding deed of insane man made on adequate consideration, but never ratified, might be avoided in the hands of a bona fide purchaser; *Key v. Davis*, 1 Md. 32, holding that remainderman could not impeach deed of a tenant in tail conveying in fee, on ground that grantor was *non compos mentis*; *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 66 A. S. R. 167, 40 L.R.A. 250, 29 S. E. 182, holding bank innocently paying money on check drawn by lunatic who had been adjudged insane would not be protected.

Necessity of notice in lunacy proceedings.

Cited in *Eslava v. Lepretre*, 21 Ala. 504, 56 A. D. 266; *Conkey v. Kingman*, 24 Pick. 115; *McCurry v. Hooper*, 12 Ala. 823, 46 A. D. 280,—holding appointment of guardian for person alleged to be *non compos mentis*, void where no notice was given to the individual of the pendency of an inquisition of his

sanity; *Moody v. Bibb*, 50 Ala. 245, holding appointment of guardian of inquisition by probate court, without inquisition of lunacy and without notice to lunatic, void; *Hamilton v. Probate Court*, 9 R. I. 204, holding no notice necessary to others than intended ward, of application for appointment of guardian for adult.

Cited in notes in 23 L.R.A. 741, on necessity of notice of lunacy proceedings to alleged lunatic; 12 L.R.A. (N.S.) 896, on collateral attack on lunacy proceedings for want of notice to lunatic.

Void appointment of guardian for lunatic.

Cited in *Heckman v. Adams*, 50 Ohio St. 305, 34 N. E. 155, on validity of appointment of guardian for *non compos mentis*.

What constitutes seisin.

Cited in *Vancleave v. Milliken*, 13 Ind. 105, holding a person in possession of land under claim of title, seised of the land.

Cited in note in 125 A. S. R. 452, as to what constitutes a breach of covenant of seisin.

16 AM. DEC. 394, SAUNDERS v. FROST, 5 PICK. 259.

Rights of subsequent mortgagees.

Cited in reference note in 63 A. D. 154, on rights of subsequent mortgagees.

Mortgagor's right to redeem.

Cited in *Sheldon v. Birmingham Bldg. & L. Asso.* 121 Ala. 278, 25 So. 820, holding that before foreclosure mortgagor has no right to redeem until the maturity of the debt secured, and by terms of the contract; *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86, on right to redeem before maturity of debt.

Cited in reference note in 69 A. S. R. 197, on junior mortgagee's right to redeem from senior mortgagee.

Cited in notes in 18 E. R. C. 277, on right of mortgagee to insist that all mortgages be redeemed together; 18 E. R. C. 118, on right to redeem mortgage before day fixed for payment of mortgage moneys.

— Amount necessary.

Cited in *Mann v. Richardson*, 21 Pick. 355, holding that where several instalments were all past due and mortgagee had entered for condition broken, mortgagor might not redeem until payment of all the instalments.

Cited in reference note in 50 A. D. 44, as to when redemptioners must pay prior mortgages.

— Right of subrogation.

Cited in *Wyckoff v. Noyes*, 36 N. J. Eq. 227, holding that a party could not, by the payment of a mortgage, be subrogated to the rights of the holder without payment of holder's prior claims; *Shapley v. Rangeley*, 1 Woodb. & M. 213, Fed. Cas. No. 12,707, on right of subrogation.

Rights of redeeming codebtor.

Cited in *McLaughlin v. Curtis*, 27 Wis. 644, holding that tenant redeeming from foreclosure sale might compel contribution from comortgagors; *Robinson v. Leavitt*, 7 N. H. 73, on payment of a mortgage debt by one of several liable therefor, as affecting his rights as against the others.

Joinder of parties.

Cited in reference note in 26 A. D. 428, on joinder of mortgagees in bill to redeem.

Power of equity as to foreclosure and redemption.

Cited in *Libby v. Cobb*, 76 Me. 471, allowing special administrator to redeem land of intestate, where the right to redeem was liable to be barred by foreclosure before general administrator could qualify.

Accounting by mortgagee in possession for rents and profits.

Cited in *Strong v. Blanchard*, 4 Allen, 538; *Chamberlain v. Connecticut C. R. Co.* 54 Conn. 472, 9 Atl. 244,—holding mortgagee in possession must apply rents and profits to discharging of the debt; *Gibson v. Crehore*, 5 Pick. 145, holding assignee of mortgage have possession, liable for rents and profits from time of his taking the assignment; *Gerrish v. Black*, 104 Mass. 400, holding that in the absence of negligence and fraud a mortgagee in possession could not be charged with a higher rent than that actually received.

—For interest.

Cited in *Gordon v. Lewis*, 2 Sumn. 143, Fed. Cas. No. 5,613, holding that, where rents and profits received exceed the interest on debt, interest on such surplus may be charged; *Morrow v. Turney*, 35 Ala. 131, holding mortgagee in possession seeking to foreclose a mortgage of slaves, chargeable with interest on the annual hire of the slaves from the end of each year after his possession commenced.

Right of mortgagee to charge mortgagor with insurance.

Cited in *Boston & W. R. Corp. v. Haven*, 8 Allen, 359, holding that mortgagee could not charge for insurance effected by him upon the property without request of mortgagor; *Plimpton v. Farmers' Mut. F. Ins. Co.* 43 Vt. 497, 5 A. R. 297, on mortgagee's interest in insurance effected by mortgagor.

Cited in note in 54 A. D. 696, on mortgagor's right as to insurance procured independently by mortgagee.

—Right to charge for expenditures.

Cited in *Clark v. Smith*, 1 N. J. Eq. 121, holding mortgagee who spent money in making beneficial improvements, without consent of mortgagor, could not recover; *Dexter v. Arnold*, 2 Sumn. 108, Fed. Cas. No. 3,858, holding mortgagee bound to make all necessary and reasonable repairs on mortgaged premises while in his possession; *Donohue v. Chase*, 139 Mass. 407, 2 N. E. 84, holding mortgagee entitled to recover for water rent chargeable to mortgagor and paid by mortgagee in order to avoid having supply cut off.

Sufficiency of tender of money.

Cited in *Continental Ins. Co. v. Busby*, 3 Tex. App. Civ. Cas. (Willson) 124; *Moore v. Cord*, 14 Wis. 214; *Hawes v. Smith*, 12 Me. 429,—on when a tender considered valid and sufficient; *Wilhite v. Ryan*, 66 Ala. 106, holding a tender of money with a condition annexed which would prejudice the rights of the party refusing to accept was bad.

Cited in reference notes in 22 A. D. 225; 26 A. D. 265,—on sufficiency and necessity of tender.

Cited in note in 77 A. D. 471, on general requisites of good tender and effect thereof.

—With demand for rights as condition.

Cited in *Buffum v. Buffum*, 11 N. H. 451, holding tender with a request that a deed to which the party was entitled be executed, was not conditional; *State v. Central P. R. Co.* 21 Nev. 247, 30 Pac. 686, holding same where upon payment of taxes the statutory receipt was demanded; *Halpin v. Phenix Ins. Co.* 118 N. Y. 165, 23 N. E. 482, holding debtor might upon tender of payment of the debt,

demand return of securities pledged as collateral; *Kennedy v. Moore*, 91 Iowa, 39, 58 N. W. 1066, holding tender of amount due on mortgage claimed by assignee may be conditioned by demand for note and mortgage with assignment or release.

Distinguished in *Balme v. Wambaugh*, 16 Minn. 116, Gil. 106, holding tender of payment of note at bank where it was payable, the payee having it in his possession, on condition that note must be delivered up, did not discharge the mortgage security; *Bigelow v. Cassidy*, 26 N. J. Eq. 557 (reversing 25 N. J. Eq. 112), where a subsequent mortgagee, who, to protect his interest, made an unconditional tender of payment to first mortgagee, demanding assignment of it, was protected as against first mortgagee.

Effect of payment after default on mortgage.

Cited in *Mussina v. Bartlett*, 8 Port. (Ala.) 277; *Fulgham v. Morris*, 75 Ala. 245,—holding that payment of past-due instalments of mortgage debt after bill filed for foreclosure may stop further proceedings.

Cited in note in 37 L.R.A. 749, on stay of proceedings to enforce mortgage for part of mortgage debt.

Recovery of costs in equity.

Cited in *Barnard v. Savier*, 2 Mich. N. P. 174; *Coleman v. Coleman*, 2 Pearson (Pa.) 511; *Allen v. Lewis*, 74 Ala. 379,—holding in equity the court has a discretion in apportionment of costs; *Clark v. Reed*, 11 Pick. 446, holding that plaintiff, who had apparently a good cause of action, with sufficient cause for beginning suit, would not be held for costs; *Couch v. Millard*, 41 Hun, 212, denying right of unsuccessful defendant to recover costs out of plaintiff's recovery of money in the action; *Coleman v. Brooke*, 15 Phila. 302, 39 Phila. Leg. Int. 158, requiring defendants, successful in the main issue, who set up a claim which was not sustained to pay as much of the costs as resulted therefrom; *Stone v. Locke*, 48 Me. 425, on costs in equity; *Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418, on a contestant's right to recover costs.

Cited in reference notes in 77 A. S. R. 77, on subject of costs; 81 A. S. R. 24, on liability for costs; 62 A. S. R. 734, as to who is entitled to costs; 33 A. D. 475, as to when costs are not allowed; 61 A. S. R. 161, on right to costs in equity; 21 A. D. 73; 42 A. D. 504; 59 A. D. 52,—on costs at law and in equity; 50 A. D. 68; 90 A. D. 689; 46 A. S. R. 679,—on discretion of court as to costs in equity; 46 A. D. 426, on allowance of costs by lower court being rarely reviewed in equity; 72 A. D. 394, on recovery of costs by mortgagee.

Cited in note in 88 A. D. 182, on items of expense recoverable by prevailing party as costs.

— On bill to redeem.

Cited in *Sewall v. Sewall*, 130 Mass. 201, holding in a bill to redeem land plaintiff was not entitled to costs, not having made tender before filing bill and defendant not entitled, his defence being groundless; *McNeil v. Call*, 19 N. H. 402, 51 A. D. 188, holding plaintiff mortgagor might recover costs, the conduct of the agent of mortgagee being unconscientious and oppressive; *Bean v. Brackett*, 35 N. H. 88, holding costs would be allowed to the petitioners, the mortgage being discharged.

Cited in note in 18 E. R. C. 507, on right of mortgagee to costs of and incident to action to redeem or foreclose mortgage and how right to costs may be lost by improper conduct.

16 AM. DEC. 407, BALL v. CLAFLIN, 5 PICK. 303.**What allowable as amendment.**

Cited in *Stevenson v. Mudgett*, 10 N. H. 338, 34 A. D. 155; *Swan v. Nesmith*, 7 Pick. 220, 19 A. D. 282,—holding that declaration might be amended, on leave of court, by new counts for the same cause of action and consistent with original counts; *Tiernan v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027, holding that an amendment would not be struck out because it introduced a new cause of action embraced by the suit; *Smith v. Palmer*, 6 Cush. 513, holding that a new count growing out of same transaction might be inserted as an amendment, though form of liability be different; *Prater v. Snead*, 12 Kan. 447, holding amendment to conform to evidence of one of the facts which entered into a description of the cause of action, but which did not substantially change it, allowable; *May v. Gesellschaft*, 211 Ill. 310, 71 N. E. 1001, holding that a plaintiff in attachment might amend his declaration in tort to state same cause of action in assumpsit; *Bishop v. Williamson*, 11 Me. 495, holding pleading charging a postmaster with refusing to deliver mail, properly amended by new count charging same act to another, who was wrongfully allowed to care for mail; *Bluehill Academy v. Ellis*, 32 Me. 260; *Perrin v. Keene*, 19 Me. 355, 36 A. D. 759,—holding in suit upon note given in settlement, complaint might be amended by filing new count for the original claim; *Brewer v. East Machias*, 27 Me. 489, holding action in *indebitatus assumpsit* might be amended by new count, under statute covering same cause of action; *McConnell v. Leighton*, 74 Me. 415, holding that to action originally trover new counts in case might be added; *People ex rel. Drew v. Circuit Ct. Judges*, 1 Dougl. (Mich.) 434, holding that counts in debt to recover a statutory penalty for usury could not be amended by substituting counts for money had and received; *Strang v. Branch Circuit Judge*, 108 Mich. 229, 65 N. W. 969, holding an amended declaration which counts upon the same contract as the original and sets up the same damage, although it alleged the breach in a different manner, did not state a new cause of action; *Davis v. Hill*, 41 N. H. 329, holding writ alleging damages by reason of defective highway in a particular locality, amendable by charging damage to have resulted from want of barrier to protect traveler; *Hayward v. Hapgood*, 4 Gray, 437, holding court had no power to allow a bill in equity to be substituted for a count in contract; *Thomas v. United States*, 15 Ct. Cl. 335 (dissenting opinion); *Snyder v. Harper*, 24 W. Va. 206; *Quillen v. Arnold*, 12 Nev. 234 (dissenting opinion),—on what allowable as amendments.

Cited in reference notes in 35 A. D. 735, on amendment of pleadings; 9 A. S. R. 173, on amendment of complaint; 39 A. D. 68; 79 A. D. 482, on allowance of amendments changing cause of action; 34 A. D. 697, on nonallowance of amendment, which changes whole character of litigation.

Cited in notes in 51 A. S. R. 424, on admissibility of amendments changing form of action; 51 A. S. R. 420, on amendment of declaration in assumpsit changing cause of action; 51 A. S. R. 414, on inadmissibility of amendments to pleadings because of changing cause of action; 61 A. D. 125, on amendments of declarations or complaints in attachment; 35 L.R.A. 767, on right of attachment creditors to question validity of attachment; 35 L.R.A. 782, on right of creditors to question validity of attachment for injury to vested rights by alteration of amount claimed.

Amendment as discharging bail or writs founded on declaration.

Cited in *Wood v. Denny*, 7 Gray. 540, holding bail not discharged by allowing

a declaration on money counts to be amended by adding counts upon promissory notes which were the real cause of action to be relied on under money count; *Knight v. Dorr*, 19 Pick. 48, holding same where in an action against two defendants one was discharged and court allowed complainant to strike out his name and take judgment against other; *Brown v. Howe*, 3 Allen, 528, holding same of introduction of count for work done and materials furnished, the former count being for breach of contract and for the work and materials, and the bill of particulars being the same; *Townsend Nat. Bank v. Jones*, 151 Mass. 454, 24 N. E. 593, holding surety on bond to dissolve attachment, not discharged where the declaration was amended so as to set forth more accurately same cause of action; *Merrick v. Greely*, 10 Mo. 106, holding amendment of statement of the cause of action not changing the cause, did not release sureties; *The Maggie Jones*, 1 Flipp. 635, Fed. Cas. No. 8,947, holding amendment of libel by the adding co-libellant did not discharge the surety on the stipulation; *Smith v. Brown*, 14 N. H. 67, holding that amendment of an action originally brought against two, by striking out the name of one, would not discharge a receptor; *Boyd v. Beville*, 91 Tex. 439, 44 S. W. 287; *Mendes v. Freiters*, 16 Nev. 388,—holding an amendment changing the form of an action merely, or adding a new count for the same, would not dissolve an attachment as to interveners; *Norris v. Anderson*, 181 Mass. 308, 92 A. S. R. 420, 64 N. E. 71, holding an amendment made to cure a clerical error did not affect the validity of an attachment; *Laighton v. Lord*, 29 N. H. 237, holding alteration of writ to the prejudice of subsequent attaching creditors would dissolve the attachment as against them.

16 AM. DEC. 409, SARGENT v. SOUTHGATE, 5 PICK. 312.

Equitable defenses to negotiable instruments.

Cited in *Davis v. Miller*, 14 Gratt. 1; *Britton v. Bishop*, 11 Vt. 70,—holding overdue note subject to equitable defenses, good against indorsee; *Southard v. Porter*, 43 N. H. 379, holding note delivered to indorsee before maturity, but not indorsed until after, subject to equitable defenses on part of maker; *Thayer v. Crossman*, 1 Met. 416; *Pine v. Smith*, 11 Gray, 38; *Spring v. Lovett*, 11 Pick. 417,—as to when negotiable instrument subject to equitable defenses.

Cited in reference note in 39 A. D. 710, as to what defenses endorsee of overdue note is subject.

Cited in notes in 25 A. D. 56, on equities subject to which indorsee takes overdue note; 4 L.R.A. 241, on authority of partner.

Distinguished in *Thayer v. Buffum*, 11 Met. 398, holding indorsee of a note on demand could maintain an action against the maker, it being made by a firm to one of firm members, although the promisee could not recover.

—Set-offs in action by indorsee with notice or after dishonor.

Cited in *Edney v. Willis*, 23 Neb. 56, 36 N. W. 300; *Davis v. Neligh*, 7 Neb. 78,—holding any set-off good between original parties was good between maker and indorsee taking after maturity; *Bowen v. Snell*, 9 Ala. 481, holding defendant might show that the suit was instituted for the benefit of a different person from the one indicated in the record and against whom he might plead offset; *Baxter v. Little*, 6 Met. 7, 39 A. D. 707; *Bond v. Fitzpatrick*, 4 Gray, 89; *Shirley v. Todd*, 9 Me. 83,—holding maker of bill might set off claims against indorser accruing prior to transfer of the bill; *Robinson v. Perry*, 73 Me. 168; *Stowers v. Barnard*, 15 Pick. 221; *Barney v. Norton*, 11 Me. 350,—holding maker might set off claims against payee; *Lewis v. Brooks*, 9 Met. 367, holding in

suit on demand note maker might set off a judgment recovered by him against payee; *Armstrong v. Chadwick*, 127 Mass. 156, holding maker might set up a note and mortgage given by payee as consideration for note in suit at time of making; *Tyler v. Boyce*, 135 Mass. 558; *Wood v. Warren*, 19 Me. 23,—holding that maker may plead counterclaims against indorser; *Burnham v. Tucker*, 18 Me. 179, holding that against a judgment obtained against the maker by an indorsee, after due day, the maker might set off a judgment obtained against the payee; *Amercian Bank v. Wall*, 56 Me. 167, holding in action by insolvent bank against indorser he might set off bills of the bank which he held at the time of its failure.

Cited in reference note in 45 A. D. 137, as to whether or not indorsee of overdue note takes subject to set-offs.

Cited in notes in 23 L.R.A. 328, on set-off against assignee of commercial paper transferred after maturity; 46 L.R.A. 793, 794, on rights of holder of negotiable paper transferred after maturity under statutes as to set off of mutual claims.

Disapproved in *Sheffield v. Parmelee*, 8 Ala. 889; holding indorsee of bill after maturity not affected by set-off by the makers against the indorser; *Chandler v. Drew*, 6 N. H. 469, 26 A. D. 704; *Leavitt v. Peabody*, 62 N. H. 185; *Cumberland Bank v. Hann*, 18 N. J. L. 222; *Kilcrease v. White*, 6 Fla. 45,—holding that indorsee of overdue note does not take subject to set-off of debt due from indorser to maker.

Defenses good against assignee.

Cited in *Barlett v. Pearson*, 29 Me. 9, on defenses to assignment of chose in action.

Defense of set-off.

Cited in *Bemis v. Smith*, 10 Met. 194, holding that in suit by assignee of insolvent debtor upon covenants of warranty in deed defendant might set up notes and accounts due him from debtor; *Clark v. Parker*, 4 Cush. 361, holding that where choses in action were reassigned the debtor in action in name of assignor might avail himself of same defenses as if brought in name of assignee; *School Dist. No. 9 v. Deshon*, 51 Me. 454, on right of set-off against claim; *Green v. Nelson*, 12 Met. 567, on introduction of defense of set-off.

Set-off of or against notes.

Cited in *Rice v. Howland*, 147 Mass. 407, 18 N. E. 229, holding in action by payee on note maker might set off notes held by and made by payee to him; *Ranger v. Cary*, 1 Met. 369; *Backus v. Spaulding*, 129 Mass. 234; *Woods v. Carlisle*, 6 N. H. 27; *Terney v. Wilson*, 45 N. J. L. 282; *Eaves v. Henderson*, 17 Wend. 190; *Paige v. Cagwin*, 7 Hill, 361, 42 A. D. 68; *Fitch v. Gates*, 30 Conn. 366,—on when negotiable instrument subject of set-off.

Indorsement after dishonor.

Cited in reference note in 29 A. D. 586, on necessity of demand and notice to indorser of past due note.

Cited in note 18 L. ed. U. S. 932, on rights of holder of commercial paper transferred after maturity.

Disapproved in *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Holton v. Hubbard*, 49 La. Ann. 715, 22 So. 338,—holding note not dishonored when indorsed on last day for payment.

16 AM. DEC. 415, *JONES v. PERCIVAL*, 5 PICK. 485.

Easements of way over another's lands.

Cited in *Rosser v. Bunn*, 66 Ala. 89, on easement presumed by prescription or

long user; *Nichols v. Luce*, 24 Pick. 102, 35 A. D. 302, holding easement might be acquired in the land of another in the nature of right of way from necessity.

Cited in note in 88 A. D. 280, 281, on use of private ways.

Nature of easement of way.

Cited in *Worthen v. Garno*, 182 Mass. 243, 65 N. E. 67; *Hoyt v. Kennedy*, 170 Mass. 54, 48 N. E. 1073, holding that right of way over the land of another does not consist in right to cross the land in any direction not prejudicial to owner; *Canon City & S. J. R. Co. v. Denver & R. G. R. Co.* Fed. Cas. No. 2,387; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Chase v. Perry*, 132 Mass. 582,—on the nature of a right of way.

Cited in note in 100 A. D. 115, on nature of ways.

Location essential to easements.

Cited in *Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Asso.* 64 N. Y. 561, holding easement granted for building a dam at certain location gave no rights to change location; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544; *Jennison v. Walker*, 11 Gray, 423,—holding same of right to build an aqueduct in particular place, it being impossible to rebuild in old location; *Onthank v. Lake Shore & M. S. R. Co.* 8 Hun, 131, holding grant to use certain pipes to carry water gave no right to use larger pipes, taking a larger amount of water.

Duty to repair way over another's land.

Cited in *Abbott v. Jackson*, 84 Me. 449, 24 Atl. 900, holding that duty to keep in repair a way over land was on the owner of the easement.

16 AM. DEC. 417, DOTY v. GORHAM, 5 PICK. 487.

Implied license to enter on lands.

Cited in *Berry v. Friedman*, 192 Mass. 131, 78 N. E. 305, holding landlord who permitted a piano to be brought into house by enlarging window would be presumed, on being secured for damages, to license removal in same manner; *Hector v. Boston Electric Light Co.* 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, on presumption of license to enter on property of another; *Agate v. Lowenbein*, 4 Daly, 62; *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 232,—on implied license from nature and situation of property.

Cited in note in 10 A. D. 43, on trespass against one going on land to remove buildings erected under parol license.

Distinguished in *McLeod v. Jones*, 105 Mass. 403, 7 A. R. 539, holding purchaser who entered and took furniture during absence of seller, guilty of trespass, no license being implied.

Right of tenant to remove fixtures.

Cited in *Hanrahan v. O'Reilly*, 102 Mass. 201, holding bowling alleys erected in building with consent of owner, removable fixtures prior to expiration of tenancy; *Morey v. Hoyt*, 62 Conn. 542, 19 L.R.A. 611, 26 Atl. 127, on right of tenant to remove fixtures after termination of tenancy; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 A. R. 694, holding lessee who took new lease, in which he did not reserve previous right to remove fixtures, could not thereafter remove them.

Removable fixtures.

Cited in *Haven v. Emery*, 33 N. H. 66, holding rails laid with agreement that they remain property of owners until paid for did not become property of railroad company; *Mott v. Palmer*, 1 N. Y. 564, holding rails built into a fence, under agreement that they might be removed, remain personalty as between landlord

and tenant; *Steers v. Daniel*, 4 Fed. 587; *Treadway v. Sharon*, 7 Nev. 37 (dissenting opinion),—on when fixtures to be considered part of realty; *Fifield v. Maine C. R. Co.* 62 Me. 77, holding rails and sleepers in side track, personalty, such track not being part of realty.

Cited in notes in 19 L.R.A. 442, on effect of agreement to prevent fixtures from becoming part of realty; 84 A. S. R. 896, on effect as to third parties of agreement that fixtures may retain character of personal property.

—Buildings as.

Cited in *Curtiss v. Hoyt*, 19 Conn. 154, 48 A. D. 149; *Curtis v. Riddle*, 7 Allen, 185; *Howard v. Fessenden*, 14 Allen, 124; *Aldrich v. Parsons*, 6 N. H. 555; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 A. R. 622,—holding that buildings erected upon the land of another, with owner's consent, remain personal property; *Batcheller v. Commercial Union Assur. Co.* 143 Mass. 495, 10 N. E. 321, holding same of schoolhouse erected by party on his own land, but under an agreement that it was to belong to the district; *Lanphere v. Lowe*, 3 Neb. 131, holding same of building put on premises by tenant and set on blocks, without a cellar or foundation; *Hope Mut. Ins. Co. v. Brolaskey*, 35 Pa. 282, holding that building erected upon property of another may remain personalty; *Freeman v. Lynch*, 8 Neb. 192, holding that where it was evident that a house built in a makeshift manner was intended to be permanent, it was part of the realty; *Com. v. Andrews*, 1 Va. Dec. 190; *Andrews v. Auditor*, 28 Gratt. 115,—holding buildings erected on land of another for a temporary purpose, with agreement giving right to remove, were personal property; *Dame v. Dame*, 38 N. H. 429, 75 A. D. 195, holding same of house erected on land of another with agreement that it might be removed; *Frink v. Branch*, 16 Conn. 260; *Bean v. Brackett*, 34 N. H. 102; *Pope v. Skinkle*, 45 N. J. L. 39; *White v. Arndt*, 1 Whart. 91; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900; *McGreary v. Osborne*, 9 Cal. 119,—on when buildings on land may be treated as personal estate; *Gordon v. Miller*, 28 Ind. App. 612, 63 N. E. 774, holding chattel mortgage of mill estopped from denying that mortgaged property was personalty; *Hamlin v. Parsons*, 12 Minn. 108, Gil. 59, 90 A. D. 284, holding mortgage lien on a house and lot followed the house, on its being removed to another lot without the consent of mortgagee.

Cited in note in 14 L.R.A. (N.S.). 440, on character of building placed by consent on another's land as real or personal property, in absence of agreement as to its character.

Distinguished in *Poor v. Oakman*, 104 Mass. 309, where church was erected on land of another, with permanent foundations and no intention to remove it.

Presumption as to regularity of official acts.

Cited in *Brooks v. Rooney*, 11 Ga. 423, 56 A. D. 430, holding sale made by a *de facto* deputy good as to third persons; *Hutchings v. Van Bokkelen*, 34 Me. 126, holding that acts of one acting in the discharge of the duties of a public office, without producing his authority, but under color thereof would be held valid; *Gleason v. Sloper*, 24 Pick. 181, holding that an instrument signed by certain persons as selectmen of a town, admissible without proof that such individuals were in fact selectmen; *Prescott v. Hayes*, 42 N. H. 56; *Board of Auditors v. Benoit*, 20 Mich. 176, 4 A. R. 382,—holding official acts of party acting under color of right, valid; *Foot v. Stiles*, 57 N. Y. 399, holding failure of an officer to execute and file his official bond did not render his official acts void; *Saline County v. Anderson*, 20 Kan. 298, 27 A. R. 171; *Twombly v. Kimbrough*, 24 Ark. 459,—holding on presumption of validity of official acts.

Revocable licenses.

Cited in *Wickersham v. Orr*, 9 Iowa, 253, 74 A. D. 348, holding license to build a partition wall on the land of another, not revocable.

Parol evidence to show person's action was in official capacity.

Cited in *Dillingham v. Smith*, 30 Me. 370, holding that it might be proved by parol that persons claiming to act for the public were acting county commissioners.

Officers de facto.

Cited in reference note in 19 A. D. 69, on authority of officer *de facto*.

16 AM. DEC. 419, INGLEE v. BOSWORTH, 5 PICK. 498.**Tax assessment valid in part.**

Cited in *Sanford v. Dick*, 15 Conn. 447, holding erroneous taxation of party did not render the tax void as to remainder of assessment; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794, on effect of partial invalidity on a tax assessment.

Right to recover illegal assessment.

Cited in *Ware v. Percival*, 61 Me. 391, 14 A. R. 565, holding that party whose property was sold to pay illegal assessment might recover damages; *Hill v. Livingston County*, 12 N. Y. 52 (dissenting opinion), on right to recover tax illegally assessed.

Liability of assessors for taxes illegally assessed.

Cited in *Little v. Merrill*, 10 Pick. 543, holding person compelled to pay illegal school tax had a right of action against assessors; *Freeman v. Kenney*, 15 Pick. 44; *Thurston v. Martin*, 5 Mason, 497, Fed. Cas. No. 14,018,—holding same as to collector for enforcing tax wrongfully levied on a nonresident; *Herriman v. Stowers*, 43 Me. 497, holding assessors who levied tax against a resident of another town, over which they had no jurisdiction, not protected; *Fuller v. Gould*, 20 Vt. 643; *Palmer v. Lawrence*, 6 Lans. 282,—on liability of assessors for levying invalid tax; *Lyon v. Huthard*, 52 Mich. 271, 17 N. W. 839, holding party who paid improper tax under protest, to prevent seizure of goods, might recover from officer collecting it so long as it remains in his hands.

Cited in reference note in 24 A. D. 121, on liability of assessors for taking property to pay illegal tax.

Distinguished in *Baker v. Allen*, 21 Pick. 382, holding that under statute assessors are not liable for taxing party of whom they had no jurisdiction, where they showed fidelity and integrity in the exercise of their duties.

Residence as basis for tax.

Cited in *Ware v. Sherburne*, 8 Cush. 267, holding person who withdrew from a parish after a vote to raise money for expenses for the ensuing year could not be legally assessed for the money so voted; *Dow v. Sudbury*, 5 Met. 73, holding a person who withdrew from a parish before the expiration of the year, not liable to assessment for the ensuing year; *Harrington v. Glidden*, 179 Mass. 486, 88 A. S. R. 613, 61 N. E. 54, holding on effect of want of jurisdiction on validity of a tax.

Relevy and reassessment.

Cited in *Woodbridge v. Cambridge*, 114 Mass. 485, holding that a valid order of assessment could not be rescinded at a subsequent meeting, where it had already taken effect; *Higgins v. Chicago*, 18 Ill. 276, holding city might not question an assessment for irregularities, where it has made confirmation; *Oakham v. Hall*,

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112 Mass. 535, holding that where original assessment was valid, reassessment was void.

Distinguished in *Eddy v. Wilson*, 43 Vt. 362, holding relevy of a tax valid, it being the same as the sum of two former levys.

16 AM. DEC. 423, FULLER v. HUBBARD, 6 COW. 13. Affirmed in 7 Cow. 53, 17 A. D. 498.

Demand to fix default on contract.

Cited in *Hartley v. James*, 50 N. Y. 38; *Northrup v. Mead*, 121 App. Div. 385, 106 N. Y. Supp. 150,—holding that to put a party in default on a defendant contract there must be a demand of performance; *Childers v. Lee*, 5 N. M. 576, 12 L.R.A. 67, 25 Pac. 781, holding that one cannot hold another on a contract for renewal of a lease without demanding compliance with contract; *Bruce v. Tilson*, 25 N. Y. 194, holding when an act is to be done requiring time for its performance a reasonable time must be given for its performance, after demand; *Hoyt v. Hall*, 3 Bosw. 42, holding that to put vendor of boat in default he must be shown to have refused to receive what was due and to deliver a bill of sale.

—As to contract for conveyance of real property.

Cited in *Kinthead v. Shreve*, 17 Cal. 275; *Dowdney v. McCullom*, 59 N. Y. 367; *Dowdney v. McCollom*, 48 How. Pr. 342,—holding that vendee must make a demand for a deed; *Garlock v. Lane*, 15 Barb. 359, holding that vendee must tender payment and demand deed; *Fairbanks v. Dow*, 6 N. H. 266, holding that security for purchase money must be tendered and deed demanded; *Raudabaugh v. Hart*, 61 Ohio St. 73, 76 A. S. R. 361, 55 N. E. 214, holding an averment of a readiness and willingness to perform, not sufficient; *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397, holding that mortgagee must aver and prove a demand and refusal of mortgagor to execute mortgage; *Webb v. Steiner*, 113 Mo. App. 482, 87 S. W. 618, holding party who advances money in part performance and then refuses to complete, the other party being ready and willing, cannot recover back the money so advanced; *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080 (reversing 2 Misc. 287, 24 N. Y. Supp. 922), holding, if the vendor is unable to perform at time provided, a formal demand or tender by vendee is not necessary; *Field v. Martin*, 49 Ga. 268, holding demand not necessary where obligor has sold land to third person and completed such conveyance.

Cited in reference notes in 17 A. D. 502; 24 A. D. 129, —on vendee's duty as to demanding deed; 44 A. D. 536, on necessity of party entitled to deed demanding same.

Renewal of demand after time to prepare deed.

Cited in *Foote v. West*, 1 Denio, 544; *Camp v. Morse*, 5 Denio, 161; *Connelly v. Pierce*, 7 Wend. 129; *Lutweller v. Linnell*, 12 Barb. 512; *Hackett v. Huson*, 3 Wend. 249,—holding that to put vendor in default it is necessary that vendee should demand a deed and wait a reasonable time for defendant to get it drawn and then again present himself to receive it; *Fuller v. Williams*, 7 Cow. 53, 17 A. D. 498 (affirming, 6 Cow. 13), to same effect; *Dye v. Montague*, 10 Wis. 18, holding same, though vendor has covenanted to convey by a day certain; *Wells v. Smith*, 2 Edw. Ch. 78, holding that after such demand vendor is allowed a reasonable time for drawing papers and executing the deed; *Morris v. Sliter*, 1 Denio, 59, holding that vendor has a reasonable time to complete a conveyance after time of payment.

Distinguished in *Carpenter v. Brown*, 6 Barb. 147, holding that on contract call-

ing for deed on date designated but one demand is required; *Pearsall v. Frazer*, 14 Barb. 564, holding that requirement of two demands is laid down as a rule of evidence and not a rule of pleading.

Modified in *Gray v. Dougherty*, 25 Cal. 266, holding but one demand necessary.
Bringing action as demand.

Cited in *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44, holding commencement of suit sufficient demand to charge a city with interest from that day on taxes illegally collected.

Performance to put other party in default.

Cited in *Slocum v. Despard*, 8 Wend. 615, holding party cannot recover without a distinct and special averment of performance of defendant covenant; *Lawrence v. Simons*, 4 Barb. 354, holding failure or inability on defendant's part to perform must be shown.

Cited in reference note in 44 A. D. 546, on tender of deed in action for purchase money when covenants are mutual.

Cited in note in 31 A. D. 278, on necessity of performance of tender of performance on part of vendor.

Duty to prepare conveyance as between vendor and purchaser.

Cited in *Guthrie v. Thompson*, 1 Or. 353; *Ritchie v. Bennett*, 35 App. Div. 68, 54 N. Y. Supp. 379,—holding that vendee is not required to tender a deed to vendor to be executed; *Arledge v. Rooks*, 22 Ark. 427, holding it duty of vendor to prepare and deliver deed, on tender of payment and demand of deed by vendee; *Smith v. Henry*, 7 Ark. 207, 44 A. D. 540, holding that it devolves on vendor to prepare and tender deed.

Cited in reference note in 26 A. D. 625, as to whether vendor or vendee shall prepare deed.

Deed required by agreement to "convey in fee."

Cited in *Ryder v. Jenny*, 2 Robt. 56, holding deed without covenants sufficient; *Jerome v. Scudder*, 2 Robt. 169, holding a tender of conveyance subject to two mortgages and outstanding leases, not sufficient; *Long v. Allen*, 2 Fla. 403, 50 A. D. 281, on significance of covenant "to give a good and sufficient deed."

Cited in reference note in 39 A. D. 56, as to how covenant to give "good deed" is satisfied.

Distinguished in *Penfield v. Clark*, 62 Barb. 584, holding contract not satisfied by giving a deed in which conveys a fee encumbered by liens.

Disapproved in *Dwight v. Cutler*, 3 Mich. 566, 64 A. D. 105, holding an agreement to convey, where no contrary intention is shown, gives vendee a right to a deed containing usual covenants of title.

Recovery of purchase money on default of vendor.

Cited in *Cooper v. Brown*, 2 McLean, 495, Fed. Cas. No. 3,191, holding that after deed refused assumpsit will lie for purchase money paid.

Cited in reference note in 47 A. D. 732, on assumpsit for money paid on executory contract to convey lands where title defective.

Cited in note in 50 A. D. 680, 681, on recovery of money paid on contract to purchase.

Distinguished in *Fletcher v. Button*, 6 Barb. 646, holding in an action for breach of covenant, the purchase money having been fully paid, the plaintiff may recover the amount of the purchase money actually paid, with interest.

Reasonable time for performance of contract duty.

Cited in *Barber v. Cary*, 11 Barb. 549, holding plaintiff in foreclosure entitled to a reasonable time to pay over surplus to mortgagor.

Right to rescind contract for sale of lands.

Cited in *Fay v. Oliver*, 20 Vt. 118, 49 A. D. 764, holding that, where contract has been so far carried out that the parties cannot be placed *in statu quo*, neither party can alone rescind.

Cited in note in 30 L.R.A. 66, on right of vendee to rescind contract.

Title taken by grantee of encumbered land.

Cited in *Fort v. Burch*, 6 Barb. 60, holding that a deed from a mortgagee conveys interest of mortgagee in land and debt.

Time as nonessential in equity.

Distinguished in *Anderson v. Frye*, 18 Ill. 94, holding that, although time is not of the essence of the contract in equity, yet party who has been guilty of gross laches will be left to remedy at law.

Right of action for breach of agreement to convey.

Cited in reference note in 49 A. D. 697, on vendee's right to sue for breach of contract to convey.

Decree divesting legal title to land.

Cited in reference notes in 38 A. D. 697, on effect of judgment to vest title in defendant; 59 A. D. 667, on effect of decree in equity to divest legal title to real property.

16 AM. DEC. 429, VERNON SOC. v. HILLS, 6 COW. 23.**Necessity of proving corporate existence.**

Cited in reference notes in 35 A. D. 229, on necessity of proving corporate existence; 40 A. D. 475, as to whether corporation must prove its corporate existence under general issue; 43 A. D. 465, on necessity that plaintiff corporation show due incorporation under plea of general issue; 36 A. D. 499, on general issue pleaded to action by corporation as excusing proof of incorporation.

Cited in note in 24 A. D. 58, on necessity of corporation proving its incorporation under general issue.

Holding over by corporate officers.

Cited in *Congregational Soc. v. Sperry*, 10 Conn. 200, holding committee of ecclesiastical society appointed "for the year ensuing" continue to hold their offices until superseded by the appointment of another committee; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274, holding same as to the cashier of an incorporated bank, under a charter directing an annual election of officers; *Tuley v. State*, 1 Ind. 500, *Smith (Ind.)* 299, holding same as to a school commissioner elected for ensuing year; *State ex rel. Carson v. Harrison*, 113 Ind. 434, 3 A. S. R. 663, 16 N. E. 384, holding same as to public officers where by the Constitution officers are elected for a term and until their successors are elected and qualified; *Bath v. Reed*, 78 Me. 276, 4 Atl. 688, holding same as to a city assessor elected for the term of three years; *Philips v. Wickham*, 1 Paige, 590, on acts of officers holding over until successors are appointed; *State ex rel. Ives v. Choate*, 11 Ohio, 511 (dissenting opinion), on the termination of the tenure of a public officer.

Disapproved in *Beck v. Hanscom*, 29 N. H. 213, where charter made no provision that the city marshal should hold office after the expiration of his term.

Acts of de facto corporate officers.

Cited in *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 A. D. 128, holding their authority can be questioned only by a direct proceeding for their ouster; *Decorah v. Bullis*, 25 Iowa, 12; *People ex rel. Hodgkinson v. Stevens*, 5 Hill, 616; *Doremus*

v. Dutch Reformed Church, 3 N. J. Eq. 332, holding as to third person, acts of officers *de facto* are binding on corporation; Presbyterian Soc. v. Smithers, 12 Ohio St. 248, holding that title of *de facto* trustees of a religious society can only be tried by direct proceeding in nature of quo warranto; Hughes v. Parker, 20 N. H. 58, holding that title of irregularly elected directors of a corporation cannot be inquired into under a bill to restrain them from exercising the functions of their office; Hussey v. Gallagher, 61 Ga. 86, denying an injunction against acts of officers of a religious corporation; All Saints Church v. Lovett, 1 Hall, 191, holding acts of *de facto* trustees valid; Batteron v. Thompson, 8 Phila. 251, 28 Phila. Leg. Int. 172, holding same as to duties performed by a vestry *de facto*; Boardman v. Keystone Standard Water Co. 8 Lanc. L. Rev. 33, holding assignment made by directors *de facto* of corporation valid; Re Mohawk & H. R. R. Co. 19 Wend. 135, holding acts of *de facto* inspectors of a corporate election, valid; Lord v. Equitable L. Assur. Soc. 57 Misc. 417, 108 N. Y. Supp. 67, denying the right of a stockholder to attack collaterally acts of *de facto* directors; The Vigilancia, 19 C. C. A. 528, 38 U. S. App. 563, 73 Fed. 452, holding stockholders estopped to question authority of officers irregularly elected, as against third person; Stillman v. Associated Lace Makers' Co. 14 Misc. 503, 35 N. Y. Supp. 1071, holding that service of summons on the president *de facto* of a corporation gives jurisdiction.

Cited in note in 15 L.R.A. 419, as to directors *de facto*.

— *De facto* officers of public corporations.

Cited in State ex rel. Mitchell v. Tolan, 33 N. J. L. 195, holding that acts of a common council of a municipal corporation cannot be questioned by showing the illegality of the election of its members; Cochran v. McCleary, 22 Iowa, 75, holding acts and votes of *de facto* alderman valid in collateral suits and proceedings; Flournoy v. Clements, 7 Ala. 535, holding service of writ by a *de facto* sheriff, good; Brown v. Lunt, 37 Me. 423, holding same as to an acknowledgment by a *de facto* justice; Plymouth v. Painter, 17 Conn. 585, 44 A. D. 574, holding same as to an act of a grand juror, though his oath was irregularly taken; Sudbury v. Stearns, 21 Pick. 148, upholding acts of officers elected at a parish meeting, though illegal votes may have been cast; Hinton v. Lindsay, 20 Ga. 746, holding justice of the peace who, notwithstanding his removal into an adjoining district, continues to act under his former commission, is a *de facto* officer; Fairfield County Turnp. Co. v. Thorp, 13 Conn. 173, on acts of *de facto* officers.

Distinguished in Com. ex rel. Hensel v. Waller, 28 W. N. C. 252, 10 Pa. Co. Ct. 111, 8 Lanc. L. Rev. 281, 48 Phila. Leg. Int. 312, holding in a proceeding to test an officer's title to office, officer must show he has a title to it *de jure*.

Forfeiture of franchise.

Cited in Thompson v. People, 23 Wend. 537, holding that, where it is shown that a trust has vested under a franchise, the presumption is that, it remains so until otherwise judicially declared.

Cited in reference notes in 30 A. D. 497; 42 A. D. 109,—on dissolution of corporation; 26 A. D. 115, on what constitutes dissolution of corporation; 43 A. D. 465, on omission to choose corporate directors or officers as evidence of dissolution.

Mode of dissolution and forfeiture of corporation.

Cited in Importing & Exporting Co. v. Locke, 50 Ala. 332; John v. Farmers' & M. Bank, 2 Blackf. 367, 20 A. D. 119; State v. Vincennes University, 5 Ind. 87; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 A. D. 656; Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 513; State v. Carr, 5 N. H. 367; State ex rel. Linley v. Bryce, 7 Ohio, pt. 2, p. 82; Commercial Bank v. State, 4 Smedes & M.

439,—holding that a corporation does not cease to exist by an act of forfeiture until such forfeiture is judicially pronounced; *Kellogg v. Union Co.* 12 Conn. 7; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1; *Peirce v. Somersworth*, 10 N. H. 369,—holding that, if the government waive the right to exact a forfeiture, individuals, cannot show and rely upon it; *Knowlton v. Ackley*, 8 Cush. 93; *Cahill v. Kalamazoo Mut. Ins. Co.* 20 Dougl. (Mich.) 124, 43 A. D. 457; *Persse & B. Paper Works v. Willett*, 19 Abb. Pr. 416, 1 Robt. 131; *Thompson v. New York & H. R. Co.* 3 Sandf. Ch. 625,—holding that forfeiture of corporate rights can be taken advantage of only on process in behalf of the state; *Webb v. Moler*, 8 Ohio, 548, holding that a corporate franchise cannot be forfeited except by a judicial determination; *State v. Fourth N. H. Turnp. Road*, 15 N. H. 162, 41 A. R. 690, holding that state must be a party to suit and judgment declaring a forfeiture; *University of Maryland v. Williams*, 9 Gill. & J. 365, 31 A. D. 72, sustaining the right of a corporation to be heard before it is stripped of its corporate franchise; *Haight v. New York Elev. R. Co.* 49 How. Pr. 20, holding that a forfeiture cannot be enforced in a collateral proceeding; *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 357, holding where a foreign corporation has suffered no act which *per se* works a forfeiture, a judgment of forfeiture must first be obtained in state granting the corporate powers; *Bradt v. Benedict*, 17 N. Y. 93, holding that, to have a dissolution, there must be a surrender accepted by the government, or a forfeiture judicially ascertained and declared.

Cited in reference notes in 41 A. D. 120, on necessity of judicial declaration on forfeiture for abuse or neglect; 48 A. D. 724, on forfeiture of charter taking effect only on judgment of competent tribunal; 35 A. D. 296, on forfeiture of corporate franchise by direct proceeding only; 43 A. D. 465, on collateral inquiry into violation of corporate charter; 41 A. D. 694, on right to collaterally inquire into validity of forfeiture of corporate charter.

Cited in notes in 9 L.R.A. 36, as to how forfeiture of corporation franchise is declared; 8 A. S. R. 194, on necessity for direct proceedings by state to forfeit corporate franchises; 5 A. S. R. 804, on necessity of judicial act declaring forfeiture for nonperformance of condition in grant or franchise; 2 L.R.A. 258, on due process of law in declaring forfeiture of corporate franchise.

Nonuser or misuser as cause of forfeiture.

Cited in *Parsons v. Eureka Powder Works*, 48 N. H. 66, holding that fact that corporation has assigned all its property for the benefit of creditors does not work a dissolution.

Cited in reference notes in 35 A. D. 636, on forfeiture of corporate franchises by misuser or nonuser; 31 A. D. 113, on right to take advantage, in collateral action, of nonuser or misuser working forfeiture of corporate rights.

Cited in note in 8 L.R.A. 499, on forfeiture and dissolution of corporation for misuser of franchise.

Right to question act as *ultra vires*.

Cited in *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, holding that no private person can take advantage of the fact that a corporation has taken title to property in excess of its corporate powers; *Rainey v. Laing*, 58 Barb. 453, holding that a corporation may take property under a will, though it could not hold such property if questioned by state; *St. John v. Andrews Institute*, 117 App. Div. 698, 102 N. Y. Supp. 808, holding same as to a right to take a bequest; *Rives v. Montgomery South Pl. Road Co.* 30 Ala. 92, holding fact that contract is *ultra vires* is no defense to an action on a contract made by the corporation;

Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, holding that persons dealing with corporations have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealings.

Estoppel to deny corporate existence.

Cited in **Selma & T. R. Co. v. Tipton**, 5 Ala. 787, 39 A. D. 344, holding that a stockholder who has taken an active part in the management of a corporation cannot deny its existence; **Montgomery R. Co. v. Hurst**, 9 Ala. 513, holding the making of a note to a corporation by its corporate name, an admission of its existence; **Hyatt v. Esmond**, 37 Barb. 601, holding certification from proper officers, professed legal organization, and user of corporate powers, binding on one dealing with corporation.

Acts of a de facto corporation.

Cited in **Lafin & R. Powder Co. v. Sinsheimer**, 46 Md. 315, 24 A. R. 522; **Jones v. Dana**, 24 Barb. 395,—holding a company having in form a charter authorizing it to act as a body corporate, and which is in fact exercising corporate powers, is a corporation *de facto*; **Bergeron v. Hobbs**, 96 Wis. 641, 65 A. S. R. 85, 71 N. W. 1056 (dissenting opinion), on what constitutes a corporation *de facto*.

—As binding on parties.

Cited in **Williams v. Bank of Michigan**, 7 Wend. 539, holding that the acts of a *de facto* corporation are binding on parties till set aside; **Reformed Dutch Church v. Brandow**, 52 Barb. 228, holding the proceedings of a *de facto* corporation, valid until ousted by a judgment at the suit of the people.

Strictness in conduct of corporate elections.

Cited in **People ex rel. Smith v. Peck**, 11 Wend. 604, 27 A. D. 104, holding an election of trustees to a church, good, though provisions of statute were not strictly complied with, no evil results or fraud being shown, and all parties being present.

Distinguished in **People ex rel. McKune v. Weller**, 11 Cal. 49, 70 A. D. 754, holding the statutory requirement of a proclamation by the governor, an essential prerequisite to all elections to fill vacancies.

16 AM. DEC. 432, COOK v. SATTERLEE, 6 COW. 108.

Requisites of bill or note.

Cited in **Arnold v. Rock River Valley Union R. Co.** 5 Duer, 207; **Durham v. Manrow**, 2 N. Y. 533,—holding that note must contain a positive engagement by the makers, that they will pay a certain sum of money at a specific time absolutely and unconditionally; **Bell v. Yates**, 33 Barb. 627, holding that it must be payable at all events and not on a contingency; **Walker v. Ocean Bank**, 19 Ind. 247, on requisites of a negotiable instrument.

Cited in reference notes in 40 A. D. 560, as to what is a negotiable instrument; 25 A. D. 593; 45 A. D. 647; 55 A. D. 59; 8 A. S. R. 815,—on essentials of promissory note; 76 A. D. 209, on essentials to bill or note; 41 A. D. 465, on what is a negotiable instrument, and essential elements thereof; 52 A. D. 760, on what is necessary to constitute a negotiable bill or note; 71 A. D. 699, on essential qualities of bills and notes and test of negotiability; 53 A. D. 742, as to what constitutes bill of exchange; 16 A. S. R. 721, on what are and what are not bills of exchange.

Cited in notes in 3 L.R.A. 50, on necessity for certainty as to payment of promis-

sory note; 4 E. R. C. 193, on negotiability of bill of exchange or promissory note.

Distinguished in *Wright v. Irwin*, 33 Mich. 32, holding a provision to a note to explain how payee is expected to employ money paid on note does not effect character of note.

— **Promise to pay on certain or future event.**

Cited in *Duffield v. Johnston*, 96 N. Y. 369, holding order payable when certain work was performed, not negotiable paper; *Harriman v. Sanborn*, 43 N. H. 128, holding same as to a note payable on delivery of a particular package of money; *Miller v. Excelsior Stone Co.* 1 Ill. App. 273, holding same as to a bill payable when certain buildings are "ready for roof;" *Glidden v. Henry*, 104 Ind. 278, 54 A. R. 316, 1 N. E. 369, holding same as to a note containing provision that "the payee or his assigns may extend time of payment from time to time indefinitely, as he or they may see fit; *Chapman v. State*, 79 Me. 595, 12 Atl. 546, holding same as to a note payable on condition that a third party fails to pay a named sum; *Sloan v. McCarty*, 134 Mass. 245, holding same as to a note, payable on condition that a certain horse remain absolute property of payee; *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070, holding same as to a note the payment of which is dependent on future negotiations of parties; *Van Zandt v. Hopkins*, 151 Ill. 248, 37 N. E. 845 (affirming 40 Ill. App. 635), holding same as to a note payable on surrender of "ctf. of stock, No. 113 for five shares of stock, etc."

— **Direction for payment from specific fund or in medium other than money.**

Cited in *Hinnemann v. Rosenback*, 39 N. Y. 98, holding it must be payable in money; *Munger v. Shannon*, 61 N. Y. 251, holding a bill payable out of an uncertain fund, as profits, non-negotiable; *Hamilton v. Myrick*, 3 Ark. 541, holding same as to an order payable "out of the money received on my account from the insurance office, when collected;" *National State Bank v. Ringel*, 51 Ind. 393, holding a note payable in "current funds," not negotiable; *Blood v. Northup*, 1 Kan. 28, on same point; *Gorrell v. Home L. Ins. Co.* 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371, holding same as to a note payable from a designated fund; *Thompson v. Sloan*, 23 Wend. 71, 35 A. D. 546, holding a note payable here in Canada money, not negotiable; *Smith v. Giegrich*, 36 Mo. 369, holding same as to a note payable in wagons of a certain value; *Bunker v. Athearn*, 35 Me. 364, holding same as to a note whereby promisor promised to have amount of note indorsed on a note from payee to a third person; *Krakauer v. Hardman*, 2 N. Y. City Ct. Rep. 241, holding an order directing a party to let a named person have a piano of a certain description, on drawer's lumber account, not a bill.

Cited in note in 35 L.R.A. 648, on order payable out of particular fund as bill of exchange.

Distinguished in *Corbett v. Clark*, 45 Wis. 403, 30 A. R. 763, holding a bill payable out of "our share of the grain," negotiable; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 A. R. 534, holding a United States Treasury note giving holder option upon maturity to convert it into bonds, negotiable.

— **Requests to pay.**

Cited in *Gillian v. Myers*, 31 Ill. 525, holding request to "take up my note payable to S." is not negotiable.

Distinguished in *Leonard v. Mason*, 1 Wend. 522, holding a request to pay the amount of a promissory note, written underneath the same, is a bill, and drawee is liable after acceptance.

Pleading in action on non-negotiable paper.

Distinguished in *Odiorne v. Odiorne*, 5 N. H. 315, holding a note payable on a contingency may be declared on in the same manner as if it were strictly negotiable.

16 AM. DEC. 433, CHAPMAN v. LATHROP, 6 COW. 110.

Necessity of delivery.

Cited in note in 55 A. D. 413, on invalidity of deed for want of delivery.

What constitutes a delivery.

Cited in *People v. Haynes*, 14 Wend. 546, 28 A. D. 530, holding a delivery of goods on board a steamboat and addressed to purchaser is a complete delivery; *Baker v. Bourcicault*, 1 Daly, 23, holding property does not pass by a delivery to an express company, with a direction to company to collect on delivery.

Waiver of antecedent conditions by delivery.

Cited in *Fuller v. Bean*, 34 N. H. 290, holding a delivery without insisting on condition, a waiver of condition; *Caraway v. Wallace*, 2 Ala. 542; *Russell v. Minor*, 22 Wend. 659,—holding a delivery of property sold without requiring a precedent act to be performed by vendee is a waiver and a transfer of property; *Sutro v. Hoile*, 2 Neb. 186, holding same where there is no fraudulent contrivance on part of vendee to obtain possession; *Lupin v. Marie*, 6 Wend. 77, 21 A. D. 256 (affirming 2 Paige, 169), holding same as to goods sold, for which notes were to be given, the notes not being required at time of delivery; *Smith v. Lynes*, 5 N. Y. 41 (reversing 3 Sandf. 203), holding same as to goods sold to be paid for in indorsed notes, where delivery is not conditioned upon notes being given; *Osborn v. Gantz*, 6 Jones & S. 148, holding that if buyer refuses to deliver note as agreed on delivery of goods, vendor may reclaim goods; *Decker v. Furniss*, 3 Duer, 291 (dissenting opinion), on effect of act to be contemporaneous with delivery.

Cited in note in 21 A. D. 262, on delivery without payment or performance of conditions.

Delivery of goods sold for cash.

Cited in *Buck v. Grimshaw*, 1 Edw. Ch. 140, holding that vendor may waive a cash delivery by a delivery without demanding cash; *White v. Adkins*, 18 Ala. 636; *Shindler v. Houston*, 1 Denio, 48; *Morgan v. Powers*, 66 Barb. 35; *Fitch v. Beach*, 15 Wend. 221; *Ward v. Shaw*, 7 Wend. 404,—holding that simultaneous payment may be waived by a free and absolute delivery without payment; *Furniss v. Hone*, 8 Wend. 247, holding in such case property in article is changed; *Ives v. Humphreys*, 1 E. D. Smith, 196, holding that voluntarily to permit vendee to have possession is a waiver of cash payment; *Hogan v. Shorb*, 24 Wend. 458, allowing vendee to set off certain notes in an action for purchase price, though sale was to be for cash, where there had been a delivery of goods; *Bannerman v. Quackenbush*, 11 Daly, 529, 2 How. Pr. N. S. 293, allowing a set-off of a discounted note, where party had agreed to pay cash but has procured possession of goods; *Lees v. Richardson*, 2 Hilt. 164, holding fact of a cash sale will not warrant an inference of a conditional delivery.

Cited in reference notes in 96 A. S. R. 26, on passing of title where sale is made for cash; 38 A. S. R. 626, on avoidance of sale by failure of vendee to pay; 33 A. S. R. 675, on waiver of vendor's rights in conditional sales; 52 A. D. 290, on payment and delivery as simultaneous acts; 64 A. D. 576, on showing readiness and willingness to perform in action for nonperformance of contract of sale.

Distinguished in *Genin v. Tompkins*, 12 Barb. 265, holding a delivery not a

waiver of right to demand immediate payment; *Conway v. Bush*, 4 Barb. 564, holding that a purchaser of chattels for cash cannot take the goods, or sue for them, without payment.

What constitutes a cash sale.

Cited in *Clark v. Dales*, 20 Barb. 42, holding where contract for sale is silent as to time and manner of payment, payment must be made on delivery and in legal currency; *Johnston v. Eichelberger*, 13 Fla. 230, holding where no credit is agreed on or necessarily implied, the property does not pass without payment or actual delivery; *Currie v. White*, 1 Sweeny, 166, 6 Abb. Pr. N. S. 352, 37 How. Pr. 330, holding where stock is sold for a certain amount, payable on delivery, the contract is executory.

Right of stoppage in transitu.

Cited in reference notes in 23 A. D. 614; 84 A. D. 484,—on when right of stoppage *in transitu* exists; 99 A. D. 729, on what will entitle vendor to right of stoppage *in transitu*; 11 A. S. R. 767, on vendor's right to invoke stoppage *in transitu* upon learning of vendee's insolvency; 28 A. D. 550, on termination of right of stoppage *in transitu*.

Subsequent agreement as displacing antecedent one.

Cited in *Thomason v. Dill*, 30 Ala. 444, holding when a contract is reduced to writing all previous agreements and stipulations are merged into the writing; *Stoudenmeier v. Williamson*, 29 Ala. 558, on inadmissibility of previous negotiations in an action on a written warranty.

Right of person induced by fraud to contract.

Cited in *Galloway v. Holmes*, 1 Dougl. (Mich.) 330, holding fraudulent contract voidable at election of defrauded party.

Attachment of property taken from prisoner.

Cited in *Closson v. Morrison*, 47 N. H. 482, 93 A. D. 459, holding property taken from prisoner by officer in good faith may be subsequently attached by officer.

16 AM. DEC. 437, WARD v. GREEN, 6 COW. 173.

Vessel as common carrier.

Cited in *Steele v. McTyer*, 31 Ala. 667, 70 A. D. 516, holding that parties holding themselves out as ready to carry for any person to the extent of the capacity of boat are liable as common carriers.

Authority of master of ship to make contracts.

Cited in *Sager v. Nichols*, 1 Daly, 1, holding owners liable *in solido* for supplies furnished vessel on order of captain.

Cited in reference note in 26 A. D. 481, on conclusiveness on owners of lawful contracts of master of vessel.

Cited in note in 63 A. D. 642, on master's power to hypothecate ship, freight, and cargo.

— Carrying contracts.

Cited in *The Director*, 26 Fed. 708, sustaining authority of master to contract for carriage of wheat; *Lamar v. New York S. N. Co.* 16 Ga. 558, holding on authority of master to contract, though owner is present.

Liability of private carrier.

Cited in *Joy v. Allen*, 2 Woodb. & M. 303, Fed. Cas. No. 7,552, holding a private carrier liable only for ordinary diligence.

Liability of vessel owner.

Cited in reference notes in 16 A. D. 266; 16 A. D. 271; 27 A. D. 323; 35 A. D. 244,—on liability of owners for acts of master; 56 A. D. 84, on responsibility of common carrier for agent's contracts for carrying; 39 A. D. 76, on liability of owner of vessel for supplies; 62 A. D. 320, on liability of vessel owner for supplies ordered by master.

16 AM. DEC. 440, MUMFORD v. BROWN, 6 COW. 475.**Duty as between landlord and tenant to repair.**

Cited in *White v. Meallo*, 5 Jones & S. 72, holding a covenant to repair not implied; *Van Every v. Ogg*, 59 Cal. 563; *Green v. Redding*, 92 Cal. 548, 28 Pac. 599; *Barrett v. Boddie*, 158 Ill. 479, 49 A. S. R. 172, 42 N. E. 143; *Rogan v. Dockery*, 23 Mo. App. 313; *Witty v. Matthews*, 52 N. Y. 512; *Bloomer v. Merrill*, 1 Daly, 485; *Bloomer v. Merrill*, 29 How. Pr. 259; *Torreson v. Walla*, 11 N. D. 481, 92 N. W. 834; *Kahn v. Love*, 3 Or. 206; *Plummer v. Shulmyer*, 12 Lanc. L. Rev. 217; *Cleves v. Willoughby*, 7 Hill, 83,—holding that, in the absence of an express agreement, the landlord is under no obligation to repair; *Sheets v. Selden*, 7 Wall. 416, 19 L. ed. 166; *Wilson v. Scruggs*, 7 Lea, 635,—holding same unless there is a special agreement; *Franklin v. Brown*, 118 N. Y. 110, 16 A. S. R. 744, 6 L.R.A. 770, 23 N. E. 126, holding same though the demised premises are unfit for occupation; *Johnson v. Dixon*, 1 Daly, 178 (dissenting opinion), on same point.

Liability of landlord for repairs.

Cited in *Gottsberger v. Radway*, 2 Hilt. 342; *Heintze v. Bentley*, 34 N. J. Eq. 562,—holding that, in the absence of an agreement, the tenant makes repairs at his own expense; *American Bonding Co. v. Pueblo Invest. Co.* 80 C. C. A. 97, 9 L.R.A. (N.S.) 557, 150 Fed. 17; *Skillen v. Waterworks Co.* 49 Ind. 193,—holding that tenant cannot make repairs at expense of the landlord, unless by special agreement; *Castagnette v. Nicchia*, 76 App. Div. 371, 78 N. J. Supp. 498, holding landlord not liable for outside repairs under a lease covenanting for inside repair.

Cited in reference note in 52 A. S. R. 884, on landlord's liability for tenant's repairs.

Cited in notes in 95 A. D. 118, on landlord's covenant to repair; 50 A. D. 777, on liability of lessor to tenant for nuisances or injuries from failure to repair.

Compensation to tenant for improvements.

Cited in reference note in 60 A. D. 629, as to when tenant is entitled to compensation for improvements.

Liability of a tenant in common for repairs.

Cited in *Rindge v. Baker*, 57 N. Y. 209, 15 A. R. 475, holding that a tenant in common may, after demand, incur necessary expense and then recover proportionate share from his defaulting cotenant; *Taylor v. Baldwin*, 10 Barb. 582, holding that one tenant in common before making necessary repairs must first request his cotenant to join with him; *Calvert v. Aldrich*, 99 Mass. 74, 96 A. D. 693; *Pickering v. Pickering*, 63 N. H. 468, 3 Atl. 744; *Stevens v. Thompson*, 17 N. H. 103,—holding notice and opportunity to unite in making repairs, necessary; *McDearman v. McClure*, 31 Ark. 559, sustaining a bill in equity for contribution from a cotenant, where he refused to join in making necessary repairs; *Waupin v. Chester*, 61 Wis. 401, 21 N. W. 251, holding one of two towns which are jointly bound to keep a bridge in repair, may, on refusal of other, to join in making necessary repairs, make them and recover proportionate share from town refusal.

ing; *Grannis v. Cook*, 3 Thomp. & C. 299, holding a tenant in common liable for repairs made by cotenant upon his consent.

Cited in notes in 62 A. D. 482, on repairs by cotenant; 52 A. S. R. 935; 29 L.R.A. 458,—on liability of cotenants for repairs; 29 L.R.A. 452, 459, liability of cotenants in assumpsit for improvements.

Distinguished in *Hannan v. Osborn*, 4 Paige, 336, holding a tenant in common who has been in possession and received whole of rents and profits entitled, on accounting to his cotenant, to an allowance for taxes and ordinary repairs.

—For improvements to common estate.

Cited in *Cosgriff v. Foss*, 152 N. Y. 104, 57 A. S. R. 500, 36 L.R.A. 753, 46 N. E. 307, holding in the absence of an express or implied consent a tenant in common cannot recover from cotenant for permanent improvements; *Austin v. Barrett*, 44 Iowa, 488; *Ward v. Ward*, 40 W. Va. 611, 52 A. S. R. 911, 29 L.R.A. 449, 21 S. E. 746; *Taylor v. Baldwin*, 10 Barb. 626,—holding cotenant not liable for improvements made on property; *Kidder v. Rixford*, 16 Vt. 169, 42 A. D. 504, holding cotenant not liable for expense in clearing land; *Rico Reduction & Min. Co. v. Musgrove*, 14 Colo. 79, 23 Pac. 458, holding a party not entitled to a mechanics' lien on the interest of a cotenant who has not consented to an improvement; *Houston v. McCluney*, 8 W. Va. 135, allowing in equity, to a tenant in common, a lien on interest of cotenant for money expended under agreement with latter to be allowed for such improvements; *Re Diack*, 2 N. B. N. Rep. 664, 100 Fed. 770, on nonliability of coparty's interest to lien for voluntary advances or expenditures.

Cited in reference note in 41 A. D. 165, on rights of tenant in common as to repairs and improvements made by him on the common land.

Distinguished in *Green v. Putnam*, 1 Barb. 500, holding that, though no assent or previous request is shown, on a partition in equity a suitable compensation will be allowed, or tenant making improvements will be assigned part of premises on which improvement is made.

Liability for rent of uninhabitable house.

Cited in *New York Academy of Music v. Hackett*, 2 Hilt. 217, holding that tenant cannot set up a claim in abatement or extinguishment of a demand for rent, that premises were unfit for habitation or for purpose intended by him; *Pomeroy v. Tyler*, 9 N. Y. S. R. 514, holding fact that premises are infested with bugs and roaches constitutes no defense to an action for rent.

Implied promises.

Cited in *Mansur v. Murphy*, 49 Mo. App. 266, holding that a promise cannot be implied contrary to expressed intention of party sought to be charged; *Grant v. United States*, 5 Ct. Cl. 71, holding one who silently but with full knowledge assents to changes of a contract, is bound to pay necessarily increased price for work done.

16 AM. DEC. 443, WELCH v. HICKS, 6 COW. 504.

Contract for carriage of goods as an entire contract.

Cited in *Brown v. Harris*, 2 Gray, 359, holding that contract for freight for carriage of goods is entire, and, unless voyage is fully performed, nothing is earned.

Action to recover freight pro rata itineris.

Cited in *The Mohawk (Barrell v. The Mohawk)* 8 Wall. 153, 19 L. ed. 406; *Hinsdell v. Weed*, 5 Denio, 172; *Smyth v. Wright*, 15 Barb. 51,—holding that voluntary acceptance of goods by the shipper at any intermediate port of necessity,

discharges the carrier and entitles him to *pro rata* freight; *Center v. American Ins. Co.* 7 Cow. 564; *Weston v. Minot*, 3 Woodb. & M. 437, Fed. Cas. No. 17,453,—on same point; *Rossiter v. Chester*, 1 Dougl. (Mich.) 154, holding that there must be a voluntary and unconditional acceptance of goods by owner at intermediate port, to form basis of contract for ratable freight; *Atlantic Mut. Ins. Co. v. Bird*, 2 Bosw. 195, holding that acceptance must be voluntary; *Bork v. Norton*, 2 McLean, 422, Fed. Cas. No. 1,659, holding if master without sufficient cause refuse to repair his ship at the intermediate port and send on goods, or procure another ship for that purpose, he can recover no freight; *Coffin v. Storer*, 5 Mass. 252, 4 A. D. 54, holding hirer of vessel which is wrecked on the voyage and who completes carriage to port agreed shall pay agreed hire of vessel, deducting expense of transportation of goods from wreck to port of delivery.

Cited in reference notes in 30 A. D. 718, as to when freight is due; 20 A. D. 452, as to when freight *pro rata itineris* is demandable; 30 A. D. 718, on right to freight *pro rata itineris* where owner voluntarily receives goods at intermediate port.

Cited in notes in 60 A. D. 153, 154, on freight *pro rata itineris*; 12 E. R. C. 367, on right to freight where vessel is unable to complete voyage.

16 AM. DEC. 447, EX PARTE JENNINGS, 6 COW. 518.

Occasion for exercise of eminent domain.

Cited in *Walker v. Gatlin*, 12 Fla. 9, on right of eminent domain on ground of public necessity or even expediency.

Cited in reference notes in 22 A. D. 634, 756, on eminent domain; 70 A. S. R. 40, on who bound by condemnation proceedings.

Cited in note in 22 A. D. 697, on exercise of power of eminent domain for canals, public landings, booms, and telegraphs.

What constitutes a "taking of property."

Cited in *Sweet v. Syracuse*, 60 Hun, 28, 14 N. Y. Supp. 421, holding the impairment of rights is the taking of property; *Allegheny County v. Rowley*, 4 Clark (Pa.) 379, denying right of a municipality to alter grade of street so as to injure walls of buildings without compensation; *Markham v. Atlanta*, 23 Ga. 402, on consequential damages as a taking of property; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479, holding that damages must be allowed for whatever interest is taken.

Cited in reference note in 37 A. D. 238, on appropriation of stream under power of eminent domain.

— Impairment of flow or drainage of water.

Cited in *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 A. D. 477, holding damage by water of a canal discharged from one of the waste weirs over land of plaintiff is a taking; *Hamor v. Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40; *McCord v. High*, 24 Iowa, 336,—holding that rights of riparian owner in a flowing water course cannot be taken without compensation; *Shenandoah Co.'s Appeal*, 2 W. N. C. 46, enjoining a water company from taking water from a stream which supplied the complainant's colliery, without compensation, though authorized by statute; *Heckscher v. Shenandoah Citizens' Water & Gas Co.* 2 Legal Chron. 273, holding that the right of an owner of adjoining property in a stream cannot be taken without compensation; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504, 12 A. R. 147, holding a railroad liable for damage from floods and freshets in consequence of a removal of a natural barrier, which had theretofore protected this land.

Necessity of compensation for property taken.

Cited in reference notes in 36 A. D. 385, on compensation for exercise of right of eminent domain; 36 A. D. 210, on compensation for land taken by eminent domain; 74 A. D. 555, on legislative power to take private property for public use without compensation; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use.

Cited in notes in 24 A. D. 300, on interest in stream taken for public use as subject for compensation; 4 A. S. R. 403, on damage from overflowing land, diverting stream, etc.

Who entitled to compensation for property taken for public use.

Cited in reference notes in 61 A. S. R. 160, on rights of mortgagee on taking of mortgaged premises under eminent domain; 38 A. D. 430, on right of owner of limited interest in property taken for public use to compensation.

Cited in note in 21 L.R.A. 220, on rights of life tenants, reversioners, and remaindermen where property is taken by eminent domain.

Rights of riparian owner.

Cited in *The Magnolia v. Marshall*, 39 Miss. 109, holding that soil under fresh-water rivers belongs to riparian proprietor, subject only to easement of public for navigation where stream is navigable in fact; *Cobb v. Davenport*, 32 N. J. L. 369, holding same as to soil under waters of fresh-water lakes within boundaries of original grant of province of New Jersey; *Morgan v. King*, 30 Barb. 9 (affirming 18 Barb. 277), holding that in fresh-water rivers, where tide does not rise, the ownership of the citizen is of the whole river, subject to the servitude of the public as a right of way.

Cited in reference notes in 22 A. D. 756; 27 A. D. 318,—on rights of riparian proprietors; 28 A. D. 281, on division between opposite owners of island forming in non-navigable rivers; 16 A. R. 54, on right to seaweed deposited between high and low water mark.

— Right to flow of stream.

Cited in *Vansickle v. Haines*, 7 Nev. 249, holding that proprietor cannot, under color of right to use water for irrigation or for the actual purpose of irrigating his own land, wholly obstruct or divert the water course or take an unreasonable quantity of water or make an unreasonable use of it; *Hendrick v. Cook*, 4 Ga. 241, sustaining an action for damages where a proprietor on both sides of stream dammed back on land of an upper proprietor; *Varick v. Smith*, 9 Paige, 547; *Varick v. Smith*, 5 Paige, 137, 28 A. D. 417,—on rights of adjoining landowner to flow of water in stream; *Canal Appraisers v. People*, 17 Wend. 571 (reversing 13 Wend. 355) (dissenting opinion), on rights of a mill proprietor on a non-navigable stream; *Canal Comrs. v. People*, 5 Wend. 423 (dissenting opinion); *Thorp v. Freed*, 1 Mont. 651,—on rights of riparian proprietor in streams.

Extent of grants on non-navigable streams.

Cited in *Jackson ex dem. Smedley v. Smith*, 5 Denio, 603 note, holding that common-law non-navigable stream as boundary means the thread of stream; *Arthur v. Case*, 1 Paige, 447, holding that persons owning lands on the different sides of a private stream hold to the middle of the water; *People ex rel. Howell v. Jessup*, 160 N. Y. 249, 54 N. E. 682, holding that the Crown by a grant conveyed land under water of nontidal streams; *Re Wilder*, 90 App. Div. 262, 85 N. Y. Supp. 741, holding that presumption is that riparian owner has title to bed of stream; *Boston v. Richardson*, 105 Mass. 351, holding soil to thread of stream passes; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 30 A. S. R. 669, 18 L.R.A.

695, 31 N. E. 865, holding conveyance of land adjoining a non-navigable pond gives title to center of pond; *Kraut v. Crawford*, 18 Iowa, 549, 87 A. D. 414, holding that accretions belong to riparian owner; *Case v. Haight*, 3 Wend. 632, on conveyance of one half of bed of stream by adjoining owner as conveying use of water in stream; *Starr v. Child*, 20 Wend. 149, holding grant bounded by "bank" of a non-navigable stream takes to *ad filium aquæ*.

Cited in reference notes in 29 A. D. 503, on navigable rivers as boundaries; 29 A. D. 503, on non-navigable waters as boundaries; 30 A. D. 286, on water course as a boundary; 42 A. D. 180, on extent of grant bounded on navigable river; 35 A. D. 640, on grantee of land bounded by non-navigable stream taking to thread of stream.

Cited in notes in 10 L.R.A. 207, on boundaries of grant bordering on stream; 27 A. S. R. 60, on lines running along bank, edge, or margin of stream as boundary; 42 L.R.A. 505, on particular descriptions passing title to thread of stream.

Distinguished in *Holbert v. Edens*, 5 Lea, 204, 40 A. R. 26, holding soil under water does not pass where side of stream is used as boundary.

— On navigable nontidal streams.

Cited in *Walton v. Tift*, 14 Barb. 216, holding conveyance of premises as running south "to the north bounds of Hudson river, hence easterly along the river, etc.," gives title to center of main channel of river; *Middleton v. Pritchard*, 4 Ill. 510, 38 A. D. 112, holding that land bounded on the Mississippi extends to middle of stream; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, holding a grant to include bed of Delaware river above tide water; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, Gil. 59, 88 A. D. 59, holding that a grantee of land bounded on the Mississippi river takes at least to low-water mark; *Berry v. Snyder*, 3 Bush, 266, 96 A. D. 219, holding land granted on Ohio river extends only to high-water mark; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210, holding on the delivery of doctrine in states as to boundary of lands on non-navigable streams.

Cited in note in 42 L.R.A. 170, on title to land under nontidal rivers.

Distinguished in *McManus v. Carmichael*, 3 Iowa, 1, holding a riparian owner on the Mississippi has no title to the land between high and low water so as to enable him to maintain trespass for taking sand.

Disapproved in *Bullock v. Wilson*, 2 Port. (Ala.) 436, holding that an individual cannot assert any private right in soil beyond low-water mark in a stream of sufficient width and depth and suited for ordinary purposes of navigation.

— On tidal streams.

Cited in *Lowndes v. Dickerson*, 34 Barb. 586, holding a grant on a river flowed by tide extends to the edge of the water only; *Gough v. Bell*, 21 N. J. L. 156, holding all between high and low-water mark to be under dominion of state; *New York v. Hart*, 95 N. Y. 443, holding a grantee on a tide river takes to line of high water only; *Gerrish v. Union Wharf*, 26 Me. 384, 46 A. D. 568, holding where tide flows, ordinary high-water mark is line of boundary; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 A. D. 267, holding a British grant of bank of Mobile river to grant only to high-water mark; *The Martha Anne*, Olcott 18. Fed. Cas. No. 9,146, holding on right of inhabitants of Oyster Bay township in that bay.

Distinguished in *New York v. Hart*, 16 Hun, 380, holding a grant of land to a town on a river in which the tide flows to extends to low-water mark.

What constitutes navigable stream.

Cited in *Rhodes v. Otis*, 33 Ala. 578, 73 A. D. 439, holding word navigable under

the common law describes public waters where the tide ebbs and flows; *Morgan v. King*, 35 N. Y. 454, 91 A. D. 58, holding navigable in fact a river on which boats, lighters, or rafts may be floated to market; *Curtis v. Keesler*, 14 Barb. 511, holding fresh-water creek which in its natural state is not capable of floating a log on its surface, and during freshets will float single logs only, is not subject to servitude of public.

Cited in reference notes in 26 A. D. 530, on nature of non-navigable rivers; 38 A. D. 727, on what are navigable waters; 84 A. D. 540, on what were navigable rivers at common law.

Cited in notes in 13 L.R.A. 828, on what constitutes navigable stream; 42 L.R.A. 313, on what waters are navigable; 3 L.R.A. 610, on what are private streams.

Right of public in streams navigable in fact.

Cited in *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 A. R. 407, holding right of public is that of easement only, for purpose of navigation and floating; *De Camp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1014, holding such easement limited to the navigable capacity of stream; *Pierrepoint v. Loveless*, 72 N. Y. 211, holding that public has right to use streams through private property for rafting and floating logs, so far as necessary for public accommodation; *People v. Gutchiss*, 48 Barb. 656, holding that right of public in a non-navigable stream in the legal sense is simply that of passage; *Harris v. Thompson*, 9 Barb. 350, holding any obstruction of navigation above the flow of the tide is prima facie a public nuisance; *Smith v. Rochester*, 92 N. Y. 463, 44 A. R. 393, holding that state has no right to convert such waters, or to authorize their conversion, to any other purpose than that of navigation, except by right of eminent domain.

Cited in note in 81 A. D. 583, on right of public or of individuals to use water courses as highways and remedies available to vindicate right.

Distinguished in *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461, holding riparian owners on the Mohawk river have no claim for damages for diversion of water by the public for canal purposes.

When mandamus lies.

Cited in *People ex rel. Griffin v. Steele*, 2 Barb. 397, 1 Edm. Sel. Cas. 505, granting writ to put a minister in possession of the pulpit to which he is entitled.

Cited in note in 19 A. D. 508, as to when mandamus will be granted.

—Against public officer.

Cited in *State v. Elkinton*, 30 N. J. L. 335, granting alternative mandamus to an overseer, commanding him to open a road; *People ex rel. Stranahan v. Thompson*, 67 How. Pr. 491, issuing writ to compel commissioners of public works to grant permit to a bridge company to enter on street and take up pavement.

Cited in note in 89 A. D. 733, on mandamus against public officers.

Distinguished in *Chance v. Temple*, 1 Iowa, 179, holding that writ does not lie to perfect a doubtful right as against the state; *People ex rel. Yates v. Canal Board*, 13 Barb. 432, denying writ to compel a canal board to approve or disapprove a contract awarded to an individual, in pursuance of a statute.

Notice before granting mandamus.

Cited in *Ex parte Garland*, 42 Ala. 559, on necessity of a rule nisi before granting a mandamus.

Review of judgment in extraordinary legal action.

Cited in *State ex rel. Kenny v. Hudspeth*, 59 N. J. L. 504, 37 Atl. 67, holding that a writ of error will lie from a final judgment rendered on demurrer to an

alternative writ of mandamus; *Haughton v. Allen*, 1 N. C. (Conference, 157) 277, holding where a court exercising a statutory jurisdiction acts in a summary manner, in a manner different from common law, the remedy for review is by certiorari.

Boundary on highway.

Cited in *People v. Law*, 22 How. Pr. 109, 34 Barb. 494, holding premises bounded in general terms by a street extend to middle of street; *Paige v. Schenectady R. Co.* 178 N. Y. 102, 70 N. E. 213, holding presumption is that conveyance carries to center of street; *Cox v. Freedley*, 33 Pa. 124, 75 A. D. 584, holding that grantee of land bounded by side of street takes to center of street; *Gove v. White*, 20 Wis. 426, holding words "commencing on the road . . . thence south on the road dividing sections 10 and 11," etc., takes to center of highway.

Distinguished in *Wetmore v. Law*, 22 How. Pr. 133, 34 Barb. 515, holding land grant running along a certain street, "to the said easterly line of street, and thence southwardly along the same," etc., does not carry to center of street.

Right of public in highway.

Cited in *Monongahela Nav. Co. v. Coons*, 6 Watts. & S. 101 (dissenting opinion), on right of public in a public highway.

Natural linear objects as boundaries.

Cited in *Clarkston v. Virginia Coal & I. Co.* 93 Va. 258, 24 S. E. 937, holding a description calling for a ridge as a boundry means top of ridge.

16 AM. DEC. 454, JACKSON EX DEM. BRATT v. WHITBECK, 6 COW. 632.

Presumptive adverse possession by cotenant.

Cited in *Woolsey v. Morss*, 19 Hun, 273, holding where a cotenant enters whole and claims whole exclusively for twenty-one years, it raises presumption of ouster by him; *Jackson ex dem. Bratt v. Tibbits*, 9 Cow. 241, holding that where cotenant by some notorious act, claims an exclusive right, though under a void title, statute will run from time of such claim; *Flock v. Wyatt*, 49 Iowa, 466; *Alexander v. Kennedy*, 19 Tex. 488, 70 A. D. 358,—holding mere possession of a tenant in common for a great length of time may raise inference of an ouster; *Dubois v. Campau*, 28 Mich. 304; *Marr v. Gilliam*, 1 Coldw. 488,—holding same as to an uninterrupted and exclusive possession by one tenant in common for twenty or more years without any account with such cotenant; *Gill v. Fauntleroy*, 8 B. Mon. 177, holding same where cotenant claimed whole and refused to share profits; *Campau v. Dubois*, 39 Mich. 274, holding same where one of several heirs occupied land and improved it, the other heirs being in immediate vicinity and not interfering; *Cole v. Lester*, 48 Misc. 13, 96 N. Y. Supp. 67; *Zapf v. Carter*, 70 App. Div. 395, 75 N. Y. Supp. 197,—holding same where acts are such as unequivocally to convey to cotenants the information that the possession is in defiance of their cotenancy; *Colburn v. Mason*, 25 Me. 434, 43 A. D. 292, holding an entry of a cotenant presumed to be in accordance with title of other cotenant until act of unequivocal exclusion has occurred.

Cited in reference notes in 27 A. D. 338; 37 A. D. 126,—on ouster of one cotenant by another; 36 A. D. 166, on ouster and adverse possession by cotenant; 90 A. D. 454, as to what constitutes adverse possession and ouster of tenant in common by cotenant; 52 A. D. 221, on right of one cotenant to oust another and hold adversely to him; 69 A. D. 597, as to what possession by one cotenant will amount to an ouster as against the other.

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Cited in notes in 35 L.R.A. 836, on adverse possession by donee under parol gift; 10 L.R.A. (N.S.) 187, on presumption of ouster of one tenant in common from long-continued, undisturbed possession of another; 13 A. D. 141, on what justifies jury in finding ouster by cotenant.

Distinguished in *Kathan v. Rockwell*, 16 Hun, 90, holding sole possession by a tenant in common, not adverse possession.

Inferences by court as trier of facts.

Cited in *Wight v. Curtis*, Fed. Cas. No. 17,628, holding that a court may draw the same inference from evidence as a jury would; *Tyack v. Brumley*, 1 Barb. Ch. 540 note, on authority of court to draw inferences from evidence; *Hamby Mountain Gold Mines v. Calhoun Land & Min. Co.* 83 Ga. 311, 9 S. E. 831, sustaining judge in presuming an actual ouster from certain facts in evidence.

16 AM. DEC. 456, MILLER v. PLUMB, 6 COW. 665.

Intention as criterion of fixture.

Cited in *Gulick v. Heermans*, 6 Luzerne Leg. Reg. 227, holding legal criterion of fixture is intention to annex it to freehold.

Rule as to fixtures.

Cited in reference notes in 59 A. D. 658, on machinery as fixture; 55 A. D. 417, on rule that whatever is annexed to the freehold becomes part thereof and cannot be removed.

Cited in notes in 21 A. D. 732; 23 A. D. 386; 28 A. D. 293; 36 A. D. 557; 37 A. D. 219; 5 L.R.A. 594,—on what are fixtures.

—As between vendor and vendee.

Cited in *Conner v. Coffin*, 22 N. H. 538, holding that grantee takes all fixtures, whether for trade, manufacture, or agriculture; *Tate v. Blackburne*, 48 Miss. 1, holding that a cotton gin passed to purchaser; *Bond v. Coke*, 71 N. C. 97, holding same as to a gin and press annexed to freehold; *Cohen v. Kyler*, 27 Mo. 122, holding a bathing tub and lead pipes fastened to the walls and floor of a building by nailing are fixtures; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 A. D. 203, holding an engine which could not be removed without taking down a part of building to be a fixture; *Harkness v. Sears*, 26 Ala. 493, 62 A. D. 742, holding same as to a turning lathe propelled by horse power and a large cogwheel let into the ground; *Fratt v. Whittier*, 58 Cal. 126, 41 A. R. 251, holding gas fixtures pass under deed; *Opinion of Spruance*, 8 Del. Ch. 539 Appx., holding articles of a mill not actually attached to building or machinery by belting or otherwise do not pass as freehold; *Ruckman v. Outwater*, 28 N. J. L. 581, holding manure in barnyard passes to grantee; *Ford v. Cobb*, 20 N. Y. 344, holding salt kettles imbedded in brick arches personal property and subject to lien of a chattel mortgage for their purchase price.

Distinguished in *Cross v. Marston*, 17 Vt. 533, 44 A. D. 353, holding drawers and sash of a show case put in a building by consent of owner of them are personal property as against a vendee of building.

—As between mortgagor and mortgagee.

Cited in *Williams v. Chicago Exhibition Co.* 188 Ill. 19, 58 N. E. 611, holding that whatever will pass as between vendor and vendee will pass as between mortgagor and mortgagee; *McLane v. Geer*, 3 Edw. Ch. 245; *King v. Wilcomb*, 7 Barb. 283,—holding as between mortgagor and mortgagee everything attached to the freehold or growing on soil is part of realty; *Sparks v. State Bank*, 7 Blackf. 469, holding steam engine erected in a permanent manner in a tanyard is realty;

Sands v. Pfeiffer, 10 Cal. 258, holding same as to engines and boilers used in a flour mill permanently fastened thereto; **Murdock v. Gifford**, 18 N. Y. 28, holding looms in a woolen factory personal property; **Sayles v. National Water Purifying Co.** 41 N. Y. S. R. 856, 16 N. Y. Supp. 555, holding a large filter not attached except by detachable pipes personal property under an agreement that it shall remain such between seller of filter and owner of factory.

—As between cotenants or heir and personal representative.

Cited in **Buckley v. Buckley**, 11 Barb. 43, holding as between heir and personal representative, that whatever is let into the soil or attached to it or erected upon it, to be habitually there, is part of freehold; **Walker v. Sherman**, 20 Wend. 636, holding certain machinery personal property in a partition of real estate belonging to tenants in common, it not appearing to have been fastened to building.

—As between landlord and tenant.

Cited in **Raymond v. White**, 7 Cow. 319, holding as between landlord and tenant, that property fixed to the premises by the tenant for the purpose of manufacturing belongs to tenant; **Andrews v. Day Button Co.** 132 N. Y. 348, 30 N. E. 831, sustaining right of tenant to remove an engine from a factory; **Moore v. Smith**, 24 Ill. 512, holding that distillery pipes and machinery may be removed by tenant; **Mott v. Palmer**, 1 N. Y. 564, holding rails built into a fence by tenant, under agreement to remove, are personal property; **Fisher v. Saffer**, 1 E. D. Smith, 611, on temporary structures as personal property.

Cited in reference note in 64 A. D. 75, on favoring tenant in respect to fixtures.

—Purchaser at judicial sale.

Cited in **Stillman v. Flenniken**, 58 Iowa, 450, 43 A. R. 120, 10 N. W. 842, holding smutter operated in gristmill passes to purchaser of mill at judicial sale.

Cited in note in 7 L.R.A. 278, on rights of purchaser at mortgage foreclosure sale.

Buildings erected on land of another.

Cited in **Day v. Saunders**, 3 Keyes, 347, holding a building erected on land of another by a trespasser becomes realty; **Richtmyer v. Morss**, 4 Abb. App. Dec. 55, 37 How. Pr. 388, 5 Abb. Pr. N. S. 44, holding same as to a building erected on land of another without agreement.

What constitutes conversion.

Cited in reference note in 37 A. D. 60, on what constitutes conversion.

Cited in note in 24 A. S. R. 800, on illustrations showing various modes of conversion.

16 AM. DEC. 460, FOWLER v. AETNA F. INS. CO. 6 COW. 673, Reaffirmed in later case between same parties in 7 Wend. 270.

Evidence of general good character in civil actions.

Cited in **Heileg v. Dumas**, 65 N. C. 214, holding that, unless the character of the party be put directly in issue by the nature of the proceeding, evidence of the defendant's character is inadmissible; **Hills v. Goodyear**, 4 Lea, 233, 40 A. R. 5, holding evidence of good character admissible, where intent is essence of the issue; **Houghtaling v. Kelderhouse**, 2 Barb. 149, holding evidence of plaintiff's good character inadmissible in an action for slander; **Shipman v. Burrows**, 1 Hall, 442, holding same unless put in issue by defendant; **United States v. Wood**, 13 Blatchf. 252, Fed. Cas. No. 16,752, holding in an action against sureties on an official bond, that evidence of officer's general conduct is

inadmissible, even though officer is dead; *Rollins v. Griffin*, 7 Misc. 232, 27 N. Y. Sup. 269, holding plaintiff's general reputation inadmissible in an action for training defendant's colt, where defense is nonperformance of contract; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308, holding in the impeachment of witnesses, inquiry is confined to the general reputation of the witnesses for truth and veracity.

Cited in note in 53 A. D. 133, on evidence of character in civil actions.

Questioned in *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488, holding as to deceased person charged with undue influence in procuring a will, that evidence of such party's character is admissible.

— **In civil action for acts having criminal aspect.**

Cited in *Quinton v. Van Tuyl*, 30 Iowa, 554; *Fahey v. Crotty*, 63 Mich. 383, 6 A. S. R. 305, 29 N. W. 876,—holding character inadmissible in action for assault; *Gebhart v. Burket*, 57 Ind. 378, 26 A. R. 61, holding same in an action for trespass, though such unlawful act would be indictable; *Barton v. Thompson*, 56 Iowa. 571, 41 A. R. 119, 9 N. W. 899, holding same in an action to recover damages for malicious mischief; *Thayer v. Boyle*, 30 Me. 475, holding same in an action for maliciously setting fire to barn; *Harrison v. Russell*, *Wilson Super. Ct.* 391, holding same in a suit for money claimed to have been taken by robbery; *Walker v. State*, 6 Blackf. 1, holding same in a case of bastardy; *Kinneberg v. Kinneberg*, 8 N. D. 311, 79 N. W. 337, holding evidence of defendant's reputation for chastity inadmissible in an action for an assault with intent to commit rape.

Cited in reference note in 41 A. R. 120. on admissibility of evidence of defendant's good character in civil action for tort.

Distinguished in *Dally v. Woodbridge*, 21 N. J. L. 491, holding evidence of good moral character admissible in a bastardy proceedings.

— **Where fraud of party is in issue.**

Cited in *Gough v. St. John*, 16 Wend. 646, holding character not admissible in defense to action for fraudulent representation; *Leinkauf v. Brinker*, 62 Miss. 255, 52 A. R. 183, holding same where a purchase by defendant is assailed as fraudulent; *Dudley v. McCluer*, 65 Mo. 241, 27 A. R. 273, holding same as to one charged with fraudulent dealing; *Smets v. Plunket*, 1 Strobb. L. 372; *Norris v. Stewart*, 105 N. C. 455, 18 A. S. R. 917, 10 S. E. 912,—holding same as defense to an allegation of fraud; *Vansickle v. Shenk*, 150 Ind. 413, 50 N. E. 381, holding same in an action to set aside a fraudulent conveyance; *Simpson v. Westenbergen*, 28 Kan. 756, 42 A. R. 195, holding same where a mortgage is assailed as fraudulent as against creditors.

— **In action on insurance policy.**

Cited in *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, holding in an action by a woman upon a policy of insurance on the life of her husband, evidence of her good character is inadmissible; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529, holding same where insurance company set up defense that fire was occasioned by fraudulent and wilful act of plaintiff.

What constitutes a warranty by insured.

Cited in reference notes in 79 A. D. 743; 91 A. D. 234,—on warranties in insurance contracts; 59 A. D. 201, as to when applications, surveys, or proposals are part of insurance policy so as to make the warranties; 22 A. D. 574, on necessity that warranty appear on face of policy.

Cited in note in 40 A. D. 349, as to what constitutes warranty in insurance policy.

— Descriptions in policy.

Cited in *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469, 55 A. D. 360, holding every clear and explicit declaration contained in a policy concerning the conditions and description of the property is a warranty; *Chrisman v. State Ins. Co.* 16 Or. 283, 18 Pac. 466, holding application part of policy by reference, and the answers and statements therein warranties; *Richards v. Protection Ins. Co.* 30 Me. 273, holding description a warranty when the rate of premium is thereby affected; *Richards v. Protection Ins. Co.* 30 Me. 273 (dissenting opinion), on description of subject-matter insured as a warranty.

Cited in reference notes in 35 A. D. 96, on description of property in fire insurance policy; 65 A. S. R. 812, on description of premises in insurance policy; 44 A. S. R. 326, on description of use of insured building; 37 A. D. 46, on materiality of description of property in insurance policy.

Cited in note in 59 A. R. 818, on construction of insured's statements in application for insurance as to whether warranties or not.

Distinction between warranties and representations.

Cited in reference notes in 20 A. D. 433, on representation, warranties, and concealment; 22 A. D. 544; 59 A. D. 201; 65 A. S. R. 697,—on distinctions between warranties and representations by insured; 30 A. D. 123, on distinction between and effect of warranties and representations in insurance contracts; 74 A. D. 462, on misdescription of insured property, and distinction between representations and warranties in insurance contracts.

Effect of warranty on risk.

Cited in *Wall v. East River Mut. Ins. Co.* 7 N. Y. 370; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285,—holding that a warranty must be complied with as condition precedent to a recovery by the insured; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 A. D. 345, holding warranty in relation to the existence of a particular fact must be strictly true; *Inman v. Western F. Ins. Co.* 12 Wend. 452, holding same, irrespective of whether warranty is material to risk or not; *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding permanent occupation of premises for another purpose than that covered discharges insurer while so used.

Cited in reference note in 49 A. D. 238, on necessity for strict compliance with warranty in insurance policy.

Cited in note in 40 A. D. 349, on necessity that warranty in policy be strictly kept.

Effect of misrepresentation by insured.

Cited in reference notes in 61 A. S. R. 107, on immaterial misrepresentation by insured; 40 A. D. 351, on effect upon insurance of misrepresentations by assured; 41 A. D. 496, on effect of false or inaccurate representations in application for insurance; 59 A. D. 202, as to when misrepresentation will avoid insurance policy; 65 A. S. R. 895, on representations as to health of insured; 29 A. S. R. 910, on representation by insured as to encumbrances.

Cited in note in 19 A. D. 433, on effect of misdescription in policy.

— As to property insured.

Cited in *Weil v. New York L. Ins. Co.* 47 La. Ann. 1405, 17 So. 853, holding false representation, unlike a false warranty, will not avoid policy unless material to risk or made material by agreement; *Allen v. Lafayette Ins. Co.* 34 La. Ann.

763, holding description not strictly accurate, if only a representation, and making no difference in premium and risk, will not avoid policy; *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 A. R. 112, 2 So. 125, holding statements and answers in application, binding only so far as they are material to the risk unless this is clearly against the expressed intention of parties; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.* 6 Ill. 236, holding mistake or omission, if material to the risk, avoids contract; *Campbell v. Merchants' & F. Mut. F. Ins. Co.* 37 N. H. 35, 72 A. D. 324; *Marshall v. Columbian Mut. F. Ins. Co.* 27 N. H. 157,—holding that whatever is material to risk should be set forth in application for policy; *Roth v. City Ins. Co.* 6 McLean, 324, Fed. Cas. No. 12,084, holding misrepresentations made by insured, the agent having no knowledge of premises, avoids policy, if material to risk; *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061, holding false representations as to use of lamps in insured building avoids policy.

Cited in reference notes in 30 A. D. 124, on misdescription of insured property; 38 A. D. 530, on effect on insurance of erroneous statement of use of property; 81 A. D. 530, as to when error in description of property in insurance policy is not fatal.

Cited in note in 30 A. D. 101, on what is a misdescription of insured property and its effect.

Distinguished in *Niblo v. North American F. Ins. Co.* 1 Sandf. 551, holding description of buildings in policy as "his buildings," not material misrepresentation, though interest of insured is that of a tenant; *Delonguemare v. Traders' Ins. Co.* 2 Hall, 629, holding as to description referred to only in a general way in policy, a substantial accuracy is enough; *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. 527, holding under by-laws requiring true representations "so far as concerns the risk and value thereof" that a policy was not void for an omission where risk was not increased.

Concealment by insured.

Cited in reference notes in 32 A. D. 117, on effect of omission to state facts material to the risk; 81 A. S. R. 139, on effect of concealment and warranty on liability on marine policy.

Cited in note in 40 A. D. 350, on effect on validity of insurance of concealment of material fact by insurer.

16 AM. DEC. 471, GRAVES v. MERRY, 6 COW. 701.

Notice of dissolution of partnership.

Cited in *Holdane v. Butterworth*, 5 Bosw. 1, holding actual notice not necessary as to those who have had no previous transactions with the firm; *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336, holding notice in a local editorial item sufficient; *Simonds v. Strong, C. & Co.* 24 Vt. 642, holding that as to all persons who have had no previous dealings with firm, a general newspaper notice of dissolution must be given; *Citizens Nat. Bank v. Weston*, 162 N. Y. 113, 56 N. E. 494, holding that notice of dissolution should be seasonably published in one or more newspapers in immediate vicinity; *Austin v. Holland*, 69 N. Y. 571, 25 A. R. 240, holding firm not bound if at time of dealing party was aware of fact of dissolution; *Hodgskin v. Heim*, 33 Misc. 548, 87 N. Y. Supp. 876, holding subsequent creditor without notice of dissolution may hold former partners; *Mauldin v. Branch Bank*, 2 Ala. 502, holding question whether form of notice is sufficient is for jury.

Cited in reference note in 26 A. D. 493, on sufficiency of notice of dissolution of partners.

Cited in notes in 32 A. D. 151, on notice of dissolution of partnership; 26 A. D. 290, on notice of dissolution of partnership; 23 L. ed. U. S. 852, on what notice of dissolution of firm is sufficient to avoid liability; 40 A. S. R. 573, on notice to terminate liability after dissolution of firm; 62 A. D. 321, 322, on inference of notice arising from newspaper articles or publication not required or authorized by law.

—As to persons previously dealing with firm.

Cited in *Clapp v. Rogers*, 12 N. Y. 283; *Wardwell v. Haight*, 2 Barb. 549; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *National Shoe & Leather Bank v. Herz*, 24 Hun, 260; *Vernon v. Manhattan Co.* 22 Wend. 183 (reversing 17 Wend. 524),—holding actual notice necessary as to those who have had previous dealings with firm; *Hyde v. Shank*, 93 Mich. 535, 53 N. W. 787, holding same and citing annotation also on this point; *Zollar v. Janvrin*, 47 N. H. 324, holding it not sufficient that creditor who had dealt with firm was accustomed to take paper containing notice; *Shurlds v. Tilson*, 2 McLean, 458, Fed. Cas. No. 12,827, holding published notice may be received in evidence, jury to determine whether party had actual notice.

Cited in note in 26 A. D. 292, on necessity of actual notice of dissolution of partnership to customers.

Distinguished in *Block v. Price*, 24 Mo. App. 14, holding that retiring partner must have been known to have been a partner by the customer.

Partner's authority after dissolution.

Cited in *Bristol v. Sprague*, 8 Wend. 423, holding that one partner may bind another after dissolution, if payee or holder of paper is not chargeable with notice of dissolution; *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. ed. 851, holding same as to goods purchased by partner after dissolution; *Forbes v. Garfield*, 32 Hun, 389; *Robertson Lumber Co. v. Anderson*, 96 Minn. 527, 105 N. W. 972,—holding a partial payment on a partnership debt will suspend operation of the statute of limitations as to other partners, where creditor has had previous dealings with firm and has no notice of dissolution; *Meadowcraft v. Walsh*, 15 Mont. 544, 39 Pac. 914, holding that a retiring partner may after dissolution of firm ratify an act of his former partner and make himself responsible; *Easter v. Farmers' Nat. Bank*, 57 Ill. 215, holding that an unauthorized use of firm name by a partner after dissolution may be ratified by other members.

Cited in notes in 18 A. D. 515; 21 A. D. 638; 26 A. D. 433; 36 A. D. 311; 37 A. D. 612; 62 A. D. 280; 49 A. S. R. 309,—on power of partner to bind firm after dissolution; 2 A. S. R. 764, on effect of note, made in partnership name by one partner after dissolution, to payee not having notice of dissolution; 25 A. D. 363, on admissions by partner after dissolution.

16 AM. DEC. 475, PACKARD v. GETMAN, 6 COW. 757.

Inception and termination of carrier's liability.

Cited in *Grosvenor v. New York C. R. Co.* 39 N. Y. 34, 5 Abb. Pr. N. S. 345, holding that liability attaches only from time of acceptance of goods for carriage; *The R. E. Lee*, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690, 2 Leg. Gaz. 298; *Jordan v. Hazard*, 10 Ala. 221; *Blanchard v. Isaacs*, 3 Barb. 388,—holding liability does not commence until delivery to carrier is complete; *O'Bannon v. Southern Exp. Co.* 51 Ala. 481, holding notice to carrier, express or implied, of intent to com-

mit goods to his care and custody for transportation, is essential; *Atlantic Nav. Co. v. Johnson*, 4 Robt. 474, holding when notice is permitted to take the place of an actual delivery by the carrier it must be a reasonable one; *Farmers' & M. Bank v. Champlain Transp. Co.* 23 Vt. 186, 56 A. D. 68, holding question when liability terminates is for jury under practice of carriers and attendant circumstances.

Cited in reference notes in 43 A. S. R. 756, as to when liability as carrier begins; 61 A. D. 432, on what constitutes a good delivery.

Cited in notes in 23 A. D. 457, on what constitutes delivery to carrier; 52 A. D. 349, on sufficiency of delivery of goods to common carrier; 42 A. D. 38, on sufficiency of delivery of goods to carrier to render him liable.

Distinguished in *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 A. D. 344, holding express notice not necessary where particular habit or custom of carrier as to delivery is complied with.

— Goods left on docks, platforms, or in cars.

Cited in *Hobart v. Littlefield*, 13 R. I. 341, holding delivery on wharf and notice to servants, sufficient; *Ball v. New Jersey S. B. Co.* 1 Daly, 491, holding it not good delivery to leave baggage on a boat, without calling agent's attention to it; *Houston & T. C. R. Co. v. Hodde*, 42 Tex. 467, holding the lading of cotton on a car of a carrier, not delivery, in absence of a regulation or custom, or notice given carrier; *Ford v. Mitchell*, 21 Ind. 54, holding practice and usage by carrier to receive property left for transportation at a particular place, without any special notice, admissible.

Liability of carriers for loss of property.

Cited in notes in 26 A. D. 467; 21 A. D. 168,—on liability of common carriers; 3 L.R.A. 346, on carrier's liability for loss of baggage; 50 A. D. 99, 100, on customs of common carriers and their validity.

Demand and refusal as evidence of conversion.

Cited in *Daggett v. Davis*, 53 Mich. 35, 51 A. R. 91, 18 N. W. 548, holding demand and refusal only evidence of a conversion; *Wamsley v. Atlas S. S. Co.* 37 App. Div. 553, 56 N. Y. Supp. 284; *Packard v. Getman*, 4 Wend. 613, 21 A. D. 166,—holding evidence admissible to negative presumption of conversion raised by demand and refusal.

Cited in reference notes in 22 A. D. 555; 33 A. D. 131; 71 A. D. 330,—on demand and refusal as evidence of conversion; 26 A. D. 356; 55 A. D. 51,—on demand and refusal as prima facie evidence of conversion; 35 A. D. 616, on refusal to deliver goods as evidence of conversion; 43 A. D. 765, on refusal to deliver goods upon demand as evidence of conversion.

16 AM. DEC. 478, *WICKERSHAM v. NICHOLSON*, 14 SERG. & R. 118.

Constructive notice of adjudication of bankruptcy.

Cited in *Mays v. Manufacturers' Nat. Bank*, 64 Pa. 74, 3 A. R. 573, 27 Phila. Leg. Int. 35, 2 Legal Gaz, 37, holding payment to bankrupt after filing of petition, void, though bona fide and without actual notice; *Bellas v. McCarty*, 10 Watts, 13 (dissenting opinion), on duty of all world to take notice of judicial assignments.

Distinguished in *Galvin v. Boyd*, 4 W. N. C. 288, Fed. Cas. No. 5,208, because of different terms of subsequent bankrupt act.

Necessity of acceptance by assignee in bankruptcy.

Cited in *Gibbs v. Smith*, 2 Phila. 84, 13 Phila. Leg. Int. 92, holding estate

devested from debtor whether assignee accepts or not, or whether assignment is or is not executed.

Distinguished in *Power v. Hollman*, 2 Watts, 218, holding creditor appointed but not accepting as assignee, not barred from purchasing land of insolvent.

16 AM. DEC. 480, *KELLOGG v. KRAUSER*, 14 SERG. & R. 137.

Declarations against interest to affect title.

Cited in *Gibblehouse v. Strong*, 3 Rawle, 437, holding declarations of legal title holder, that he was trustee, admissible against those claiming under him.

Opinion evidence.

Cited in *Rembert v. Brown*, 14 Ala. 360, holding witness who professes to know number of slaves and mules on plantation may testify as to amount of corn necessary for one month; *Bissell v. Wert*, 35 Ind. 54, holding witness should state facts and not amount of damages in action for unskilful sowing of clover.

Cited in reference notes in 41 A. D. 464, on opinion evidence; 58 A. D. 305, on opinions of witnesses as evidence.

As to value of property or damage thereto.

Referred to as a leading case in *Galbraith v. Philadelphia Co.* 2 Pa. Super. Ct. 359, holding all persons familiar with the land who have formed an opinion, competent to testify as to value.

Cited in *Derby v. Gallup*, 5 Minn. 119, Gil. 85, holding witness may testify as to value of property in question; *Swan v. Middlesex County*, 101 Mass. 173; *Clark v. Baird*, 9 N. Y. 183,—holding same as to opinion of witness acquainted with real estate; *Illinois & W. R. Co. v. Van Horn*, 18 Ill. 257, holding opinions of witnesses and basic facts, admissible; *Pennsylvania & N. Y. R. & Canal Co. v. Bunnell*, 81 Pa. 414, 2 W. N. C. 633, 33 Phila. Leg. Int. 256, holding opinions of persons in neighborhood as to value of land, competent; *Re Pearl Street*, 19 Wend. 651, holding opinions of witnesses as to value of property taken for public improvement, admissible, though of slight value; *White Deer Creek Improv. Co. v. Sassaman*, 67 Pa. 415, 3 Legal Gaz. 61, holding opinion of witness acquainted with facts competent on question of damages from overflow of land; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23, holding opinions of farmers as to damages sustained from cutting down of shade trees on side of stock yard, competent; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315, 23 Phila. Leg. Int. 284, holding question as to length of time decedent would be useful to family, proper on question of damages in action for causing death; *James v. Adams*, 16 W. Va. 245, holding testimony of dry goods merchants as to per cent. of depreciation generally from sales and injuries from keeping, competent to prove value of remnant of a particular stock; *St. Louis, I. M. & S. R. Co. v. Edwards*, 24 C. C. A. 300, 49 U. S. App. 52, 78 Fed. 745, allowing opinion evidence as to damage to cattle by carrier's delay, by one who attended them during trip and who was familiar with such business; *Berry v. Reed*, 53 Me. 487, on whether opinion as to value of logs is admissible; *Burlington & M. River R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. 747 (dissenting opinion), on admissibility of opinion of witness as to damage to land from running of fire through it; *State v. Pike*, 49 N. H. 399, 6 A. R. 533 (dissenting opinion), on competency of nonexpert opinion as to sanity of a person, formed from observation of conduct.

Distinguished in *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185, holding witness cannot state his opinion as to damages to farm sustained by construction of railroad over it.

Disapproved in *Hoitt v. Moulton*, 21 N. H. 586, holding opinion of witness as to value of land, incompetent.

Sufficiency of notice.

Cited in *Cameron v. Little*, 13 N. H. 23, holding notice by officer agreeable to instructions on back of writ served on debtor in suit in name of payee, sufficient notice of assignment of note.

— To assignee of judgment of equities outstanding.

Cited in *Rowe v. Langley*, 49 N. H. 395, holding express notice not necessary to charge purchaser of judgment with equities, where facts and circumstances ought to have caused inquiry.

Validity of judgment entered in violation of agreement.

Cited in *Atkinson v. Conrad*, 37 Phila. Leg. Int. 4, holding judgment entered in violation of an agreement is void and should be stricken off.

Jurisdiction to open judgment and direct issue.

Cited in *Ingersoll v. Dyott*, 1 Miles (Pa.) 245; *Banning v. Taylor*, 24 Pa. 289,—upholding jurisdiction to strike off judgment entered without authority; *Cochran v. Eldridge*, 49 Pa. 365, holding it proper to open judgment and allow defendant to show fraud in obtaining it; *Koch v. Biesecker*, 7 Pa. Super. Ct. 37, on the power of law courts in Pennsylvania to open judgments on equitable grounds; *Campbell v. Kent*, 3 Penr. & W. 72 (dissenting opinion); *Stradding v. Henck*, 2 Phila. 302, 14 Phila. Leg. Int. 212,—on power to direct issue to try question of fraud in entry of judgment.

— Propriety of feigned or direct issue.

Cited in *Gallup v. Reynolds*, 8 Watts, 424, holding it proper to try collusion by collateral issue, but pretermitted matter of defense by an issue in case itself; *Baker v. Williamson*, 2 Pa. 116, upholding jurisdiction of common pleas to direct feigned issue; *Parish v. Gear*, 1 Pinney (Wis.) 261, *Burnett (Wis.)* 99 (dissenting opinion), on power to open judgment and direct an issue.

Feigned issue as matter of discretion.

Cited in *Morris v. Harding*, 27 Phila. Leg. Int. 77, holding order of court discharging rule to open judgment, not the subject of a writ of error; *White v. Leeds*, 51 Pa. 187, holding motion to take off default, regular on its face, addressed to discretion and not subject of writ of error; *Knowles v. Jacobs*, 4 Pa. Super. Ct. 268, holding the granting of feigned issue a matter of discretion, and mode of molding is not the subject of writ of error.

Trial of feigned issue as separate action.

Cited in *Brown v. Parkinson*, 56 Pa. 336, holding feigned issue like separate action before jury; *Filbert v. Filbert*, 9 Pa. Co. Ct. 149, holding supreme court upon error to trial of feigned issue, has nothing to do with anything which occurred in original proceedings.

16 AM. DEC. 484, HAIN v. KALBACH, 14 SERG. & R. 159.

Parol evidence as to contemporaneous agreements.

Cited in *Martin v. Berens*, 67 Pa. 459, 28 Phila. Leg. Int. 69, holding parol evidence of nonliability in case of fire, inadmissible, where lease provided that lessee should do all rebuilding in case of accident.

— Where parol promise induced execution of writing.

Cited in *Rearich v. Swinehart*, 11 Pa. 233, 51 A. D. 540, allowing parol proof in action for purchase money that purchaser a son of vendor was to be liable only

in case of vendor's need; *Caulk v. Everly*, 6 Whart. 303, allowing parol proof of agreement to pay for repairs inadvertently omitted from lease and relied upon by lessee at time of execution.

Sufficiency of proof to controvert writing.

Cited in *Spencer v. Colt*, 89 Pa. 314, 7 W. N. C. 333, 36 Phila. Leg. Int. 394, holding no error to charge that parol agreement to reform writing must be made out by "clear, precise, and indubitable proof."

Necessity of reliance on fraudulent representations.

Cited in *Clark v. Partridge*, 2 Pa. St. 13; *Zentmyer v. Mittower*, 5 Pa. 403,—holding misrepresentation will not avoid contract unless shown to have been relied on; *Zeibert v. Grew*, 6 Whart. 404, holding agreement not to sue for certain time will not defeat foreclosure, where not alleged to have induced the execution of the mortgage; *Levy v. Moore*, 1 Phila. 325, 9 Phila. Leg. Int. 46, holding it necessary to aver that representation was relied on by party executing notes.

Presumption as to fraud.

Cited in *Clark v. Partridge*, 2 Pa. St. 13, holding it insufficient to aver facts from which jury may infer fraud.

16 AM. DEC. 486, SHEETS v. HAWK, 14 SERG. & R. 173.

Conclusiveness of judgment.

Cited in *Gallagher v. Kenedy*, 2 Rawle, 163, holding parol evidence inadmissible to show grounds of an order or decree in collateral action; *Shriver v. Com.* 2 Rawle, 206, holding record of forfeiture of recognizance in proper court is conclusive in debt on the recognizance.

— Collateral attack.

Cited in *Haines v. Hall*, 209, Pa. 104, 58 Atl. 125, holding as general rule, that decree of court having jurisdiction is not subject to collateral attack; *Jackson ex dem. Grignon v. Astor*, 1 Pinney (Wis.) 137, 39 A. D. 281, holding judgment cannot be attacked in collateral issue, where court possessed jurisdiction, for errors apparent on record; *Heilner v. Bast*, 1 Penr. & W. 267, holding order in insolvency proceedings, "Proceedings quashed by order of court," not open to collateral attack; *Lease v. Asper*, 2 Rawle, 182, holding parol evidence inadmissible in collateral action to show that court should have discharged petitioner instead of rejecting his petition; *Hoffman v. Coster*, 2 Whart. 453, holding exception in cases of fraud permitting collateral attack of judgment of court with jurisdiction, inapplicable to parties or privies.

— Of discharge of insolvent.

Cited in *Crissy v. Vogt*, 9 Pa. Super. Ct. 418, 43 W. N. C. 527, holding discharge by competent court raises presumption of legal appearance, in suit on bond; *Cohen v. Patton*, 2 Miles (Pa.) 437, holding discharge earlier than time conditioned in bond for appearance of insolvent, a bar to action on bond for nonappearance; *Fritts v. Doe*, 22 Pa. 335, holding final discharge after irregularities, conclusive of compliance with all requirements.

Cited in reference note in 53 A. D. 88, as to when discharge in bankruptcy is deemed conclusive.

Distinguished in *Berens v. Rasch*, 9 Phila. 45, 29 Phila. Leg. Int. 316, holding record of discharge not conclusive of notice given in action on bond for failure to give required notice of hearing.

Forfeiture of bail to appear.

Distinguished in *Re Taylor's Application*, 1 Pearson (Pa.) 191, holding failure

of applicant to appear on day fixed for hearing works a forfeiture of bond, in absence of continuance by court.

16 AM. DEC. 488, WITHERS'S APPEAL, 14 SERG. & R. 185.

Equitable conversion by order of sale.

Cited in *Lancaster County Bank v. Stauffer*, 10 Pa. 398, holding judgment against tenant by curtesy initiate, after issue born, binds his estate in wife's lands, ordered sold but not yet sold in partition proceedings; *Beyer v. Reesor*, 5 Watts & S. 501, 1 Clark (Pa.) 445, on nonconversion of realty into personalty by mere order of sale by court.

Cited in reference notes in 58 A. D. 604, on equitable conversion; 35 A. D. 651; 45 A. D. 615,—on equitable conversion of realty.

Effect of secret transfers.

Cited in *Clark v. Campbell*, 2 Rawle, 215, holding purchaser at sheriff's sale not affected by secret parol transfer previous to judgment, especially if defendant was then in possession.

Trust conveyances under statute of frauds.

Cited in *Gratz v. Gratz*, 4 Rawle, 411, holding statute of frauds requires sale of equitable interest under resulting trust to be in writing.

— Parol trusts.

Cited in *Gibblehouse v. Strong*, 3 Rawle, 437, holding parol evidence admissible to show resulting trust.

— Effect of part payment.

Cited in *Hill v. Meyers*, 43 Pa. 170, holding payment will not take oral contract out of statute unless accompanied by possession under the contract; *Newkumet v. Kraft*, 10 Phila. 127, 31 Phila. Leg. Int. 109, holding part payment without possession, and afterwards appropriated to another indebtedness, will not take parol agreement out of statute; *Maguire v. Heraty*, 163 Pa. 381, 35 W. N. C. 228, on insufficiency of mere payment or tender of purchase money to take case out of statute.

— Effect of possession under parol contract.

Cited in *Kutz v. Helper*, 3 Legal Chron. 44, holding possession to take parol contract out of statute must be exclusive.

16 AM. DEC. 491, MARTIN v. MATHIOT, 14 SERG. & R. 214.

Fraudulent sales of chattels by deceptive possession.

Cited in *Streeper v. Eckhart*, 2 Whart. 302, 30 A. D. 258, holding transfer of personalty without change of possession, void against creditors; *Hower v. Geesaman*, 17 Serg. & R. 251, holding assignment for creditors unaccompanied by possession, void as to levying creditor, though he had notice before judgment; *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542 (affirming 18 Ill. App. 198), holding ostensible ownership in another allowed by real owner will postpone rights of latter to those of execution or attachment creditors of former; *Heft's Appeal*, 5 Sadler (Pa.) 573, 9 Atl. 87, 19 W. N. C. 302, on necessity of possession by mortgagee of chattels to validity of his lien against creditors.

Cited in reference note in 20 A. D. 199, on retention of possession by vendor or mortgagor.

—Conditional sale with delivery of possession.

Cited in *Haak v. Linderman*, 64 Pa. 499, 3 A. R. 612, denying lien for purchase-

money against creditors of vendee in conditional sale, with delivery; *Stiles v. Whittaker*, 1 Phila. 271, 8 Phil. Leg. Int. 239; *Rose v. Story*, 1 Pa. St. 190, 44 A. D. 121; *Wylie's Appeal*, 90 Pa. 210; *Euwer v. Van Giesen*, 6 W. N. C. 363, 36 Phila. Leg. Int. 314; *Shirk v. Konigsmacher*, 13 Lanc. L. Rev. 109; *Heppe v. Speakman*, 7 Phila. 117, 26 Phila. Leg. Int. 252, 3 Brewst. (Pa.) 548,—holding conditional sale and delivery of personalty, void as to creditors; *Dudley v. Abner*, 52 Ala. 572, holding delivery under agreement that title is not to pass until price is paid, void as to creditors or bona fide purchasers; *Waldron v. Haupt*, 52 Pa. 408, holding purchaser at judicial sale, who left property with defendant under a conditional sale, will not prevail against creditors; *Sumner v. Woods*, 52 Ala. 94; *Stadtfeld v. Huntsman*, 92 Pa. 53, 37 A. R. 661, 10 W. N. C. 216, 37 Phila. Leg. Int. 413; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190,—holding bona fide purchaser without notice from conditional vendee in possession will prevail against vendor; *Farrell v. Nathans*, 1 Phila. 557, 12 Phila. Leg. Int. 162, holding same as against bona fide pawnee without notice; *Davis v. Crompton*, 85 C. C. A. 633, 158 Fed. 735, holding reservation of title until payment in conditional sale, valid under Pennsylvania decisions, against trustee in bankruptcy in absence of fraud; *Re Tice*, 139 Fed. 52, 15 Pa. Dist. R. 269, holding reservation of title until payment in contract essentially a conditional sale and not a bailment, void under Pennsylvania decisions, as to creditors of vendee in possession; *Sterling v. Goodrich*, 5 Luzerne Leg. Reg. 81, holding boat title of which is to pass when purchase money is paid out of earnings, not subject to levy for purchaser's debts.

Cited in reference notes in 44 A. D. 124, on title to property sold under conditional sale; 37 A. R. 667, on title of bona fide purchaser from one holding under conditional sale.

Cited in notes in 94 A. S. R. 214, 215, on distinction between absolute sales and conditional sales; 57 A. R. 578, on conditional sales of chattels; 42 A. R. 106, on title of bona fide purchaser from vendee holding under conditional sale.

Distinguished in *Christie v. Scott*, 85 Pa. 463, 35 Phila. Leg. Int. 154, where lessee of land put tenant in under him.

Criticized in *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51, holding conditional sale and delivery valid against a purchaser with notice.

Disapproved in *Cole v. Berry*, 42 N. J. L. 308, 36 A. R. 511, holding conditional sale and delivery prima facie valid against execution creditors, though liable to be assailed for fraud.

— Exception as to bailments.

Cited in *Wolf's Appeal*, 59 Pa. 471; *Edward's Appeal*, 105 Pa. 103, 15 W. N. C. 22, 4 Phila. Leg. Int. 418,—holding bailor of chattels unlike conditional seller will be protected against creditors; *Chamberlain v. Smith*, 44 Pa. 431; *McCall v. Powell*, 64 Ala. 254,—holding purchaser without notice from bailee in possession with privilege of purchase will not prevail against owner; *Stranghellan v. Ward*, 13 W. N. C. 111, on same point; *Henkels v. Brown*, 4 Phila. 301, 18 Phila. Leg. Int. 172, holding lessee of furniture is the owner as to his creditors, so as to waive appraisement upon seizure and sale as his property.

Distinguished in *Lehigh Co. v. Field*, 8 Watts & S. 232; *Patterson v. Stevenson*, 2 Pearson (Pa.) 205,—holding possession not badge of fraud because transaction was not in fact a sale but a bailment; *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. R. 649, holding bailor to factor who was to retain excess over invoice price was prior to levying creditor, though bailee gave notes as an accommodation to bailor; *Yohn v. Landis*, 17 Lanc. L. Rev. 397, holding question of absolute sale or bailment properly submitted to jury on conflicting evidence.

Criticized in *Kistner v. Keiser Cigar Co.* 4 Pa. Dist. R. 479, following cited case as binding, and holding "lease" of chattels till paid for, a sale and binding on seller as such.

Effect of conditional sale between parties.

Cited in *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746, holding conditional sale and delivery valid between the parties; *Atkins v. Busby*, 25 Ark. 176, holding title remains in vendor in conditional sale and delivery of slaves, and that liberation before final payment operates as failure of consideration.

Construction of contract as conditional sale or otherwise.

Cited in *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102, 3 Pa. Dist. R. 573, 15 Pa. Co. Ct. 97; *Harper v. Hogue*, 10 Pa. Super. Ct. 624,—on construction of contract to pay sum in payment as work progressed as conditional sale, void as to creditors.

Distinguished in *Enlow v. Klein*, 79 Pa. 488, 33 Phila. Leg. Int. 250, construing certain contract to pay for use of horses, with option to purchase, as bailment, protecting owner against creditors of bailee.

16 AM. DEC. 494, BOMBAY v. BOYER, 14 SERG. & R. 253.

Duration of lien of judgment.

Cited in *Brown v. Simpson*, 2 Watts, 233, holding lien under scire facias not served on terretenants expires in five years from expiration of stay entered on record.

Extension of lien by agreement.

Cited in *Mercantile Trust Co. v. St. Louis & S. F. R. Co.* 69 Fed. 193, holding stay entered on record delays the running of limitations, though the stay is longer than the period of limitations; *Re Lents*, 5 Pa. 103, holding statutes limiting liens unless certain proceedings are adopted may be waived by parol.

—Necessity of recording stay of judgment.

Cited in *Hemphill v. Carpenter*, 6 Watts, 22, holding agreement to extend time of lien not on record will not affect purchaser, though he have notice; *Betz's Appeal*, 1 Penr. & W. 271, on necessity as to creditors of entry of stay on record.

16 AM. DEC. 497, RERICK v. KERN, 14 SERG. & R. 267.

Parol licenses generally.

Cited in reference notes in 22 A. D. 413; 25 A. D. 472,—on parol license; 26 A. D. 741, on proof of license by parol; 30 A. D. 72, on creation and nature of license; 57 A. D. 690, on parol license to overflow or back water; 35 A. D. 239, on establishment, by parol, of license to overflow another's land; 2 A. S. R. 409, on effect of parol license; 15 A. S. R. 889, on right of licensee sued in trespass to justify by specially pleading parol license; 16 A. D. 419, on nature of license and rights acquired by virtue of parol license; 41 A. D. 250, on rights of licensee as to erections made with licensor's permission.

Irrevocability of executed parol license.

Cited in *Lane v. Miller*, 27 Ind. 534, holding parol license upon which money has been expended irrevocable unless licensee can be placed *in statu quo*; *Davis v. Souder*, 2 Foster (Pa.) 55, 2 Legal Chron. 60, 10 Phila. 113, 31 Phila. Leg. Int. 53, 6 Legal Gaz. 51, holding same as parol license to remove soil from lots; *House v. Montgomery*, 19 Mo. App. 170, holding license to go over land revocable at will unless there has been an expenditure of labor or money; *Gard-*

ner v. Weaver, 11 W. N. C. 544, holding license to cross lot necessary to enjoyment of grant of right of way, irrevocable; *Dillion v. Crook*, 11 Bush, 321, holding equity will require indemnity from owner revoking parol grant of easement after expenditure of money thereunder; *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017, holding owners who have erected their buildings with reference to license for right of way cannot be deprived of its use; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467, holding parol license to erect outside stairway on land of another irrevocable after erection of building without any other stairway, *Crescent Min. Co. v. Silver King Min. Co.* 14 Utah, 57, 45 Pac. 1093; *Heyl v. Railroad Co.* 6 Phila. 42, 22 Phila. Leg. Int. 206,—holding rule that expenditure of money makes license irrevocable dependent upon direct proof of license; *Pierrepoint v. Barnard*, 6 N. Y. 279 (dissenting opinion), on revocability of executed parol license to cut and carry away standing timber.

Cited in reference notes in 53 A. S. R. 878, on power to revoke parol license; 24 A. D. 627; 15 A. S. R. 173,—on revocability of parol licenses; 12 A. S. R. 331, on revocability of parol licenses granted without consideration; 46 A. D. 190, as to when revocation of license not permitted; 45 A. D. 206, on validity and revocability of parol licenses; 28 A. D. 721, on validity and irrevocability of parol license; 27 A. D. 681, on revocability or assignability of parol license.

Cited in notes in 54 A. D. 166; 26 A. S. R. 555; 16 E. R. C. 78,—on revocability of license; 10 A. D. 42, as to when license is not revocable; 43 A. R. 196, 197, on revocability of parol license; 31 A. S. R. 712, on nature and revocation of parol licenses; 45 A. D. 576, on revocability of executed license; 10 L.R.A. 486, on effect of executed license; 54 A. D. 167, on effect of improvements under parol license; 8 A. D. 700, on estoppel to deny or revoke parol license as to easement in land; 49 L.R.A. 506, on right to abandon or change easement in land by parol; 49 L.R.A. 517, on specific performance of license to maintain burden on land after licensee has incurred expense in creating the burden; 49 L.R.A. 515, 516, on specific performance of license to maintain burden on land, after licensee had incurred expense in creating the burden.

Distinguished in *Read v. Church of St. Ambrose*, 6 Pa. Co. Ct. 76, 19 Phila. 466, 45 Phila. Leg. Int. 184, holding grant by vestry of temporary use of building to church society, revocable at will.

Criticized in *McGuire v. St. Patrick's Cathedral*, 54 Hun, 207, 7 N. Y. Supp. 345, holding burial right in cemetery a revocable license; *Jamieson v. Millemann*, 3 Duer, 255, holding parol license which if irrevocable would transfer interest in lands is void, except as justification for acts prior to revocation.

Disapproved in *Hall v. Chaffee*, 13 Vt. 150, on right at law to revoke a parol executed license.

—To erect mill and use power.

Cited in *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 142, holding license to divert water for power revocable till executed by making of necessary improvements, but not afterwards; *M'Kellip v. M'Ilhenny*, 4 Watts, 317, 28 A. D. 711, holding parol license to erect milldam and overflow lands, irrevocable after execution as to subsequent purchasers; *Sheffield v. Collier*, 3 Ga. 82, holding parol permission to cut timber and overflow land irrevocable upon erection of dam; *Leibig v. Ginther*, 1 Foster (Pa.) 183, 1 Legal Chron. 203, 4 Legal Gaz. 245, holding failure to object to erection of milldam implies a license incapable of revocation without compensation; *Mumford v. Whitney*, 15 Wend. 380, 30 A. D. 60, holding parol license to maintain dam on another's land as long as there shall be use for water power revocable, notwithstanding execution; *Thompson v. McElar-*

ney, 82 Pa. 174, 32 Phila. Leg. Int. 410, holding executed parol license to throw waste from mill into stream running through another's land irrevocable.

Annotation cited in *Kivett v. McKeithan*, 90 N. C. 106, holding parol license to mill owner to construct dam revocable notwithstanding completion of the improvements.

Criticized in *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, holding verbal agreement to allow overflow of lands during the operation of a mill in consideration of its erection, revocable after execution.

Disapproved in *Babcock v. Utter*, 1 Keyes, 397, 1 Abb. App. Dec. 27, 32 How. Pr. 439, holding executed parol license to construct dam and flow land, revocable; *Hazleton v. Putnam*, 3 Chand. (Wis.) 117, 54 A. D. 158, 3 Pinney (Wis.) 107, holding parol license to draw water to run mill revocable though water-course had been constructed.

— To use or conduct waters over land.

Referred to as a leading case in *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358, holding parol license to lay aqueduct irrevocable in equity during existence of the aqueduct; *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035, holding parol agreement for construction of joint drain irrevocable upon expenditure of money or labor thereunder, and citing annotation on this point.

Cited in *Flickinger v. Shaw*, 87 Cal. 126, 22 A. S. R. 234, 11 L.R.A. 134, 25 Pac. 268, holding oral contract for right of way for ditch in consideration of use of part of water, irrevocable after execution; *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902, holding same of parol license to construct irrigation ditch; *Maple Orchard Grove v. Vineyard Co. v. Marshall*, 27 Utah, 215, 75 Pac. 369, holding same as to license to construct irrigation pipe line; *School Dist. v. Lindsay*, 47 Mo. App. 134, holding same as to well dug to furnish water for adjoining school; *Wynn v. Garland*, 19 Ark. 23, 68 A. D. 190, holding executed parol agreement as to common system of drainage, irrevocable; *Russell v. Howe*, 30 Pa. Super. Ct. 591, holding parol lease of wharf right irrevocable until reasonable time afforded lessee to remove his property; *National Waterworks Co. v. Kansas City*, 65 Fed. 691, holding railroad estopped to revoke executed parol license for erection of pipe line on right of way; *Delaware, L. & W. R. Co. v. McNeal*, 4 Luzerne Leg. Reg. 47, restraining revocation of license to lay pipes and erect water tank, when acted upon; *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158, 20 Atl. 286, holding equity will restrain interference with drain erected by brewery on line of lot with consent of owner, as long as necessity of brewery requires it; *Frear v. Casterlin*, 6 Luzerne Leg. Reg. 111, holding special water rights may be acquired by actual grant or license; *Addison v. Hack*, 2 Gill. 221, 41 A. D. 421, holding evidence of executed parol license admissible to bar action for overflow of lands; *Millerd v. Reeves*, 1 Mich. 107, holding unrevoked parol license from third person with right to flow, a defense to action for overflowing land.

Annotation cited in *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10, holding parol license to build ditch on land, irrevocable after execution; *Stoner v. Zucker*, 148 Cal. 516, 113 A. S. R. 301, 83 Pac. 808, 7 A. & E. Ann. Cas. 704, holding parol license to construct irrigating ditch becomes irrevocable for as long as its nature calls for, upon expenditure of money or labor.

Cited in note in 6 L.R.A. (N.S.) 155, on effect of incurrence of expense on parol license to drain water onto one's property.

Distinguished in *Oster v. Broe*, 161 Ind. 113, 64 N. E. 918, holding recovery

as damages of entire cost of tile ditch erected under oral license, a bar to action for permission to repair, and citing annotation.

—To build or use party wall or attach to wall.

Cited in *Wickersham v. Orr*, 9 Iowa, 253, 74 A. D. 348; *Rindge v. Baker*, 57 N. Y. 209, 15 A. R. 475,—holding executed parol agreement for party wall, irrevocable in equity both as to parties and subsequent grantees; *Russell v. Hubbard*, 59 Ill. 335, holding same of parol permission to attach building to brick wall already up in consideration of erection of brick instead of frame building.

—To erect railroad or the like.

Referred to as a leading case in *Willis v. Erie City Pass. R. Co.* 188 Pa. 56, 41 Atl. 307, on irrevocability of executed license for erection of street railways.

Cited in *Williamstown & T. R. Co. v. Battle*, 66 N. C. 540, holding written license for valuable consideration to construct railroad over land irrevocable; *Shimer v. Easton & N. Street R. Co.* 7 Northamp. Co. Rep. 249; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. 23,—holding same as to license, given or ratified by parol, to railroad to cross private lands, money having been expended in consequence; *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265, holding such license irrevocable after completion of road; *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.* 4 Del. Ch. 180, holding railroad not estopped to revoke license for side track notwithstanding erection of factory, where voluntary accommodation was intended; *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352, holding equity will not sustain maintenance of railroad erected in public street without objection, but without license, as on an executed agreement; *Park Steel Co. v. Allegheny Valley R. Co.* 213 Pa. 322, 62 Atl. 920, on irrevocability of executed license to build tramway of steel company over railroad; *Western U. Teleg. Co. v. Pennsylvania Co.* 68 L.R.A. 968, 64 C. C. A. 285, 129 Fed. 849, holding railroad cannot revoke executed written license to construct telegraph line on right of way; *Western U. Teleg. Co. v. Bullard*, 67 Vt. 272, 31 Atl. 286, holding abutter who consented to erection of telegraph poles in street cannot revoke license after setting of poles, without an offer to place licensee *in statu quo*.

Annotation cited in *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338, holding gratuitous license to construct logging road over land revocable, notwithstanding expenditure of money.

Distinguished in *Baltimore & H. R. Co. v. Boyd*, 63 Md. 319, holding entry and construction of railroad under license from owner will not defeat trespass for running trains; *Branson v. Philadelphia*, 47 Pa. 329, holding license from city for turn-out from railroad in public street may be appropriated by eminent domain.

Disapproved in *Richmond & D. R. Co. v. Durham & N. R. Co.* 104 N. C. 658, 10 S. E. 659, holding oral license to allow another road to lay tracks on right of way revocable at will, notwithstanding improvements.

—To mine or sink mineral wells.

Cited in *Huff v. McCauley*, 53 Pa. 206, 91 A. D. 203, holding license to take coal from land not irrevocable by mere fact that consideration was agreed to be paid for it; *Funk v. Haldeman*, 53 Pa. 229, holding license to work mines coupled with an interest not revocable at will; *Dark v. Johnston*, 55 Pa. 164, 93 A. D. 732, 24 Phila. Leg. Int. 164, holding executed license by deed to sink oil wells on land of another, irrevocable as long as license is unassigned.

Duration of license.

Cited in *Hepburn v. M'Dowell*, 17 Serg. & R. 383, holding permission to erect Am. Dec. Vol. III.—19.

dam for temporary purpose terminated by decay of dam; *Campbell v. McCoy*, 31 Pa. 263, holding agreement for valuable consideration allowing overflow of lands and erection of dam, binding on later owners, though dam had fallen down at time of their purchase; *Baldwin v. Taylor*, 166 Pa. 507, 31 Atl. 250, on duration of unrestricted license as long as thing to which it is accessory.

Distinguished in *Bishop v. Buckley*, 33 Pa. Super. Ct. 123, holding right to lay pipe on land of another for life of water privilege fixed at ten years, revocable at end of that time.

Distinction between license and easement.

Cited in *Rhodes v. Otis*, 33 Ala. 578, 73 A. D. 439, holding privilege of floating spars down private stream unconnected with occupation of land, a license, and not an easement; *Wynn v. Garland*, 19 Ark. 23, 68 A. D. 190, defining simple license as a mere authority without consideration to do particular acts on another's land without passing any estate.

Cited in note in 6 L.R.A. 160, on distinction between license and easement.

Rights derived from execution of unenforceable agreement.

Cited in *Mather's Appeal*, 1 Sadler (Pa.) 46, on creation of rights otherwise unenforceable by expenditure of money under an agreement; *Harris v. Brown*, 202 Pa. 16, 90 A. S. R. 610, 51 Atl. 586, holding permission to use firm name by sons at sheriff's sale of their business to their mother, irrevocable after expenditure of money; *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, holding that an author who, pursuant to an agreement, expended labor on revision of a book, became in equity the owner of the copyright thereof.

—Agreements as to rights in land.

Cited in *Pierce v. Cleland*, 133 Pa. 189, 7 L.R.A. 752, 19 Atl. 352, on disability after execution to revoke an agreement, not express, for common passage; *Halsey v. Peters*, 79 Va. 60; *Burkholder v. Ludlam*, 30 Gratt. 255, 32 A. R. 668,—holding equity will compel conveyance under parol gift after donee has made valuable improvements on land; *Big Mountain Improv. Co.'s Appeal*, 54 Pa. 361, enjoining ejectment against party who entered and made improvements under oral agreement for exchange; *Peters v. Jones*, 35 Iowa, 512, holding specific performance will be granted of an oral contract to convey to son who entered and made improvements; *Grant v. Davenport*, 18 Iowa, 179, holding release by ordinance of city's claim to realty, enforceable in equity where releasee paid consideration or took possession and made improvements; *Swartz v. Swartz*, 4 Pa. 353, 45 A. D. 697, holding consummation validates oral partnership for operation of mill by adjoining owners, one furnishing site and other water power; *Cole v. Ellwood Power Co.* 216 Pa. 283, 65 Atl. 678, holding leasee of quarry under parol lease reserving royalties, who expended money therein, entitled to compensation upon condemnation; *Wilgus v. Gettings*, 21 Iowa, 177, holding trade fixtures erected with an implied license from owner not part of realty in equity as to purchaser with notice; *Foster v. Bear Valley Irrig. Co.* 65 Fed. 836, holding successor of irrigation corporation which allowed certain shareholders to get water at point other than that allowed in their certificates cannot increase charge after improvements at that point; *Garrett v. Mulligan*, 10 Phila. 339, 32 Phila. Leg. Int. 142, holding oral license by other occupant of building not to object to erection of sign, irrevocable after taking of lease in reliance thereof.

Estoppel as to rights in land.

Cited in *Meigs's Appeal*, 62 Pa. 28, 1 A. R. 372, 26 Phila. Leg. Int. 236,

holding town which allowed United States to erect barracks on commons during war estopped to deny that buildings are chattels capable of removal; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 A. R. 628, 27 Phila. Leg. Int. 205, holding railroad which allowed public to use tracks as way across their lot, estopped to deny special duty; *Philadelphia & R. Coal & I. Co. v. Taylor*, 1 Legal Chron. 361, 5 Legal Gaz. 392, holding one standing by and allowing purchaser to pay price based upon entire estate including easement, estopped to claim latter; *Livengood v. Stauffer*, 31 Pa. Super. Ct. 495, holding joint owner who failed to assert rights at sale of mine cannot deny use of easement of drainage in lands held separately by him; *Schuey v. Schaeffer*, 130 Pa. 16, 18 Atl. 544, on estoppel to deny title by gift of land, after entry and valuable improvements had been made; *Kay v. Pennsylvania R. Co.* 2 Legal Gaz. 148, holding parol license accompanied with expenditure of money will estop without lapse of time.

Forfeiture of easement.

Cited in *Winham v. McGuire*, 51 Ga. 578, holding easement not forfeited by nonuser, unless for period sufficient to raise presumption of release or abandonment.

16 AM. DEC. 506, *HUSTON v. MITCHELL*, 14 SERG. & R. 307.

Authority of attorney to discharge claim by compromise or release.

Cited in *Watt v. Brookover*, 35 W. Va. 323, 29 A. S. R. 811, 13 S. E. 1007, holding employment to collect does not carry power to satisfy judgment for less than full amount; *North Whitehall Twp. v. Keller*, 100 Pa. 105, 45 A. R. 361, 12 W. N. C. 177, 39 Phila. Leg. Int. 312, holding same except in peculiar circumstances; *Derwort v. Loomer*, 21 Conn. 245, holding employment to sue no authority to compromise; *Lewis v. Woodruff*, 15 How. Pr. 539, holding simple retainer will not authorize satisfaction of judgment except upon actual payment in money of full amount; *Housenick v. Miller*, 93 Pa. 514, 8 W. N. C. 346, 37 Phila. Leg. Int. 235, denying implied power to compromise after judgment without consent of client; *Kirk's Appeal*, 87 Pa. 243, 30 A. R. 357, 35 Phila. Leg. Int. 446, holding release of judgment without client's knowledge, void; *Eaton v. Knowles*, 61 Mich. 625, 28 N. W. 740, holding authority to compromise and settle not implied from authority to prosecute a collateral action; *Silvis v. Ely*, 3 Watts & S. 420, upholding power to stay execution upon judgment in consideration of third person's promise to pay debt unknown to creditor; *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209, denying implied authority to compromise claim outside of pending litigation or not under exceptional circumstances; *Preston v. Hill*, 50 Cal. 43, 19 A. R. 647, denying power to consent to compromise judgment in open court under protest of client known to adverse attorney; *Gable v. Main*, 1 Penr. & W. 264, denying power to accept money after ejectment judgment became absolute for the land; *Mackey v. Adair*, 99 Pa. 143, 12 Pittsb. L. J. N. S. 148, 39 Phila. Leg. Int. 34, denying power to settle ejectment by execution of deeds fixing certain line as boundary between estates.

Cited in reference notes in 31 A. D. 704; 42 A. D. 656,—on authority of attorney at law; 60 A. D. 510, on attorney's authority to compromise claim or suit.

Cited in notes in 76 A. D. 261, on attorney's authority to compromise; 41 A. R. 849, on implied power of attorney to settle his client's cause of action.

— To submit to reference.

Cited in *Davidson v. Rozier*, 23 Mo. 387, upholding power to enter into refer-

ence, but not to compromise; *Bingham v. Guthrie*, 19 Pa. 418, holding unauthorized submission by attorney waived by trial without revocation or application to court for annulment.

Implied authority of attorney concerning property.

Cited in *Gray v. Howell*, 205 Pa. 211, 54 Atl. 774, denying implied authority to sell client's land in payment of services to be rendered; *Naglee v. Ingersoll*, 7 Pa. 185, holding attorney at law incompetent to make contract effecting equitable conversion of client's property; *Burkhardt v. Schmidt*, 10 Phila. 118, 31 Phila. Leg. Int. 92, denying implied power to bind client by agreement for sale of land.

Distinguished in *Foster v. Wiley*, 27 Mich. 244, 15 A. R. 185, holding client liable in trespass for taking of plaintiff's property on execution at instance of attorney after perfection of appeal.

Review of consent to arbitration.

Cited in *Millar v. Criswell*, 3 Pa. St. 449, holding consent of attorney to arbitration will not be set aside by writ of error.

Setting aside judgment and verdict.

Cited in *Conrad v. Commercial Mut. Ins. Co.* 81 Pa. 66, 29 Phila. Leg. Int. 172, denying power to set aside judgment regularly entered, and not verdict.

Distinguished in *Lance v. Bonnell*, 105 Pa. 46, 14 W. N. C. 385, 41 Phila. Leg. Int. 440, holding entry of judgment on verdict no bar to new trial if motion is made regularly and on time.

Reversing judgment by confession.

Cited in *Dodds v. Dodds*, 9 Pa. 315, reversing judgment confessed by attorney on condition which court cannot carry out.

Power to open judgment or decree.

Cited in *Cochran v. Eldridge*, 49 Pa. 365, upholding right of courts to exercise chancery power of relieving against fraudulent judgments; *Sheppard v. Gibbons*, (*Contested Elections*), 8 Phila. 469, 27 Phila. Leg. Int. 140, 2 Brewst. (Pa.) 1, upholding the power to correct errors and mistakes, but not pending a certiorari to supreme court; *Catlin v. Robinson*, 2 Watts, 373, denying power to open and let in defense of terre-tenants after lapse of three years, where purchaser had recovered in ejectment against them.

Distinguished in *Lawrence v. Rutherford*, 1 Pearson (Pa.) 555, holding assignment without notice, and lapse of several years since notice, will not prevent opening of judgment on unauthorized appearance.

16 AM. DEC. 508, SCOTT v. GALLAGHER, 14 SERG. & R. 333.

Validity of secret trust.

Cited in *Yocom v. Morris*, 3 Phila. 414, 16 Phila. Leg. Int. 173, holding positive, direct, and express notice necessary to affect purchaser of legal title with trust; *Bracken v. Miller*, 4 Watts & S. 102, on same point; *Reed v. Munn*, 80 C. C. A. 215, 148 Fed. 737, holding intangible and inconsequential incidents insufficient to charge notice of trust; *Juvenal v. Patterson*, 10 Pa. 282, holding collateral agreement between lessor and lessee as to arrears of rent no defense to action by assignee of rent without notice; *Tuttle v. Walton*, 1 Ga. 43, holding lien of corporation on shareholder's stock valid against purchaser with notice at judicial sale; *Packard v. The Louisa*, 2 Woodb. & M. 48, Fed. Cas. No. 10,652, denying secret claim of seaman on vessel after dissolution of articles as against subsequent purchasers without notice; *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed.

Cas. No. 1,331, holding it competent in equity between original parties to show that a deed was intended to be a mortgage; Groton Sav. Bank v. Batty, 30 N. J. Eq. 126, holding insolvent occupant who placed legal title in mortgagor and failed to give notice estopped to assert notice from possession to defeat taker of mortgage.

Purchase of trust property.

Cited in reference notes in 32 A. D. 705, on purchaser of property held in trust as a trustee; 52 A. D. 384, on bona fide purchaser taking property discharged of the trust.

What constitutes notice.

Cited in reference note in 26 A. D. 199, on notice of trust to purchaser.

Cited in notes in 63 A. S. R. 470, on what constitutes notice of a trust; 19 A. S. R. 267, on sales and conveyances by trustee.

— Possession generally as.

Cited in Hamilton v. Fowlkes, 16 Ark. 340, holding purchaser chargeable with notice from actual, open, and visible possession of one claiming title under agreement; Mullins v. Wimberly, 50 Tex. 457, holding exceptions to rule that possession is notice of occupant's rights, limited to cases where tenant is in default in putting title on records or in misleading purchaser; Hunter v. Watson, 12 Cal. 363, 73 A. D. 543, holding that possession by an administrator was under the facts not notice; Tufts v. Tufts, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, on general rule that possession operates as notice; Wickes v. Lake, 25 Wis. 71 (dissenting opinion), on insufficiency of possession to charge notice, where consistent with legal title; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847, on possession of tenant as notice of his own title but not of the title under which he claims.

Cited in reference notes in 25 A. D. 676, on possession as notice; 28 A. D. 51, as to when possession is notice of occupant's title.

Cited in notes in 23 A. D. 53, on possession of land putting purchaser on inquiry; 13 L.R.A.(N.S.) 123, on possession of land by *cestui que trust* as notice of title; 13 L.R.A.(N.S.) 66, on ignorance or knowledge of possession of land as affecting notice of title; 13 L.R.A.(N.S.) 68, on what must be covered by inquiry as to title of land of which another is in possession; 13 L.R.A.(N.S.) 75, as to what possession of land is notice of.

— Continued possession by grantor as.

Cited in Koon v. Tramel, 71 Iowa, 132, 32 N. W. 243; Hafter v. Strange, 65 Miss. 323, 7 A. S. R. 659, 3 So. 190; Bingham v. Kirkland, 34 N. J. Eq. 229; Eylar v. Eylar, 60 Tex. 315; Bloomer v. Henderson, 8 Mich. 395, 77 A. D. 453,—holding possession by grantor not notice to purchaser on faith of recorded conveyance; Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441, holding same especially where grantor acted as agent grantee; Hockman v. Thuma, 68 Kan. 519, 75 Pac. 486; Brophy Min. Co. v. Brophy & D. G. & S. Min. Co. 15 Nev. 101; McNeil v. Jordan, 28 Kan. 7,—holding rule of notice from possession inapplicable to continued possession by grantor; Cook v. Travis, 20 N. Y. 400 (affirming 22 Barb. 338), holding judgment debtor continuing possession after execution sale presumed to hold under title of purchaser; Hood v. Fahnestock, 1 Pa. St. 470, 44 A. D. 147, holding possession of defrauded grantor by his tenants, constructive notice to purchaser at sheriff's sale as property of grantee; Turman v. Bell, 54 Ark. 273, 26 A. S. R. 35, 15 S. W. 886, holding possession of farm land by grantor for six months after conveyance and during seeding season, notice to

purchaser in absence of an estoppel; *Harris v. Arnold*, 1 R. I. 125, holding open and continued possession of land with an unrecorded deed not presumptive notice to subsequent purchaser; *Tuttle v. Churchman*, 74 Ind. 311, holding purchaser of judgment appearing on record as lien against grantee in recorded deed will be protected against grantor in possession under an unrecorded reconveyance.

Distinguished in *Rowe v. Beam*, 105 Pa. 543, 14 W. N. C. 293, 14 Pittsb. L. J. N. S. 418, 41 Phila. Leg. Int. 136, holding mortgagee charged with notice of equities of occupant other than holder or grantee of record title, which he failed to investigate.

Criticized in *Kahre v. Rundle*, 38 Neb. 315, 56 N. W. 888, holding possession of defrauded grantor notice to purchaser from grantee, who knew of possession and failed to make inquiry.

16 AM. DEC. 513, GARDNER v. FERREE, 15 SERG. & R. 28.

Discharge of surety.

Cited in *Greenawalt v. Kreider*, 3 Pa. 264, 45 A. D. 639, holding notice by surety to creditor that he would no longer consider himself bound, and request to take another bond or payment, will not discharge surety.

— By extension to principal.

Cited in *Huey v. Pinney*, 5 Minn. 310, Gil. 246, holding extension without consent of surety will discharge.

— By omitting or refusing to sue principal.

Cited in *Higerty v. Higerty*, 1 Phila. 232, 8 Phila. Leg. Int. 134, 5 Clark (Pa.) 74, 4 Am. L. J. 102, holding mere fact that no legal steps have been taken against principal does not discharge surety; *Osborne v. Campbell*, 5 Kulp, 248, 6 Pa. Co. Ct. 523, holding surety not discharged by mere neglect to pursue principal until after he became insolvent; *Donough v. Boger*, 10 Phila. 616, 31 Phila. Leg. Int. 286, 2 Legal Chron. 209, holding demand on creditor required to be given by a surety in order to discharge him should be clear and explicit to proceed and collect the debt; *Erie Bank v. Gibson*, 1 Watts, 143, holding that request must be accompanied by explicit declaration by surety that if suit is not brought he will consider himself discharged; *Warner v. Beardsley*, 8 Wend. 194, holding surety must show principal was solvent and suable in same jurisdiction, and inexcusable neglect or refusal to sue till after his insolvency; *Re Keller*, 1 Legal Chron. 190, holding mere omission of creditor to collect his debt from the principal will not discharge surety; *Stark v. Fuller*, 42 Pa. 320, on question when surety will be discharged by notice to creditor to sue; *Harvey v. Turner*, 4 Rawle, 223, on question when failure of principal to sue will discharge surety.

Cited in note in 34 A. R. 580, on failure to sue principal on request as discharge of surety.

Disapproved in *Harris v. Newell*, 42 Wis. 687; *Taylor v. Beck*, 13 Ill. 376,—holding surety not permitted to discharge himself by requesting creditor to proceed against the principal.

Right of sureties to subrogation.

Cited in *Reading Trust Co. v. Boyer*, 15 Pa. Dist. R. 45, on question of rights of sureties to subrogation upon payment of judgment against principal.

16 AM. DEC. 516, BARNET v. BARNET, 15 SERG. & R. 72.

Sufficiency and necessity of acknowledgment.

Cited in reference notes in 57 A. D. 197, on necessity and character of acknowl-

edgments in deed; 42 A. D. 202, on effect of defective acknowledgments; 1 A. D. 82, as to when certificate of acknowledgment is conclusive.

— By married woman.

Cited in *Spencer v. Reese*, 165 Pa. 158, 30 Atl. 722, 35 W. N. C. 449, 25 Pittsb. L. J. N. S. 257; *Paine v. Baker*, 15 R. I. 100, 23 Atl. 141,—holding under statute certificate of acknowledgment of deed by married woman must state that instrument was shown and explained to her by officer taking acknowledgment; *Kunkle v. Davidson*, 31 Pa. Co. Ct. 298, holding separate acknowledgment of married woman is fatally defective if it does not affirmatively show that the contents of the instrument were made known to her; *Kaiser's Estate*, 14 Pa. Super. Ct. 155, holding it not necessary that certificate be in exact language of the statute, but it must embody all the essential elements thereof.

Cited in reference notes in 32 A. D. 767, on sufficiency of acknowledgment of deed by married woman; 55 A. D. 413, as to when deed of married woman is void for want of proper acknowledgment.

Cited in note in 41 A. D. 182, on necessity of explaining contents of deed to married woman on taking her acknowledgment.

Constitutionality of retrospective statutes.

Cited in *Weister v. Hade*, 52 Pa. 474, holding legislature has power to legislate retrospectively in all matters not penal, not in violation of contracts, and not forbidden by Constitution; *Rich v. Flanders*, 39 N. H. 304, holding retroactive statute removing disqualification of witnesses, valid.

Cited in reference notes in 58 A. D. 73, on constitutionality of retrospective act; 33 A. D. 157, on statutes impairing obligation of contracts; 30 A. D. 274, on statutes impairing vested rights or obligation of contracts; 47 A. D. 398, on constitutionality of acts validating deeds of married women.

Cited in notes in 41 L. ed. U. S. 97, on retroactive laws and laws impairing vested rights; 84 A. S. R. 449, on validity of statutes impairing the marital obligation.

— Curative acts generally.

Cited in *Huffman v. Alderson*, 9 W. Va. 616; *Dentzel v. Waldie*, 30 Cal. 138,—holding statute designed to validate contracts made in good faith, but not in precise statutory mode, does not impair vested right; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Johnson v. Richardson*, 44 Ark. 365; *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *Shonk v. Brown*, 61 Pa. 320, 26 Phila. Leg. Int. 221; *Tilton v. Swift*, 40 Iowa, 78,—holding courts will sustain those which, without disturbing vested rights of property, cure defects in acts done; *Louisville v. McKegney*, 7 Bush, 651; *People v. Moore*, 1 Idaho, 662,—holding curative act did not affect existing judgments; *Lycoming County v. Union County*, 15 Pa. 166, 53 A. D. 575, holding where moral obligation exists, the legislature may give it legal effect.

— Acts curative of conveyances.

Cited in *Mercer v. Watson*, 1 Watts, 330; *Johnson v. Taylor*, 60 Tex. 360; *Kunkle v. Davidson*, 31 Pa. Co. Ct. 298,—holding defective acknowledgment of married woman may be cured by subsequent legislation; *Good v. Zercher*, 12 Ohio, 364 (dissenting opinion), on same question; *New York & O. Land Co. v. Weidner*, 169 Pa. 359, 32 Atl. 557, 36 W. N. C. 461, 26 Pittsb. L. J. N. S. 175, upholding curative act making deeds with defective acknowledgments valid; *Parkison v. Bracken*, *Burnett* (Wis.) 13, 1 *Pinney* (Wis.) 174, 39 A. D. 296, holding act of Congress curing defects in land patents, valid; *Smith v. Callaghan*, 66 Iowa, 552,

24 N. W. 50; *State, New Jersey R. & Transp. Co., Prosecutor, v. Newark*, 27 N. J. L. 185,—holding laws passed to remedy the defective execution of powers, though retrospective in their operation, are valid; *Shoenberger v. Pittsburgh*, 32 Pa. 34, holding *contra* of act conferring power in default of appointment by donee; *Menges v. Wertman*, 1 Pa. 218, holding statute confirming sheriff's conveyance of land, part of which was out of his bailiwick, valid.

Cited in reference notes in 74 A. S. R. 93, on statutes curing defective acknowledgments; 30 A. S. R. 125, on constitutionality of statute correcting defective acknowledgment; 84 A. S. R. 437, on constitutionality of acts validating contracts and deeds of married women.

Cited in notes in 22 L.R.A. 384, on constitutionality of statute to cure defective acknowledgment; 52 A. D. 525, on constitutionality of acts passed to cure defects in acknowledgment of deeds of married woman.

Extraneous evidence as to matters certified in acknowledgment.

Cited in *Jamison v. Jamison*, 3 Whart. 457, 31 A. D. 536; *Solt v. Anderson*, 71 Neb. 826, 99 N. W. 678; *O'Ferrall v. Simplot*, 4 Iowa, 381,—holding it not admissible; *Rollins v. Menager*, 22 W. Va. 461; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932; *Miller v. Wentworth*, 82 Pa. 280, 4 W. N. C. 82, 33 Phila. Leg. Int. 436,—holding in absence of fraud or duress upon a wife, a certificate of acknowledgment of a deed by her is conclusive of the facts therein stated; *Johnston v. Wallace*, 53 Miss. 331, 34 A. R. 699, holding married woman cannot attack her deed purporting to have been duly acknowledged, by proof that acknowledgment was taken in presence of husband; *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622, 49 N. W. 500, holding extraneous evidence to overcome certificate of wife's acknowledgment to a deed on ground of duress of her husband must be strong and convincing; *Louden v. Blythe*, 16 Pa. 532, 55 A. D. 527, holding parol evidence may be introduced to show that acknowledgment by *feme covert* was extorted from her by fraud and imposition.

Cited in reference notes in 1 A. D. 81, on parol evidence affecting acknowledgment; 22 A. D. 102, on parol evidence to vary certificate of acknowledgment; 75 A. S. R. 810, on parol evidence to supply defects in certificate of acknowledgment.

Right of widow to damages for detention of dower.

Cited in *Benner v. Evans*, 3 Penr. & W. 454, holding evidence of annual value of land of which husband did not die seised not admissible in action of dower; *Gannon v. Widman*, 15 Pa. Co. Ct. 474, 3 Pa. Dist. R. 835, 25 Pittsb. L. J. N. S. 249, on widow's right to such damages depending on husband dying seised.

Cited in note in 21 L.R.A. 186, on right of dowress to mesne profits or damages for detention of dower.

16 AM. DEC. 520, DOUGHERTY v. SNYDER, 15 SERG. & R. 84.

Conflict of laws as to husband and wife.

Cited in notes in 85 A. S. R. 574, on conflict of laws as to contracts between husband and wife; 7 L.R.A. 126, on marriage as governed by law of place where entered into.

Mode of proving foreign laws.

Cited in *McNeill v. Arnold*, 17 Ark. 154; *Watson v. Walker*, 23 N. H. 471; *Charlotte v. Chouteau*, 25 Mo. 465,—holding if law is unwritten it may be proved by parol, but, if written, by laws themselves properly authenticated; *Inge v. Murphy*, 10 Ala. 885, holding modifications of common law of a sister state, by its judicial decisions, may be proved by the production of the reports of adjudged

cases, accredited in the particular state; *Franklin v. Twogood*, 25 Iowa, 520, 96 A. D. 73, on question of manner of proof of foreign laws.

Cited in reference notes in 43 A. S. R. 795, on proof of foreign laws; 22 A. D. 127, 148, on mode of proving foreign laws; 113 A. S. R. 882, on proof by expert witnesses of laws of sister states or foreign countries.

Cited in notes in 25 L.R.A. 449, 450, on oral proof of foreign laws; 25 L.R.A. 451, 452, 454, on oral proof of foreign unwritten or common law; 66 A. D. 233, on proof of laws by expert testimony; 113 A. S. R. 882, on kind of evidence by which laws of sister states or of foreign countries may be proved; 113 A. S. R. 883, on effect of decisions of courts or of law treatises by writers of recognized authority as evidence of laws of sister states or foreign country; 94 A. S. R. 535, on what will disprove jurisdiction to render foreign judgment.

Effect of foreign laws.

Cited in *Bock v. Lauman*, 24 Pa. 435, holding interpretation of foreign laws is not matter of fact for jury, but is within province of the court; *Sidwell v. Evans*, 1 Penr. & W. 383, 21 A. D. 387, holding construction of foreign statutes belongs to the court.

Wife's liability for debts under laws of Louisiana.

Cited in *Partee v. Silliman*, 44 Miss. 272, holding her liable for debts contracted for her individual use or for rendering her paraphernal property more productive, or in supporting those marriage charges which she is bound to bear.

Domicil of husband and wife.

Cited in *Harrison v. Harrison*, 20 Ala. 629, 56 A. D. 227, holding they cannot be domiciled in different states; *Kayser's Estate*, 18 Pa. Co. Ct. 609, 5 Pa. Dist. R. 738, holding domicil of wife is that of the husband; *Howland v. Granger*, 22 R. I. 1, 45 Atl. 740, holding wife cannot acquire a domicil distinct from that of her husband so as to affect the liability of her personal estate to taxation at place of her husband's domicil.

Cited in reference note in 56 A. D. 235, as to when domicil of husband is that of wife.

Liability of executors for deficit when estate is divided without account.

Cited in *Gardiner's Estate*, 18 Phila. 30, 43 Phila. Leg. Int. 98, 18 W. N. C. 148, holding in such case executors are liable on bond for a deficit.

— Where account has been confirmed.

Cited in *Jones's Appeal*, 39 Phila. Leg. Int. 53, 11 Pittsb. L. J. N. S. 376, on liability to creditors of administratrix failing to take refunding bonds from distributees.

Suits by married woman against husband.

Cited in *Johnston v. Johnston*, 7 Pa. Dist. R. 555, holding act of June 8, 1893, was designed to effectually settle the question, and no suits other than those under the circumstances and for the purposes enumerated in that act, can be sustained.

Cited in reference note in 95 A. R. 199, on wife's right to sue husband.

Cited in note in 73 A. S. R. 269, on suits between husband and wife after dissolution of marriage.

Statute of limitations and disabilities.

Cited in *Hill v. Meyers*, 46 Pa. 15, holding statute does not run pending disability to sue.

16 AM. DEC. 531, COM. v. ARRISON, 15 SERG. & R. 127.**Quo warranto for corporate usurpation.**

Cited in *State ex rel. Atty. Gen. v. Topeka*, 30 Kan. 653, 2 Pac. 587, holding city may be ousted by quo warranto from power it is unlawfully exercising in licensing sale of intoxicating liquors; *Com. v. M'Closkey*, 2 Rawle, 369, holding supreme court may thus inquire into legality of proceeding of commissioners in setting aside township election, although commissioners had full power under statute to approve the election or set it aside.

Cited in reference notes in 1 A. S. R. 500, on discretion as to grant of quo warranto; 14 A. S. R. 677, on quo warranto against corporation.

Cited in notes in 28 L. ed. U. S. 483, as to when quo warranto will lie against a corporation; 30 A. D. 48, on quo warranto to correct misuse or usurpation of franchise by private corporations.

— To try title to public office.

Cited in *Cochran v. McCleary*, 22 Iowa, 75, holding right to a public office or franchise cannot be determined by injunction quo warranto being proper proceedings; *Com. v. Allen*, 70 Pa. 465, 4 Legal Gaz. 49, holding court might issue quo warranto to determine title of city councilman to office; *Seneca Nation of Indians v. John*, 27 Abb. N. C. 253, holding quo warranto proper proceeding to contest title of person to office of president of Seneca nation.

— To inquire of private franchises or corporations.

Cited in *Com. v. Frankfort*, 13 Bush, 185, holding an information would lie at common law to prevent the usurpation of a private franchise; *Re Union Ins. Co.* 22 Wend. 591, holding it may be used for trying right to office in private as well as public corporations; *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080, on same point; *People ex rel. M'Kinch v. Bristol & R. Turnp. Road*, 23 Wend. 222, holding charter of corporation may be totally forfeited in quo warranto proceedings; *Com. v. Delaware & H. Canal Co.* 43 Pa. 295, holding state has power to inquire by quo warranto whether or not a contract between two corporations is in excess of power of either.

— To try rights in church offices.

Cited in *Com. ex rel. Gordon v. Graham*, 64 Pa. 339, holding quo warranto is proper remedy against persons usurping the office of trustees of chartered church; *State ex rel. Dunlap v. Stewart*, 6 Houst. (Del.) 359, holding quo warranto will lie at suit of vestrymen of Protestant Episcopal Church, incorporated in conformity with provisions of statute as trustees to take charge of temporalities of the church, to recover their office as vestrymen against others wrongfully intruding into it.

Leave to private relator to file information for quo warranto.

Cited in *State ex rel. Lloyd v. Elliott*, 13 Utah, 200, 44 Pac. 248, holding permission to file information at relation of private person rests in discretion of court to which application is made.

What constitutes franchise.

Cited in *Com. v. Sandy Lick Gas, Coal & Coke Co.* 16 Phila. 599, 40 Phila. Leg. Int. 272, 1 Dauphin Co. Rep. 314, giving definition of "franchise."

Prerogatives of state or government.

Cited in *United States v. Hewes*, 4 Clark (Pa.) 358, 2 Am. L. J. 204, on existence of prerogative rights in the state.

16 AM. DEC. 536, HART v. BOLLER, 15 SERG. & R. 162.**Bill or note as payment.**

Cited in *First Nat. Bank v. Newton*, 10 Colo. 161, 14 Pac. 428, holding giving of debtor's own note, bill, or check, or note, bill, or check of third person, to meet antecedent indebtedness, is *prima facie* not a payment of such indebtedness; *McIntyre v. Kennedy*, 29 Pa. 448, holding as to check of third party presumption is that it was received as a conditional payment effective when paid; *Union Bank v. Smiser*, 1 Sneed, 501, holding acceptance of a promissory note or bill of a third person, if voluntary and not a measure of necessity when nothing else could be obtained, will support the defense of payment; *Jones v. Shawhan*, 4 Watts & S. 257, holding acceptance of a note for the amount of the account of mechanic is not such a satisfaction as will prevent a lien but a receipt at the foot of the bill for the note "in full of the above" is evidence of satisfaction which should be left to the jury; *Edminston v. Harris*, 5 Legal Gaz. 100; *Cake v. First Nat. Bank*, 86 Pa. 303, 5 W. N. C. 244, 35 Phila. Leg. Int. 112; *Stone v. Miller*, 16 Pa. 450,—holding whether a note or bond is accepted in satisfaction of the original claim is for jury; *Briggs v. Holmes*, 45 Phila. Leg. Int. 106, holding whether cashier's check was received as absolute or conditional payment, question of fact.

Cited in reference notes in 42 A. D. 383, on effect of accepting note for pre-existing debt; 24 A. D. 640; 27 A. D. 192,—as to when note given by debtor or third person operates as payment; 50 A. S. R. 716, on acceptance of new security as extinction of old debt; 27 A. D. 641, on presumption of payment arising from taking note.

Cited in notes in 20 A. D. 462, on payment by note; 37 A. D. 48, on extinguishment of debt by note or order.

—New note as payment of old.

Cited in *Bixler v. Lesh*, 6 Pa. Super. Ct. 459; *Mason v. Wickersham*, 4 Watts & S. 100; *Kemmerer's Appeal*, 102 Pa. 558; *Brown v. Scott*, 51 Pa. 357,—holding if one gives note to creditor for the same sum, without any new consideration, the second note will not be a satisfaction of the first, unless so intended and accepted, and that intention is for the jury; *Yates v. Valentine*, 71 Ill. 643, holding if subsequent note was so executed and accepted by respective parties the satisfaction is complete, and it is question for jury to determine; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210, holding if taken in renewal, presumption will be that new note is not payment of old one; *Fulmer v. Boyer*, 11 Lanc. L. Rev. 209, on renewal of bill or note as payment; *Re Patterson*, 3 Legal Chron. 47; *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922,—holding express agreement required to extinguish one note by another; *Mills v. McDavit*, 4 Luzerne Leg. Reg. 293; *Shrewsbury Sav. Institution's Appeal*, 94 Pa. 309, 9 W. N. C. 166, 37 Phila. Leg. Int. 413,—holding renewal not payment unless so accepted and intended; *Keel v. Larkin*, 72 Ala. 493, holding new note only *prima facie* collateral or additional security, but by express agreement it may be regarded as satisfaction; *Harvey v. First Nat. Bank*, 56 Neb. 320, 76 N. W. 870, holding renewal note no discharge of debt; *Weakly v. Bell*, 9 Watts, 273, 36 A. D. 116, holding taking new note of equal degree, either from debtor himself or from a stranger, at instance of debtor, is not of itself extinguishment of the first, and indorser is not released; *Lisahy v. O'Brien*, 4 Watts, 141, holding promissory note of third person, given as collateral security for debt, may be sued, and the amount recovered whenever it becomes due, without first resorting for payment to original debtor; *Hacker v. Perkins*, 5 Whart. 95, holding a new note given for renewal of old, and not for

money loaned; *Hoocker v. Hoerner*, 2 Pearson (Pa.) 78, on question of intention when new note is taken for old one; *Lee v. Fontaine*, 10 Ala. 755, 44 A. D. 505, on satisfaction of one note by substitution of another; *Allentown Nat. Bank v. Clay Product Supply Co.* 217 Pa. 128, 66 Atl. 252, on note as renewal of former one.

Action on original debt when note has been given therefor.

Cited in *Hays v. M'Clurg*, 4 Watts, 452, holding if negotiable note is given for goods sold and charged to purchaser, recovery cannot be had on original sale without producing note, or satisfactorily accounting for its absence or loss.

Accord and satisfaction as question of fact.

Cited in *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465, 97 S. W. 188; *Frick v. Algeier*, 87 Ind. 255,—holding to constitute accord and satisfaction, that which is received by creditor must be accepted by him in satisfaction, and whether there was such acceptance is question for jury; *Megrath v. Gilmore*, 10 Wash. 339, 39 Pac. 131, holding it for jury whether receiving of a check for the amount of a disputed claim is an acceptance as a full settlement, although check recites that it is; *Shoemaker v. Fegley*, 14 Pa. Dist. R. 850, on existence of accord as question for the jury.

16 AM. DEC. 537, DAVIS v. HARVARD, 15 SERG. & R. 165.

Conclusiveness of awards.

Cited in *Speer v. M'Chesney*, 2 Watts & S. 233, holding reference and award conclusive in determining dispute about personal right; *Shaw v. State*, 125 Ala. 80, 28 So. 390, holding award conclusive only as to subject of dispute before the arbitrators.

Cited in reference note in 38 A. D. 493, on conclusiveness of awards.

Cited in notes in 11 L.R.A. 625, on correction of mistake in award; 3 E. R. O. 510, on award as bar to all matters included in submission.

—Award settling boundary.

Cited in *Bowen v. Cooper*, 7 Watts, 311, holding award on parol submission of boundary line dispute conclusive between adjoining owners; *Perot v. Packer*, 2 Ashm. (Pa.) 165, on same point.

Cited in reference notes in 42 A. D. 537, on conclusiveness of award determining boundary line; 27 A. D. 122, on settlement of disputed boundary by express or implied agreement.

16 AM. DEC. 543, McMULLEN v. WENNER, 16 SERG. & R. 18.

Judgment as lien on interest of vendor in land.

Cited in *Minneapolis & St. L. R. Co. v. Wilson*, 25 Minn. 382, holding interest of obligor in bond for deed bound by lien of judgment duly docketed against him, in county where land is situate; *Kinports v. Boynton*, 120 Pa. 306, 6 A. S. R. 706, 21 W. N. C. 437, 14 Atl. 135, 45 Phila. Leg. Int. 338, holding lien of judgment against vendor will bind estate of vendor so long as the contract remains unexecuted, and to the extent it is unexecuted; *Stewart v. Coder*, 11 Pa. 90, holding judgments against vendor who retains legal title for security cannot be disturbed by an attachment subsequently issued for the money due by vendee, upon a judgment subsequently rendered against the vendor.

Cited in notes in 93 A. D. 353, on effect of judgment lien on interests of vendor and vendee; 117 A. S. R. 785, on judgment lien as affecting property sold under executory contract; 57 L.R.A. 645, on nature of interest of vendor or vendee in

land contract as real or personal property when judgment has been entered against vendor.

Leviability of equitable estates.

Cited in *Reynolds v. Fleming*, 43 Minn. 513, 45 N. W. 1099, holding interest of vendee under subsisting contract under which he has entered and made improvements and paid part of purchase money is subject to levy and sale; *Com. ex rel. Brewster v. Woods*, 6 Legal Gaz. 45, holding vendee in possession of land under agreement after part payment has interest subject to lien of judgment; *Schock v. Banks*, 1 Legal Chron. 221, holding judgment binds both legal and equitable estate of defendant in land.

Title of execution purchaser on sale of vendor's or purchaser's estate.

Cited in *Wilkerson v. Burr*, 10 Ga. 117; *Vierheller's Appeal*, 24 Pa. 105, 62 A. D. 365; *Catlin v. Robinson*, 2 Watts, 373,—holding purchaser under judgment against vendee or vendor succeeds to but the interest which the debtor had power to encumber or part with; *Secombe v. Steele*, 20 How. 94, 15 L. ed. 833, holding creditors of vendor who recovered judgments and sold the property, pending a suit for specific performance, in which the purchase money had been paid into court, are not necessary parties to the suit, nor are the purchasers at the sheriff's sale under such judgments; *Wilson v. Stoxe*, 10 Watts, 434, holding holder of legal title to land who, under his judgment for the purchase money, has sold the equitable estate, has no preference as such holder of the legal title, over an older judgment, as to proceeds of sale in sheriff's hands; *Garrard v. Lantz*, 12 Pa. 186, holding equitable vendee who purchases at sheriff's sale under judgment younger than equitable sale is deemed trustee for his vendor of a beneficial interest in land, to extent of unpaid purchase money.

Lien of vendor of land.

Cited in *Re Clark*, 118 Fed. 358, holding under law of Pennsylvania a vendor of land by contract to convey, on payment of purchase price, has no lien on the land distinct from his legal estate in it.

Effect on contract of sale, of sale of property under prior encumbrance.

Cited in *Mellon's Appeal*, 32 Pa. 121, holding sale under an encumbrance older than title of either vendor or vendee does not in all cases destroy the contract of purchase, if enough of the purchase money be presently payable to extinguish the outstanding encumbrance.

Estoppel in pais to deny validity of obligation.

Cited in *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904; *Hamer v. Johnston*, 5 How. (Miss.) 698; *Decker ex rel. Frytenberger v. Eisenhauer*, 1 Penr. & W. 476; *Holbrook v. Colburn*, 6 Rich. Eq. 289; *Watson v. McLaren*, 19 Wend. 557,—holding declaring a note to be good to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against debtor; *Elliott v. Callan*, 1 Penr. & W. 24, holding obligor estopped as to assignee whom he induced to take bill by stating that it would be paid; *Edgar v. Kline*, 6 Pa. 327, holding as to non-negotiable note declaration of maker thereof that it was valid, and would be paid, precludes maker from any inquiry into adequacy of the consideration or fairness of original transaction; *Brown v. Wright*, 17 Ark. 9, holding maker of bond who assures assignee, before assignment, that it will be paid at maturity, and afterwards pleads no consideration, must prove that he was ignorant of any equity that would release him; *Hubbard v. Briggs*, 31 N. Y. 518, holding one who assigned to and deposited with Comptroller of Currency a certain bond and mortgage as security for circulating notes estopped

from denying its validity in hands of comptroller; *Rorabaugh v. Schrubbs*, 25 Pa. Co. Ct. 573, holding as to duebill innocent purchaser from one in possession will take title notwithstanding the fact that the real ownership was in another, especially where payee's possession was result of act or omission of owner; *Scott v. Sadler*, 52 Pa. 211, 23 Phila. Leg. Int. 245, holding mortgagor who, having paid mortgage, secured another party to purchase it representing that whole mortgage debt was due, estopped from showing payment; *Kunkle v. Davidson*, 31 Pa. Co. Ct. 298, holding separate acknowledgment of married woman defective for not affirmatively showing that contents of instrument were made known to her may be cured by subsequent legislation; *Hardin v. Helton*, 50 Ind. 319, on question of estoppel; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109, holding defendant not limited to showing payments or set-offs made before notice of the assignment, but may prove a total or partial failure of consideration for which the writing was executed; *Jones v. Streeter*, 8 Fla. 83 (dissenting opinion), as to defenses available against assignee.

Cited in note in 23 L.R.A. 309, on estoppel to setoff against assigned claim of debtor's demand against assignor.

Defenses available against assignee.

Cited in *Taylor v. Gitt*, 10 Pa. 428, holding assignee for value of a sealed note without notice, not affected with fraud between his assignor and obligee, which as between them would avoid the previous transfer.

16 AM. DEC. 546, *TATE v. STOOLTZFOOS*, 16 SERG. & R. 35.

Sufficiency and necessity of acknowledgment.

Cited in reference note in 57 A. D. 197, on necessity and character of acknowledgments in deed.

Cited in note in 41 A. D. 180, on private examination of married woman on taking her acknowledgment.

Curing defective acknowledgments by subsequent legislation.

Cited in *Maxey v. Wise*, 25 Ind. 2, holding act to cure defects in deeds validated acknowledgement defective for lack of notarial seal; *Shrawder v. Snyder*, 142 Pa. 7, 28 W. N. C. 85, 21 Atl. 796, holding defective acknowledgment validated by subsequent legislation; *M'Masters v. Com. 3 Watts*, 294; *Watson v. Mercer*, 8 Pet. 109, 8 L. ed. 884 (affirming 1 Watts, 356), holding act valid curing defective acknowledgments by reason of informality or omission in certificates; *New York & O. Land Co. v. Weidner*, 169 Pa. 365, 36 W. N. C. 464, 32 Atl. 557 (affirming 3 Lack. Legal News, 252), holding valid act making admissible in evidence certain deeds notwithstanding defects in acknowledgment; *Johnson v. Richardson*, 44 Ark. 373, declaring valid statute validating conveyances, void for defective acknowledgment, so as to defeat action by widow for dower; *Newman v. Samuels*, 17 Iowa, 553, holding act curing defective acknowledgments cannot operate to divest rights of purchaser acquired without notice of prior deed; *Satterlee v. Matthewson*, 16 Serg. & R. 191 (dissenting opinion), on act curing defective acknowledgments as interference with vested rights; *Good v. Zercher*, 12 Ohio, 371 (dissenting opinion), on constitutionality of act intended to cure defective acknowledgments of husband and wife.

Cited in reference note in 74 A. S. R. 93, on statutes curing defective acknowledgments.

Constitutionality of ex post facto and retrospective laws.

Cited in reference notes in 30 A. D. 274, on statutes impairing vested rights or

obligation of contracts; 47 A. D. 398, on constitutionality of acts validating deeds of married women; 10 A. D. 133, on restrospective laws.

— **Statutes curing irregular or defective proceedings.**

Cited in *Simmons v. Hanover*, 23 Pick. 194, holding act remedial which validates orders and decrees of court or judge though made without jurisdiction; *Lane v. Nelson*, 79 Pa. 410, 2 W. N. C. 217, which holds act valid ratifying and confirming sale of land under order of orphans' court in one county though land wholly in another county; *Richards v. Rote*, 68 Pa. 255, declaring invalid act to validate proceedings in partition the effect of which was to divest one owning undivided interest in property and vesting his interest in another styled trustee; *Etheridge v. Vernoy*, 71 N. C. 188, declaring valid act validating appointments of trustees made *ex parte*, so far as regards parties to actions and proceedings; *Eastman v. McCarten*, 70 N. H. 24, 45 Atl. 1081, holding act not retrospective legalizing and confirming selectmen's warrant improperly posted, and proceedings thereunder; *People ex rel. Pitts v. Ulster County*, 63 Barb. 87, holding act prospective authorizing supervisors to legalize irregular acts of town officer if legalization recommended by county court; *Syracuse City Bank v. Davis*, 16 Barb. 191, holding valid act curing informalities and defects in proceedings to organize bank although it might operate upon existing contracts; *Allen v. Archer*, 49 Me. 350, declaring valid act confirming proceedings of town redistricting for schools; *Dentzel v. Waldie*, 30 Cal. 144, declaring valid act intended to cure powers of attorney executed improperly by married women.

Cited in notes in 30 A. S. R. 125; 22 L.R.A. 384,—on constitutionality of statute to cure defective acknowledgment; 18 A. D. 519, on constitutionality of acts validating contracts and deeds of married women.

Distinguished in *Richards v. Rote*, 3 Legal Gaz. 198, holding legislature without power to validate void partition proceedings.

— **Statutes affecting right of action or defense.**

Cited in *Johnson v. Taylor*, 60 Tex. 368, holding act not retroactive in form giving right of action to party interested to obtain judgment correcting defective certificate of acknowledgment; *Burget v. Merritt*, 155 Ind. 150, 57 N. E. 714, declaring act valid estopping children who had conveyed their interests under "childless wife" acts to decedent father's estate, from claiming such interest thereafter; *DeMoss v. Newton*, 31 Ind. 221, holding that where right springs from legislative enactment, and not from contract, legislature exclusive judge of reasonable limitation of action to enforce it; *Danville v. Pace*, 25 Gratt. 12, 18 Am. Rep. 663, declaring valid act taking away from corporations defense of usury as applied to existing contracts.

— **Statutes affecting pending actions or procedure.**

Cited in *Vaughan v. Bowie*, 30 Ark. 283, sustaining statute conferring jurisdiction on court of law in illegal tax matters as applied to suit pending when act took effect; *Searcy v. Stubbs*, 12 Ga. 439, declaring valid statute providing that suits pending against deceased receiver of bank should not abate; *Re Koch*, 5 Rawle, 341, holding legislation affecting pending causes valid when it affects remedy only without affecting vested rights; *Tilton v. Swift*, 40 Iowa, 80, holding legislation not retrospective within constitutional inhibition providing for the return of verdict and rendering of judgment thereon at subsequent term of court; *Wilder v. Lumpkin*, 4 Ga. 220, declaring act invalid, as taking away vested rights, providing that from and after passage of act it will not be necessary to join with parties to suit the security on appeal; *Huffman v. Alderson*, 9 W. Va. 628, declar-

ing valid, act permitting replication to plea of statute of limitations that it was suspended during period of Civil War; *Adle v. Sherwood*, 3 Whart. 484, holding valid retrospective statute providing for laying out of streets and making copy of report of commissioners' evidence; *Reynolds v. Randall*, 12 R. I. 531 (dissenting opinion), on validity of statute prohibiting the use of an easement to be admitted as evidence of its title by adverse possession or prescription; *Rich v. Flanders*, 39 N. H. 387 (dissenting opinion), on constitutionality of act making parties to pending actions competent witnesses.

— **Statutes authorizing taxation or bond issues.**

Cited in *Weister v. Hade*, 52 Pa. 480, declaring valid act to raise by taxation amount subscribed by certain persons in a community to pay bounties of soldiers; *Grim v. Weissenberg School District*, 57 Pa. 436, 98 Am. Dec. 237, declaring valid act to raise by taxation money borrowed to pay soldiers' bounties; *Lycoming County v. Union County*, 15 Pa. 171, 53 Am. Dec. 575, declaring valid statute providing for reimbursement to county of proportionate expense imposed upon it by litigation in behalf of other counties.

Distinguished in *Hasbrouck v. Milwaukee*, 13 Wis. 54, 80 Am. Dec. 718, holding act permitting city to issue such amount of bonds as might be necessary to complete harbor, begun under authority of prior acts, illegal because former acts did not authorize amount for which bonds originally issued.

— **Act appointing trustees.**

Distinguished in *Shoenberger v. Pittsburgh*, 32 Pa. 37, denying power of legislature to pass act appointing trustees to sell property of decedent devised to his widow for life with power of disposal.

16 AM. DEC. 548, SPANGLER v. COM. 16 SERG. & R. 68.

Right of levying officer to demand indemnity.

Cited in *Com. ex rel. Hood v. Vandyke*, 57 Pa. 34, 25 Phila. Leg. Int. 285; *Dornin v. McCandless*, 146 Pa. 344, 28 A. S. R. 798, 29 W. N. C. 290, 23 Atl. 245, 22 Pittsb. L. J. N. S. 292; *Grace v. Mitchell*, 31 Wis. 533, 11 A. R. 613,—holding when officer has reasonable ground for doubt whether he can lawfully execute the process, he is not required to do so at his peril, but may demand indemnity from execution plaintiff.

Cited in notes in 95 A. D. 204; 15 A. S. R. 242; 89 A. S. R. 415,—on sheriff's right to indemnity while executing civil process.

Disapproved in *State ex rel. O'Bryan v. Koontz*, 83 Mo. 323, holding officer cannot, on notice of claim of a third party to the property, demand of plaintiff indemnity, and in default refuse to execute process, or, having seized the property, release it to claimant.

— **Effect of failure to require indemnity.**

Cited in *Com. use of Dickinson v. Sides*, 12 Lanc. L. Rev. 145, holding sheriff failing to require indemnity not entitled to recover expense of wrongful levy.

Liability without indemnity.

Cited in *Miller v. Com.* 5 Pa. 294, holding that if sheriff does not demand indemnity which plaintiff had agreed to furnish, sheriff is liable if property belonged to defendant, although plaintiff may have given no indemnity; *Hall v. Galbraith*, 8 Watts, 220, holding if he has reason to doubt the ownership of property to be levied on, he may require plaintiff to indemnify him, and is otherwise liable for not proceeding.

16 AM. DEC. 554, KAUGHLEY v. BREWER, 16 SERG. & R. 123.**Admissibility of books of account as evidence.**

Cited in *Odell v. Culbert*, 9 Watts & S. 66, 42 A. D. 317, holding book of original entry of plaintiff who is dead may be given in evidence upon proof of his handwriting.

Cited in reference notes in 25 A. D. 596, on books of account as evidence; 18 A. D. 649, on admissibility of books of account and books of tradesmen.

Cited in note in 52 L.R.A. 584, on admissibility in party's own favor of entries in usual course of business.

— Entries not made as part of transaction.

Cited in *Singerly v. Doerr*, 62 Pa. 9, 26 Phila. Leg. Int. 221, holding charges are good if made according to nature and usages in the particular business; *Wollenweber v. Ketterlinus*, 17 Pa. 389, holding entry in day book may be properly made when articles ordered are finished and ready for manual delivery; *Molony v. Benners*, 3 Grant, Cas. 233, holding book entries, to be evidence, must have been made contemporaneously with the sale and delivery of the goods, or with the performance of the work.

Disapproved in *Jackson v. Evans*, 8 Mich. 476, holding where delivery of property was made by agent and entered by the principal, the books cannot be received in evidence without calling agent as witness.

16 AM. DEC. 556, McALLISTER v. HOFFMAN, 16 SERG. & R. 147.**Recovery of money held under illegal agreement.**

Cited in *Kiewert v. Rindskopf*, 46 Wis. 481, 32 A. R. 731, 1 N. W. 163, holding rule of nonenforceability does not apply where action is brought by one party to recover money received by third party in respect of his illegal contract; *Evans v. Trenton*, 24 N. J. L. 764, holding mere agent of party to illegal money transaction cannot set up the illegality in suit by principal to recover money.

— Of money from stakeholder.

Cited in *Doxey v. Miller*, 2 Ill. App. 30; *Whitwell v. Carter*, 4 Mich. 329; *Wilkinson v. Tousley*, 16 Minn. 299, Gil. 263, 10 A. R. 139; *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857; *Davenger v. Everett*, 7 Legal Gaz. 222, 4 Luzerne Legal Reg. 159; *Lewy v. Crawford*, 5 Tex. Civ. App. 293, 23 S. W. 1041; *Huncke v. Francis*, 27 N. J. L. 55,—holding money deposited on wager with stakeholder may be recovered back by the depositor if demanded before it is paid over to winner; *Ball v. Gilbert*, 12 Met. 397, holding stakeholder liable to garnishment by creditors of either party to wager; *Forscht v. Green*, 53 Pa. 138, holding under statute money bet on election is forfeited to directors of the poor who may bring an action for its recovery within two years, if they fail to claim the forfeiture within two years plaintiff might recover from stakeholder; *Williams v. Nickins*, 2 Clark (Pa.) 128, holding under same circumstances law does not give either of the parties the right to recover any portion of the sum deposited; *McAllister v. Gallaher*, 3 Penr. & W. 468, holding under statute money deposited with stakeholder of a horse race, as forfeit by either party whose horse did not run, is recoverable from such stakeholder; *Hindmarch v. Hoffman*, 127 Pa. 284, 14 A. S. R. 842, 4 L.R.A. 368, 18 Atl. 14, on recovery of money back from stakeholder.

Cited in reference note in 36 A. D. 757, on liability of stakeholder for money paid over.

Cited in notes in 51 A. D. 696; 18 L.R.A. 863,—on liability of stakeholders.

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Illegality of bets and wagers.

Cited in *Lloyd v. Leisenring*, 7 Watts, 294, holding all contracts or promises depending upon a bet on result of an election are null and void; *Wood v. McCann*, 6 Dana, 366, holding agreement for contingent fee to be paid upon passage of a legislative act, void; *Hooker v. De Palos*, 2 Cin. Sup. Ct. Rep. 369, holding that where part of consideration of contract and all the purposes of contract were illegal, the whole contract was void.

Cited in reference notes in 19 A. D. 647; 44 A. D. 361,—on illegality of wagers; 36 A. D. 458, on wagers on result of election; 42 A. D. 230; 81 A. S. R. 278,—on invalidity of election wagers.

Cited in notes in 4 A. D. 299; 3 L.R.A. 680,—on validity of wagering contracts; 11 A. R. 58, on validity of wagers on result of election; 37 A. S. R. 702, on validity and enforceability of election wagers.

— Right to recover money from party to wager.

Cited in *Harper v. Crain*, 36 Ohio St. 338, 38 A. R. 589, holding wager may be rescinded and money recovered back; *Frick v. Hammond*, 2 Clark, 156; *Thrift v. Redman*, 13 Iowa, 25,—holding money lost at gaming and paid to the winner cannot be recovered; *Speise v. McCoy*, 6 Watts & S. 485, 40 A. D. 579, holding money lost by wager and paid over to the winner cannot be recovered back from him by means of a foreign attachment at suit of creditors of loser; *Merriam v. Public Grain & Stock Exch.* 1 Pa. Co. Ct. 478, holding law condemning gambling contracts may not be invoked by partners or joint dealers to prevent the settlement of their joint concerns even though their profits or losses arose in illegal traffic.

Cited in reference notes in 40 A. D. 421, on right to recover money lost in gaming; 40 A. D. 635, as to when money paid on election bet may be recovered.

16 AM. DEC. 558, JUNIATA BANK v. HALE, 16 SERG. & R. 157.**Necessity of demand and notice to charge indorser of bill or note.**

Cited in *Catlin v. Jones*, 1 Pinney (Wis.) 130, holding indorser is only liable to indorsee upon presentation at maturity, nonpayment by maker, and notice to the indorser; *Bank of Old Dominion v. McVeigh*, 29 Gratt. 546, holding knowledge of nonpayment of protested note not sufficient to bind indorser, who had no notice that he is looked to; *Deacon v. Smaltz*, 44 W. N. C. 244, 10 Pa. Super. Ct. 154 (dissenting opinion); *Cox v. National Bank*, 100 U. S. 704, 25 L. ed. 739,—on question of necessity of demand and notice.

— Effect of death of maker.

Cited in *Groth v. Gyger*, 31 Pa. 271, 72 A. D. 745, holding death of maker before its maturity, and granting of letters testamentary to indorsee and another as his executors, does not dispense with the necessity of giving notice of nonpayment to indorser; *Huff v. Ashcraft*, 1 Disney (Ohio), 60, holding in event of the death of the maker rule of diligence does not make it necessary to make demand at dwelling of deceased the day of funeral.

Cited in reference note in 43 A. D. 248, on effect of death of maker of note before maturity.

Cited in note in 23 L.R.A. 711, on effect on notes, bills, and checks of death of party thereto.

— Sufficiency of notice.

Cited in *Marshall v. Sonneman*, 216 Pa. St. 65, 64 Atl. 874, holding notice personally delivered to indorser not sufficient to charge the latter where the notice

was addressed to another person and stated that holder looked to that person for payment.

16 AM. DEC. 564, COOK v. GRANT, 16 SERG. & R. 198.

Competency as witness after release of interest.

Cited in reference notes in 14 A. S. R. 842, on competency of witnesses; 49 A. D. 232, on release of interest to qualify witness to testify; 55 A. D. 245, on competency of interested witnesses by release of their interest; 49 A. D. 790, on effect of release of interest on competency of witness; 44 A. D. 117, on competency, as witness, of assignor of chose in action or nominal party.

Cited in note in 64 A. D. 535, on competency of devisee who releases all interest under will.

Fraud of vendor as defense to action for price.

Cited in *Forster v. Gillam*, 13 Pa. 340, holding misrepresentation as to quality of title of vendor to land later recovered from purchaser under superior title a defense in action on bonds for part of purchase money, even though purchaser took deed with special warranty; *Monroe v. Wallace*, 2 Penr. & W. 173, holding one who takes a conveyance cannot allege that it was fraudulent and void.

Cited in reference notes in 48 A. D. 335, as to when specific performance of contract will be refused for want of title of vendor; 35 A. D. 520, on refusal of specific performance where complainant cannot make good title; 90 A. D. 425, on suppression and concealment of material facts as rendering sale fraudulent; 90 A. D. 428, on concealments of defects, fraud, or surprise as vitiating contract of sale.

Estoppel by statements of witness.

Cited in *Ayres v. Watson*, 57 Pa. 360, 25 Phila. Leg. Int. 316, holding party who calls a witness is not estopped by a statement by the witness which is immaterial to the issue and which cannot affect the result.

Cited in reference note in 56 A. D. 120, on estoppel *in pais* arising from acts, admissions, and conduct.

Recovery back of property fraudulently conveyed.

Cited in *Stewart v. Kearney*, 6 Watts, 453, 31 A. D. 482, holding that though fraudulent grantor cannot maintain trover to recover it back after his death, if his estate is insolvent, action of trover survives to his personal representative for benefit of creditors.

When fraud on third person may be set up.

Cited in *Bank v. Fordyce*, 9 Pa. 275, 49 A. D. 561, as being a case where it was allowed.

16 AM. DEC. 569, GRAHAM v. WILLIAMS, 16 SERG. & R. 257.

Right to interest.

Cited in note in 6 A. D. 195, on recovery of interest on liquidated accounts.

16 AM. DEC. 571, TOD v. GALLAGHER, 16 SERG. & R. 261.

Right of purchaser to set off encumbrances discharged as against price of land.

Cited in *Garrard v. Lantz*, 12 Pa. 186; *Gansz's Appeal*, 2 Monaghan (Pa.) 251, 15 Atl. 881; *Bowen v. Thrall*, 28 Vt. 382,—holding he has the right; *Demaret v. Bennett*, 29 Tex. 262, holding purchaser who goes into possession under deed of warranty and with notice of defects in title, cannot withhold the purchase money

but must sue on warranty after eviction; *Wolbert v. Lucas*, 10 Pa. 73, 49 A. D. 578, holding purchaser who has received his deed and given a mortgage for the purchase money, may deduct encumbrances known to him at the time he made the contract.

Cited in reference note in 26 A. D. 711, on law of set-off.

Cited in note in 49 A. D. 580, on right of purchaser to deduct for encumbrances.

Distinguished in *Thompson v. Adams*, 55 Pa. 479, holding equity may compel the purchaser to pay what is due under the contract, but cannot divest a title fairly acquired by him at judicial sale for prior encumbrances.

16 AM. DEC. 573, CIST v. ZEIGLER, 16 SERG. & R. 282.

Conclusiveness of judgment in former suit.

Cited in *Souter v. Baymore*, 7 Pa. 415, 47 A. D. 518, holding a decree, in the admiralty appealed from, cannot be pleaded as a former recovery.

Cited in notes in 21 A. D. 327, on *res judicata*; 23 A. D. 449, on *res judicata* as estoppel.

— **Matters concluded.**

Cited in *Denver City Irrig. & Water Co. v. Middaugh*, 12 Colo. 434, 13 A. S. R. 234, 21 Pac. 565; *Foster v. Wells*, 4 Tex. 101; *Texas & P. R. Co. v. Long*, 1 Tex. App. Civ. Cas. (White & W.) 281,—holding judgment final as to all matters which might have been properly litigated; *Hargus v. Goodman*, 12 Ind. 629, holding judgment rendered in trespass begun in justice court where title was in issue but not necessary to rendition of judgment no bar to action in ejectment; *Man v. Drexel*, 2 Pa. St. 202, holding judgment in ejectment conclusive as to *meane profits*, from the day of the issuing the writ, even though defendant entered by *habere facias possessionem*, under a former judgment between same parties; *Schwan v. Kelly*, 173 Pa. 65, 33 Atl. 1107, 27 Pittsb. L. J. N. S. 69, holding judgment on *seire facias* on mortgage due for unpaid balance of purchase money no bar to bill in equity by vendee to rescind the contract of sale and require return of the purchase money.

— **Necessity of specially pleading judgment in bar.**

Cited in *Whitehurst v. Rogers*, 38 Md. 503; *Offutt v. John*, 8 Mo. 120, 40 A. D. 125; *Chamberlain v. Carlisle*, 26 N. H. 540; *Finley v. Hanbest*, 30 Pa. 190,—holding former judgment equally admissible under general issue and special plea in bar; *Bruner v. Finley*, 211 Pa. 74, 60 Atl. 488, holding under plea of “not guilty” in ejectment, defendants can avail themselves of the defense of *res judicata*.

Admissibility of parol proof in aid of record of former judgment.

Cited in *Carmony v. Hooper*, 5 Pa. 305, holding parol evidence is admissible to explain, but not to contradict, the record; *Kelly v. Public Works*, 25 Gratt. 755; *Driscoll v. Damp*, 16 Wis. 106,—holding it admissible to explain record of former trial; *Wallace v. Peck*, 12 Ala. 768, on admissibility of parol to explain record; *Tarleton v. Johnson*, 25 Ala. 300, 60 A. D. 515, holding person may be shown by parol to have been real defendant though no party to the record; *Foster v. Wells*, 4 Tex. 101, holding parol evidence proper to explain judgment and what was adjudicated; *Follansbee v. Walker*, 74 Pa. 306, 1 Legal Chron. 380, 30 Phila. Leg. Int. 361, holding it proper where it does not contradict the record, to show that a former recovery was not on the merits but on a technical objection; *Coleman’s Appeal*, 62 Pa. 252, holding judgment relied on as conclusive in another suit may be shown *aliunde* not to have involved the particular point.

16 AM. DEC. 575, HULTZ v. WRIGHT, 16 SERG. & R. 345.**Admissibility of parol evidence to impeach terms of written instrument.**

Cited in reference notes in 1 A. D. 257, on admissibility of parol evidence as to written instrument; 53 A. D. 187, on admissibility of parol evidence to add to, vary, or explain contracts and other writings.

—For fraud or mistake.

Cited in *Oliver v. Oliver*, 4 Rawle, 141, 26 A. D. 123; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428, holding fraud may be shown by parol; *Pierce v. Robinson*, 13 Cal. 116, holding parol evidence is admissible in equity to show that a deed absolute on its face was intended as a mortgage; *Miller v. Fichthorn*, 31 Pa. 252, holding in action on bond given for a balance due of purchase money of a tract of land, parol evidence is admissible of the transaction out of which bond arose in order to lay foundation for defense of failure of consideration.

16 AM. DEC. 577, JOHNSTON v. GRAY, 16 SERG. & R. 361.**What constitutes mortgage.**

Cited in *Gubbings v. Harper*, 7 Phila. 276, 26 Phila. Leg. Int. 165, holding an agreement for resale to vendor, dated one day after the deed from the vendor, mortgage; *McKinney v. Rheem*, 4 Legal Gaz. 85, holding absolute conveyance intended to pass redeemable estate continues to be mortgage until foreclosure.

Cited in note in 17 A. D. 302, on absolute deed and agreement to reconvey as a mortgage, if intended as a security.

Nature of mortgage.

Cited in note in 7 A. S. R. 32, on nature of mortgagor's estate at common law, and remedies available to recover possession or otherwise obtain his rights by suit or action.

Discharge of mortgage.

Cited in reference note in 34 A. D. 200, on what amounts to discharge of mortgage.

Loss of equity of redemption.

Cited in reference note in 45 A. D. 446, as to when equity of redemption is lost, forfeited, or barred.

Who entitled to redeem.

Cited in note in 21 A. S. R. 240, on who may redeem from foreclosure sale.

Validity of stipulations in securities.

Cited in *Gordon v. Hutchings*, 26 Phila. Leg. Int. 212, upholding stipulation in security from debtor for reasonable expenses of collection; *Winton v. Mott*, 4 Luzerne Leg. Reg. 71, on validity of stipulation in mortgage limiting or defeating right of redemption.

Cited in reference notes in 23 A. D. 727; 25 A. D. 735,—on invalidity of restriction on right to redeem.

Cited in notes in 55 A. S. R. 104, on contemporaneous agreements between mortgagor and mortgagee to waive or release equity of redemption; 55 A. S. R. 104, on contemporaneous agreements between mortgagor and mortgagee to waive or release equity of redemption; 18 E. R. C. 365, as to equitable relief against agreement purporting to defeat or restrict right of redemption.

Province of court and jury.

Cited in *Hieskell v. Farmers' & M. Nat. Bank*, 89 Pa. 155, 33 A. R. 745, 7 W.

N. C. 249, holding it not error to refuse to submit points where they are irrelevant or there is not sufficient evidence to justify their submission.

Cited in reference note in 39 A. D. 657, on court's right to express opinion on controverted facts.

Cited in note in 39 A. D. 114, on necessity for giving instruction as to weight of evidence.

16 AM. DEC. 582, LYNCH v. COM. 16 SERG. & R. 368.

Duty and liability of attorney to client.

Cited in *Pennington v. Yell*, 11 Ark. 212, 52 A. D. 262, holding reasonable diligence and skill constitute measure of attorney's engagement with his client; *Merrill v. Norton*, 2 Walk. (Pa.) 213, holding attorney, acting as agent to loan money, who takes judgment note as security, and gives it to his principal, instead of entering the judgment, is not liable for a loss caused by the omission to enter the note; *Hill v. Mynatt* (Tenn. Ch. App.) 52 L.R.A. 883, 59 S. W. 163, holding attorneys are not liable to their client for an error of judgment upon a doubtful question of law; *Chain v. Hart*, 140 Pa. 374, 21 Atl. 442, 28 W. N. C. 317, 22 Pittsb. L. J. N. S. 30, on liability of attorney to client.

Cited in reference notes in 38 A. D. 566, on liability of attorney; 35 A. D. 250, on liability of attorney for neglect; 68 A. D. 142, on attorney's liability for negligence and want of skill; 16 A. S. R. 592, on skill and fidelity required of attorney.

Cited in note in 22 L. ed. U. S. 483, on attorney's liability to client for negligence.

Authority of attorney.

Cited in *Daniels v. New London*, 58 Conn. 156, 7 L.R.A. 563, 19 Atl. 573, holding attorney has no implied authority to submit his client's cause to arbitration; *Burkhardt v. Schmidt*, 10 Phila. 118, 31 Phila. Leg. Int. 92, holding attorney cannot bind his client by an agreement for sale of land; *Hageman v. Salisberry*, 74 Pa. 280, 30 Phila. Leg. Int. 425, 5 Legal Gaz. 405, holding if a judgment be confessed by an attorney, neither its regularity nor his authority can be questioned in a collateral action; *Wilson v. Young*, 9 Pa. 101, holding attorney may refer his client's cause to arbitrators, with an agreement that their award shall be final.

Cited in note in 30 A. R. 360, on authority of attorney at law to bind client.

— As to execution, levy, and discharge thereof.

Cited in *Silvis v. Ely*, 3 Watts & S. 420, holding attorney at law may stay execution upon judgment in consideration of the promise of a third person to pay the debt; *Jenney v. Delesdernier*, 20 Me. 183, holding attorney for plaintiff may, without any special authority approve receipt taken by officer for personal property attached by him and thereby relieve him from his obligation to retain and produce the property; *Gillingham v. Clark*, 1 Phila. 51, 7 Phila. Leg. Int. 50, holding defendant liable in trespass for seizure of plaintiff's goods by sheriff in pursuance of directions given by attorney retained generally to conduct said suit but without any special authority as to the trespass complained of; *Clark v. Randall*, 9 Wis. 135, 76 A. D. 252, holding attorney for foreign client or one residing at a distance intrusted with collection of debt, has implied authority to indemnify officer in making a levy; *Kissick v. Hunter*, 184 Pa. 174, 39 Atl. 83, 41 W. N. C. 377, 28 Pittsb. L. J. N. S. 283, holding attorney who has conducted case up to judgment on which an execution issues, and who files a waiver of inquisition, is presumed to

do so under authority of his client; *Scott v. Seiler*, 5 Watts, 235, holding attorney has full power to discharge a defendant from arrest upon a *capias ad satisfaciendum* issued by him, and the sheriff is bound to receive and obey his instructions.

Cited in note in 76 A. D. 264, on attorney's powers over judgments and executions.

Unconscionable stipulations in loan contracts.

Cited in *McAllister's Appeal*, 59 Pa. 204, holding commissions by agreement ought not to exceed 5 per cent of the sum loaned.

16 AM. DEC. 585, WALTERS v. JUNKINS, 16 SERG. & R. 414.

Amendment of verdict.

Cited in *St. Clair v. Caldwell*, 72 Ala. 527, holding when verdict is imperfect in substance court has no power to amend it; *Re Thompson*, 9 Mont. 381, 23 Pac. 933, holding after verdict is rendered and jury discharged, the verdict cannot be changed in substance though court has power to amend it as to informalities; *Morris v. Burke*, 15 Mont. 214, 38 Pac. 1065, holding after verdict is rendered and recorded, the province of the jury is exhausted; *Hary v. Speer*, 120 Mo. App. 556, 97 S. W. 228, holding jury have no power to consider or alter verdict after they are discharged, but trial court has power to amend verdict to conform to intention of jury; *Blum v. Pate*, 20 Cal. 70, holding after verdict is recorded, party has no right to have jury polled.

Cited in reference notes in 52 A. D. 398, on amendment of verdict; 53 A. D. 487, as to how far modification of verdict by court is allowable.

Cited in note in 23 L.R.A. 734, on effect of discharge on right to correct verdict in criminal cases.

Finality of verdict.

Cited in *Scott v. Scott*, 110 Pa. 387, 2 Atl. 531, 43 Phila. Leg. Int. 205, 17 Pittsb. L. J. N. S. 47, holding juror has right to dissent from verdict before it is recorded, whether jury is polled or not, and if he does so dissent there is no valid judgment; *Com. v. Flaherty*, 12 Luzerne Leg. Reg. Rep. 305, 29 Pa. Co. Ct. 236, holding verdict not valid and final until it be pronounced and recorded in open court; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 A. R. 724, holding power of jury over their verdict, and their right to alter it so as to make it conform to their real and unanimous intention, remains until they are dismissed; *McRae v. State*, 49 Ark. 195, 4 S. W. 758, holding jury have full power over their verdict until it has been received and recorded and they have been discharged from the case; *Hanover Junction, H. & G. R. Co. v. Anthony*, 3 Walk. (Pa.) 210, on when verdict may be amended.

Remission of verdict to jury for completion.

Cited in *Wolfman v. Eyester*, 7 Watts, 38; *Reitenbaugh v. Ludwick*, 31 Pa. 131,—holding jury who have sealed up their verdict and separated, if it be not in due form, may be sent back, before it is received and recorded, to put it in form; *Pritchard v. Hennessey*, 1 Gray, 294, holding jury who return incomplete verdict upon the matter submitted may be sent out again by the court, even if they separated, after agreeing upon and sealing up their first verdict before they came into court.

Waiver of right to poll jury.

Cited in note in 2 L.R.A. 185, on waiver of right to poll jury.

16 AM. DEC. 587, CHAHOON v. HOLLENBACK, 16 SERG. & R. 425.**Lien of judgment on vendor's land.**

Cited in *Stewart v. Coder*, 11 Pa. 90, holding judgments against vendor of land, retaining legal title, cannot be disturbed by an attachment subsequently issued, for money due by vendee, upon judgment subsequently rendered against vendor.

Title of purchaser of land subject to lien.

Cited in *Garrard v. Lantz*, 12 Pa. 186, holding sale under lien sweeps away his whole estate, and he must purchase of sheriff or lose all interest.

Cited in reference note in 56 A. D. 761, on title acquired by purchaser at sheriff's sale.

Rights of purchaser of equitable estate.

Cited in *Starr v. Brown*, 7 Del. Co. Rep. 197, 6 Northampton Co. Rep. 206, holding purchaser of equitable estate at sheriff's sale not entitled to possession without making compensation for improvements upon legal estate.

Necessary and proper parties in scire facias.

Cited in *Colwell v. Easley*, 83 Pa. 31, 34 Phila. Leg. Int. 159, holding one had no connection with debtor's title, should be discharged either by nonsuit or verdict in his favor.

Cited in reference notes in 25 A. D. 271, on proper parties in scire facias to revive judgment; 52 A. D. 378, as to when scire facias lies to make executors parties.

Cited in note in 94 A. D. 232, on parties defendant to scire facias to revive judgment.

Form of writ against terre-tenants.

Cited in *Hinds v. Allen*, 34 Conn. 185, holding on the propriety of scire facias against terre-tenants generally without naming them; *M'Lanahan v. Wyant*, 1 Penr. & W. 96, 21 A. D. 363, holding approved remedy to recover legacy charged upon land is to bring suit against the executors and the terre-tenants generally by name.

Cited in note in 122 A. S. R. 92, on form and contents of scire facias.

Who are terre-tenants.

Cited in *Fox v. Seal*, 22 Wall. 424, 22 L. ed. 774, holding mortgagee not a terre-tenant; *Grant v. Jackson & S. Co.* 5 Del. Ch. 404, holding tenant from year to year is not one; *Farmer v. Fisher*, 17 Lanc. L. Rev. 305, holding in scire facias upon mortgage or judgment, a terre-tenant is one whose title is subsequent to the encumbrance; *Hulett v. Mutual L. Ins. Co.* 114 Pa. 142, 6 Atl. 554, 18 W. N. C. 374, 43 Phila. Leg. Int. 438, on question as to what constitutes a terre-tenant.

Cited in notes in 53 A. D. 443; 94 A. D. 223,—as to who are terre-tenants.

Who may defend in scire facias to foreclose mortgage.

Cited in *Sauer v. Martin*, 10 Kulp, 436, holding he who may, as a terre-tenant be bound by judgment on scire facias has a right to appear as a defendant *pro interesse suo*; *Catlin v. Robinson*, 2 Watts, 373, holding no one will be permitted to make defense who would not be prejudiced by the judgment.

Proper parties to proceeding.

Cited in *Maxwell v. Leeson*, 50 W. Va. 361, 88 A. S. R. 875, 40 S. E. 420, holding where plaintiff in judgment for money dies, it is not necessary that scire facias in the name of his personal representatives against the defendant still living should make the terre-tenants parties.

Cited in note in 1 E. R. C. 165, on proper parties to real action.

What constitutes appearance.

Cited in *Pain's Pyro-Spectacle Co. v. Lincoln Park & S. B. Consol. Co.* 39 W. N. C. 494, 19 Pa. Co. Ct. 23, 6 Pa. Dist. R. 93, holding entering rule to show cause why attachment should not be dissolved constitutes an appearance.

Effect of appearance by defendant.

Cited in *Wanamaker v. Stevens*, 18 Phila. 336, 43 Phila. Leg. Int. 56, 1 Pa. Co. Ct. 317, holding it does not preclude him from disputing the sufficiency of service or return.

Cited in reference note in 16 A. S. R. 511, on appearance in actions.

Tender as condition precedent to action of ejectment.

Cited in *Merrell v. Merrell*, 5 Kulp, 125, 5 Pa. Co. Ct. 531, holding where vendor conveys the legal title to third person, who subsequently dies, devising the land to another, the vendee may maintain ejectment upon payment or tender of balance of purchase money.

Cited in reference notes in 52 A. S. R. 517, as to when tender must be made; 77 A. D. 480, as to when tender must precede suit.

Sufficiency of tender.

Cited in note in 77 A. D. 477, on persons to whom tender must be made.

Compromise as consideration for agreement.

Cited in *Paxson v. Hewson*, 14 Phila. 174, 37 Phila. Leg. Int. 50, 8 W. N. C. 197, holding compromise of doubtful right a good consideration for an agreement which in such case constitutes an accord and satisfaction.

Conclusiveness of compromise.

Cited in reference note in 57 A. D. 219, on setting aside compromise for fraud or imposition only.

Cited in note in 26 L. ed. U. S. 1187, on conclusiveness of compromise of disputed claim.

Laches.

Cited in *Jones v. Jones*, 11 Phila. 559, 32 Phila. Leg. Int. 199, holding specific performance will not be enforced in favor of a party who has been guilty of unreasonable delay in fulfilling his part of contract.

Presumption as to validity of judgment.

Cited in *Com. v. Lelar*, 13 Pa. 22, holding it is presumed.

Extension and revivor of judgment lien.

Cited in *Sloan v. McMullen*, 5 Pa. Dist. R. 430, on history of practice of issuing execution within five years to extend lien of judgment.

16 AM. DEC. 595, SIMS v. CAMPBELL, 1 M'CORD, EQ. 53.**Sheriff as agent of parties in execution.**

Cited in *Osgood v. Brown*, Frem. Ch. (Miss.) 392, holding him agent in qualified sense only and his agency restricted to receipt of money alone or convertible bank paper; *Chalmers v. Turnipseed*, 21 S. C. 126, holding amount embezzled by sheriff who sold property under foreclosure not chargeable to mortgagee.

Cited in reference note in 36 A. D. 185, on sheriff as agent of plaintiff in execution.

Amendment of sheriff's levy.

Cited in *Sartor v. McJunkin*, 8 Rich. L. 451, holding court may order entry of levy to be corrected if it is erroneous.

Conclusiveness of entry of satisfaction by sheriff on levy.

Cited in *Moore v. Edwards*, 1 Bail. L. 23, holding word "satisfied" indorsed on execution not conclusive evidence that it has been paid.

Cited in reference notes in 44 A. D. 738, on what constitutes satisfaction of judgment; 30 A. S. R. 245, as to whether entry of satisfaction extinguishes judgment.

Right of judgment creditor to interest and lien therefor.

Cited in *Winslow v. Ancrum*, 1 M'Cord, Eq. 100, holding interest inseparable from debt.

Cited in reference notes in 49 A. D. 379, on allowance of interest on judgment; 29 A. D. 754, on interest on judgments and lien therefor; 29 A. S. R. 791, on judgment lien for interest as well as principal.

Cited in note in 51 A. D. 550, as to when judgment lien extends to interest as well as principal.

Conclusiveness of receipt.

Cited in *Daniels v. Moses*, 12 S. C. 130, holding acknowledgment of receipt of purchase money contained in a deed of conveyance not conclusive.

16 AM. DEC. 597, RHAME v. RHAME, 1 M'CORD, EQ. 197.**Jurisdiction of equity in granting alimony without divorce.**

Cited in *Galland v. Galland*, 38 Cal. 265; *Jamison v. Jamison*, 4 Md. Ch. 289; *Helms v. Franciscus*, 2 Bland, Ch. 544, 20 A. D. 402; *Baier v. Baier*, 91 Minn. 165, 97 N. W. 671; *Bueter v. Bueter*, 1 S. D. 94, 8 L.R.A. 562, 45 N. W. 208; *Hinds v. Hinds*, 80 Ala. 225,—holding they have jurisdiction even though no divorce is asked for; *Mattison v. Mattison*, 1 Strobb. Eq. 387, 47 A. D. 541, on question of jurisdiction of court of equity to grant alimony; *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227, holding alimony and suit money may be allowed *pendente lite*.

Cited in reference notes in 20 A. D. 423, on alimony and maintenance; 28 A. D. 55, 442; 42 A. S. R. 398,—on authority to grant alimony.

Cited in notes in 12 A. D. 257, on equity jurisdiction in case of alimony; 60 A. D. 666, on allowance of alimony without divorce; 77 A. S. R. 231, 234, on right to maintain separate suit for maintenance independent of suit for divorce; 25 L.R.A. 800, on jurisdiction of chancery to decree nullity or dissolution of marriage; 77 A. S. R. 242, 243, on defenses to separate suit for maintenance independent of suit for divorce.

Grounds for allowing divorce or alimony.

Cited in *Levin v. Levin*, 68 S. C. 123, 46 S. E. 945, holding husband's acts of cruelty justified granting alimony; *Bell v. Nealy*, 1 Bail. L. 312, 19 A. D. 686; *Hair v. Hair*, 10 Rich. Eq. 163; *Wise v. Wise*, 60 S. C. 426, 38 S. E. 794,—as to when alimony will be granted.

Cited in reference notes in 33 A. D. 530; 58 A. D. 83,—on cruelty as ground for divorce or alimony.

Cited in notes in 6 L.R.A. 188, on reasonable apprehension of injury as ground for divorce; 77 A. S. R. 235, on causes for which separate suit for maintenance independent of suit for divorce may be brought.

Causes of action joinable with alimony suit.

Cited in *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545, holding allegations of desertion and of desertion and cruelty, may properly be united in one cause of action for alimony.

16 AM. DEC. 602, SIMPSON v. FELTZ, 1 M'CORD, EQ. 213.**What constitutes a partnership.**

Cited in reference note in 30 A. D. 608, on what constitutes a partnership.

Cited in note in 18 L.R.A. (N.S.) 976, on characteristics of partnerships.

— Compensation according to profits as test of.

Cited in *Bartlett v. Jones*, 2 Strobb. L. 471, 49 A. D. 606, holding agent or clerk in affecting sales, whose compensation is measured by the profits, not a partner; *Pierson v. Steinmyer*, 4 Rich. L. 309, on question of agent who is to receive share of profits being liable as partner.

Cited in reference notes in 29 A. D. 448, as to when right to share in profits will constitute one a partner; 31 A. D. 382, on right to participate in profits as making one liable as partner for losses; 75 A. D. 193, on regarding as partner one receiving compensation or reward for his services.

Cited in notes in 18 L.R.A. (N.S.) 994, on necessity of sharing in profits and losses to constitute partnership; 18 L.R.A. (N.S.) 1026, on creation of partnership liability by taking profits as compensation for work and labor.

Opinion evidence.

Cited in reference notes in 41 A. D. 464, on opinion evidence; 58 A. D. 305, on opinions as witnesses as evidence.

Right to interest on money.

Cited in *Anderson v. State*, 2 Ga. 370, holding agent who admits money in his hands belonging to his principal is liable for interest thereon from the time he received it; *Mades v. Miller*, 2 App. D. C. 455, holding if executor mingles money of estate with his own he and any coexecutor acquiescing therein are chargeable with interest; *Kirkman v. Vanlier*, 7 Ala. 217, holding stakeholder enjoined from using money, and who does not offer to bring it into court, but insists upon his right to retain it as against complainant and defendant, will be charged with interest.

Cited in reference note in 50 A. D. 272, as to when interest is allowed.

Cited in note in 51 A. D. 277, on allowance of interest.

— On balance due between partners.

Cited in *Johnson v. Hartshorne*, 52 N. Y. 173, holding in settlement of partnership accounts there is no fixed rule in regard to interest; the allowance of interest depends upon the circumstances of the case; *Andrews v. Andrews*, 3 Bradf. 99, holding upon dissolution of partnership the partner against whom a balance is found is chargeable with interest thereon; *Buckingham v. Ludlum*, 29 N. J. Eq. 345, holding interest will be disallowed before dissolution, and allowed after dissolution, on overdrafts made by one partner, where there are special circumstances; *Gee v. Humphries*, 49 S. C. 253, 27 S. E. 101, holding that where partnership debt is secured by bond and mortgage of partner and is paid out of his individual property, his estate is subrogated and should be allowed interest on such payments; *Allen v. Woonsocket Co.* 13 R. I. 146, on question of allowing partner interest on balance at dissolution.

16 AM. DEC. 606, LINING v. GEDDES, 1 M'CORD, EQ. 304.**Subjects of equitable relief.**

Cited in *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548, holding subjects of fraud and trusts are peculiarly matters of equity jurisdiction; *Clark v. Donaldson*, 104 Ill. 639, holding equity will not decree removal of building simply because it is inconvenient.

Cited in reference notes in 57 A. D. 200, on rules governing exercise of equity; 24 A. D. 274; 27 A. D. 650,—on right to relief in equity where adequate remedy at law exists; 58 A. D. 332, on injunction not to be granted unless remedy at law is inadequate; 52 A. S. R. 417, on equity jurisdiction over novel questions; 70 A. S. R. 872, on jurisdiction of equity to reform instrument.

Cited in note in 11 L.R.A. 208, as to when equity will grant injunction.

— **Trespass or nuisance.**

Cited in *Wilson v. Hyatt*, 4 S. C. 369; *Latimer v. Ballew*, 41 S. C. 517, 44 A. S. R. 748, 19 S. E. 792,—holding equity will not interfere to prevent a mere trespass; *United States v. Parrott*, 1 McAll. 271, Fed. Cas. No. 15,998, holding court of equity will, in some cases, enjoin the removal of the fruits of past waste.

Cited in reference notes in 23 A. D. 772; 68 A. D. 117,—on injunction against trespass; 40 A. D. 668, on right to injunction against apprehended trespass; 54 A. D. 351, on injunction against nuisance.

Cited in notes in 11 A. D. 502, on trespass destructive of estate; 99 A. S. R. 734, on jurisdiction to enjoin trespass on realty; 1 L.R.A. 745, on special circumstances in case to warrant issuance of injunction to restrain trespass; 1 L.R.A. 744, on injunction to restrain threatened trespass; 73 A. D. 114, on injunctions against threatened nuisances; 7 L.R.A. (N.S.) 79, on injunction relief on ground of nuisance against obstruction of highways, streets, or alleys.

Effect of novelty or right to equitable relief.

Cited in reference note in 55 A. S. R. 675, on novelty as ground for inferring want of jurisdiction in equity.

Equity jurisdiction as to chattel.

Cited in reference note in 43 A. D. 624, on prerequisites to equitable decree of specific delivery of chattels.

Cited in notes in 51 A. D. 589, on equity jurisdiction to recover chattels; 33 A. D. 740; 6 E. R. C. 646,—on specific performance of contracts concerning chattels.

16 AM. DEC. 610, McCANTS v. BEE, 1 M'CORD, EQ. 383.

Dealings between persons standing in trust or unequal relations.

Cited in *Saunders v. Richard*, 35 Fla. 28, 16 So. 679, holding transaction between trustee and *cestui que trust* will not be sustained if trustee has taken any advantage in such capacity or if the *cestui que trust* entered into the transaction in ignorance of his legal rights; *Leach v. Leach*, 65 Wis. 284, 26 N. W. 754, holding burden is upon trustee to show that the *cestui que trust* knew, at the time all the facts relating to the value of the property and his rights therein, especially if price was inadequate; *Way v. Union Cent. L. Ins. Co.* 61 S. C. 501, 39 S. E. 742, holding same in a transaction between husband and wife in which he obtained advantage over the wife; *Pepper v. Addicks*, 153 Fed. 383, holding officer who sold corporation worthless bonds liable to corporation for profit made; *Hanson v. Worthington*, 12 Md. 418, on question of confirmation of contracts by *cestui que trust*; *Lay v. Lay*, 10 S. C. 208, on validity of contracts between trustees and *cestui que trust*; *Witmer's Appeal*, 1 Monaghan (Pa.) 747, 15 Atl. 428, on the disability of an agent or trustee to deal with trust affairs for his own advantage, also citing annotation on this point.

Cited in reference notes in 21 A. D. 466; 45 A. D. 314,—on right of trustee to buy trust property; 25 A. D. 399, on invalidity of purchase by trustee at his own sale; 22 A. D. 302, on trustee's right to purchase on sale of trust property; 52 A. D. 144, on vendee buying land with notice of trust therein takes subject to

same; 75 A. D. 232, on purchaser from trustee with knowledge of trust taking subject to trust.

Grounds for setting aside contract.

Cited in reference note in 59 A. D. 615, on grounds for setting aside contract.

Affirmance of avoidable contract.

Cited in *Thompson v. Laboringman's Mercantile & Mfg. Co.* 60 W. Va. 42, 6 L.R.A.(N.S.) 311, 53 S. E. 908, holding it must be made with full knowledge of all the facts; *Voltz v. Voltz*, 75 Ala. 555, holding that on confirmation of contract by ward it must be shown that he was fully acquainted with his rights, that he knew the contract to be impeachable and that with this knowledge he confirmed it.

Cited in reference notes in 80 A. D. 730, on ratification of illegal contracts; 68 A. D. 237, on necessity that principal's ratification of agent's acts be made with full knowledge.

Undue influence and its effect.

Cited in reference notes in 34 A. D. 354, on what constitutes undue influence; 59 A. D. 615, on setting aside contract for undue influence; 27 A. D. 458, on circumstances indicating fraud and imposition, coupled with mental weakness, as ground for annulling contract.

Discretionary powers of executor in making sale under power in will.

Cited in *Jennings v. Teague*, 14 S. C. 229, holding power given executors by will to sell property "so soon as the value of property shall recover from the depression caused by existing war" constituted the executors the proper judges as to whether the contingency had happened; *Bilderback v. Boyce*, 14 S. C. 528, on question of construction of powers given executor authority to sell land.

Cited in reference note in 22 A. D. 567, on estate of executors in lands which will provided shall be sold.

16 AM. DEC. 617, SMITH v. TUNNO, 1 M'CORD, EQ. 443.

Admissibility of parol evidence to prove suretyship.

Cited in *Burke v. Cruger*, 8 Tex. 66, 58 A. D. 102, holding suretyship may be proved in equity by parol; *Cole v. Fox*, 83 N. C. 463, holding in action where defendant pleaded that he was surety and had given notice to plaintiff to sue principal, parol evidence is admissible to prove fact of suretyship; *Bank of St. Marys v. Mumford*, 6 Ga. 44, holding parol evidence admissible in suit against defendants, as joint and several promisors of a note to show that one was surety only, such fact not being apparent on face of note; *Sloan v. Gibbes*, 56 S. C. 480, 76 A. S. R. 559, 35 S. E. 408, holding parol evidence is admissible to show that indorser of note in blank agreed that the liability should be that of cosureties, and not of successive sureties.

Cited in reference note in 6 L.R.A. 33, on admissibility of parol evidence of written instrument.

Subrogation of one paying debt.

Cited in reference note in 34 A. D. 762, on subrogation of surety paying debt, to rights of creditor as to collateral securities and other remedies.

Cited in note in 99 A. S. R. 485, on rights and securities to which payor is entitled to be subrogated.

Discharge of surety.

Cited in *Hagood v. Blythe*, 37 Fed. 249, holding in order to discharge surety short of payment there must be some dealing between creditor and principal chan-

ging the cause of action, or suspending the right of action; *Watkins v. Worthington*, 2 Bland, Ch. 509, on question of release of surety; *Exchange Bank v. McMillam*, 76 S. C. 561, 57 S. E. 630, holding further credit to principal will not discharge surety in absence of an agreement to that effect, nor will renewal of notes, nor taking additional indorsers; *Hawkins v. Mims*, 36 Ark. 145, 38 A. R. 30, holding liberation of imprisoned receiver committed for not paying over money and subsequent insolvency of receiver will not discharge surety on his bond; *Wayne v. Kirby*, 2 Bail. L. 551, holding promise to stay execution against principal debtor, on his confessing judgment for debt, will not discharge surety unless agreement was binding in law and affected the liability of the principal on the original contract.

Cited in reference notes in 20 A. D. 179; 31 A. S. R. 737,—on release of surety by indulgence of principal; 47 A. D. 743, on discharge of surety by forbearance, delay, negligence, or indulgence.

—By loss or release of security or contribution.

Cited in *Lang v. Brevard*, 3 Strobb. Eq. 59, holding surety not discharged by omission of creditor to record mortgage of principal executed to secure debt; *Burr v. Boyer*, 2 Neb. 265, holding *contra* if such neglect occasion a loss of the security; *Massey v. Brown*, 4 S. C. 85, on question of release of one of several joint obligors discharging the others.

Cited in note in 51 A. D. 303, on holder's surrender of collateral security as discharge of surety.

Necessity of consideration.

Cited in reference note in 27 A. D. 663, on necessity of consideration for modification of existing contract.

16 AM. DEC. 623, *MILES v. ERVIN*, 1 M'CORD, EQ. 524.

Dealings between attorney and client.

Cited in *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831, holding attorney who bargains with client in a matter of advantage to himself must show that he fully and faithfully discharged his duty to his client by exercising active diligence to see that his client was fully informed of the nature and effect of the transaction; *Allen v. Frawley*, 106 Wis. 638, 82 N. W. 593, holding wilful mistatements of the law by attorney to client to secure an advantage to himself, with ignorance and reliance on same by client, constitute actionable fraud; *Wise v. Hardin*, 5 S. C. 325, holding confession of judgment by client to attorney, if made with entire fairness and full knowledge not void merely because the value of the consideration is not equal to the amount of the confession.

Cited in reference notes in 91 A. D. 652, on contracts between attorney and client; 1 A. S. R. 260, on scrutiny by court of contract between attorney and client.

Cited in notes in 83 A. S. R. 185, 186, on requirements in dealings between attorneys and clients; 36 A. S. R. 415, on burden of proof as to fairness of transactions between attorney and client; 24 E. R. C. 692, on right of solicitor to purchase property of client.

—Bargains concerning subject matter of litigation.

Cited in *Yeamans v. James*, 27 Kan. 195, holding law will not permit attorney to take advantage of his relations with his client to make a contract with reference to property in litigation; *Donaldson v. Eaton*, 136 Iowa, 650, 14 L.R.A. (N.S.) 1168, 114 N. W. 19, holding contract to procure the annulment of client's marriage and a settlement of wife's alimony in consideration of a stated sum of

money and conveyance of certain property, void; *Le Conte v. Irwin*, 19 S. C. 554; *Douglas v. Blount*, 95 Tex. 369, 58 L.R.A. 699, 67 S. W. 484,—holding an attorney stands in no such relation of trust toward the adverse party as will prevent his buying property of defendant for himself at judicial or execution sale controlled by him as counsel for plaintiff; *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517, holding purchase by attorney for mortgagor at foreclosure, voidable; *Berrien v. McLane*, Hoffm. Ch. 421, holding *pendente lite* agreement to pay counsel a part of the property to be recovered, void.

Cited in reference note in 32 A. S. R. 614, on right of attorney to purchase outstanding title adverse to client.

Cited in note in 36 A. S. R. 415, on purchase by attorney of subject-matter of litigation.

16 AM. DEC. 628, *BUSSY v. McKIE*, 2 M'CORD, EQ. 23.

Jurisdiction of equity.

Cited in reference note in 70 A. S. R. 872, on jurisdiction of equity to reform instrument.

—To construe will.

Cited in note in 15 L.R.A.(N.S.) 600, on equity jurisdiction of bills for construction of wills of real property passing only legal estates.

—To adjust property rights.

Cited in *Butler v. Ardis*, 2 M'Cord. Eq. 60, denying jurisdiction of case involving titles to lands where no discovery is sought, or other grounds of equity relied on; *Munis v. Herrera*, 1 N. M. 362, holding bill will not lie to compel restoration of property taken under a wrongful levy or for damages therefor.

Cited in reference note in 66 A. D. 698, on jurisdiction of equity of cause involving title to land where no ground of equitable relief is alleged.

Construction of will.

Cited in reference note in 41 A. D. 740, on testator's intention governing construction of will.

16 AM. DEC. 629, *GARRETT v. DAY*, 2 M'CORD, EQ. 27.

Conclusiveness of judgment.

Cited in reference note in 78 A. S. R. 483, on conclusiveness of judgments.

16 AM. DEC. 632, *THOMAS v. SHEPPARD*, 2 M'CORD, EQ. 36.

Jurisdiction to protect wife's property in husband's hands.

Cited in *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 A. D. 257, holding where husband has not been guilty of misconduct entitling wife to divorce or separation, chancery cannot, upon application of wife, interfere with husband's legal title as tenant by the curtesy; *Bouknight v. Epting*, 11 S. C. 71, holding if wife's property has been actually reduced into possession by the husband, wife's equity to a settlement cannot be recognized; *Wiles v. Wiles*, 3 Md. 1, 56 A. D. 733, holding equity will not restrain the husband from collecting legal chose in action due the wife until suitable provision be made for her, where the aid of such a court is unnecessary to reduce such chose in action to possession; *Heath v. Heath*, 2 Hill, Eq. 100, on question of wife's equity in her personal property.

Cited in reference note in 56 A. D. 736, on wife's equity of settlement.

Mental incapacity.

Cited in note in 13 L.R.A. 758, on effect of mental incapacity.

16 AM. DEC. 635, McDOWELL v. CALDWELL, 2 M'CORD, EQ. 43.

Liability of surety for acts of principal before or after suretyship.

Cited in *Trimmier v. Trail*, 2 Bail. L. 480; *Hall v. Hall*, 45 S. C. 166, 22 S. E. 818; *Bryant v. Owen*, 1 Ga. 355,—holding surety discharged by court is released from all future, but not from any past, liability; *Gray v. Brown*, 1 Rich. L. 351, holding liability of guardian's surety not limited to property owned by ward at time bond is executed, but extends to property subsequently acquired which comes into guardian's hands; *Joyner v. Cooper*, 2 Bail. L. 199, on liability of guardian for moneys of ward received before qualification; *Treasurers of State v. Taylor*, 2 Bail. L. 524, holding sureties to bond by sheriff for additional security are liable as well for moneys collected by him before the execution of the bond, as for moneys collected afterwards.

Cited in note to *State v. Martin*, 1 Hill, Eq. 428, holding sureties liable for failure during time of bond to pay out money received prior thereto.

Liability of sureties on guardian's bond.

Cited in *Field v. Pelot*, M'Mull. Eq. 369, on liability of sureties on guardian's bond for debt due by guardian to ward; *Schnell v. Schroeder*, Bail. Eq. 334, holding on question of liability of sureties on guardian's bond.

Cited in reference note in 5 A. S. R. 654, on surety's liability for money in guardian's hands previous to execution of bond.

Amount of surety's liability on guardian's bond.

Cited in *Johnson v. Johnson*, 2 Hill, Eq. 277, 29 A. D. 72, holding them liable for default to amount of penalty of bond, and not merely to the value of the property set out in the petition praying the appointment.

Cited in note in 87 A. D. 750, as to whether interest can be recovered on penal bond beyond penalty.

Transition of liability where administrator becomes guardian.

Cited in *Williams v. Moseley*, 2 Fla. 304; *O'Neill v. Herbert*, Dud. Eq. 30, M'Mull. Eq. 495; *Simkins v. Cobb*, 2 Bail L. 60,—holding where same party who was administrator becomes guardian, his debt as administrator becomes chargeable to him as guardian.

Right of guardian to spend ward's principal.

Cited in *Osborne v. Van Horn*, 2 Fla. 360; *Teague v. Dendy*, 2 M'Cord, Eq. 207, 16 A. D. 643; *Burton v. Willen*, 6 Del. Ch. 403 Appx., 33 Atl. 675,—holding he should first procure order from court; *Hobbs v. Harlan*, 10 Lea. 268, 43 A. R. 309, holding guardian may exceed income of ward under circumstances of necessity; *Guerrey v. Capers*, Bail. Eq. 159, on duty of executors and trustees to regulate their trust in regard to expenditures.

Cited in reference notes in 57 A. D. 593, on right of guardian to exceed income of ward's estate; 41 A. D. 189, on guardian's right to use capital of ward's estate for latter's subsistence.

Cited in notes in 89 A. S. R. 300, on power of guardians as to maintenance of ward; 49 A. D. 657, on guardian's expenditure of more than income of ward; 49 A. D. 659, on authorization by court of encroachment on principal of ward's estate; 49 A. D. 659, 660, on ratification by court of encroachment on principal of ward's estate.

Right of guardian to recover for money spent for ward.

Cited in *Davis v. Roberts*, Smedes & M. Ch. 543, holding guardian who expends more money upon his ward than the income of ward's estate without authority from proper tribunal, does it at his peril.

Cited in reference note in 50 A. S. R. 343, on right of guardian to reimbursement.

— For boarding or clothing ward.

Cited in *Crosby v. Crosby*, 1 S. C. 337, holding evidence showed that board and clothing furnished ward was intended to be gratuitous.

Cited in reference notes in 30 A. D. 705, on right of guardian to reimbursement for boarding and clothing wards; 35 A. D. 681, as to when guardian cannot charge for ward's board; 39 A. D. 65, on domestic guardian's liability for maintenance and education of ward.

Cited in note in 57 A. D. 228, on claim of parent or one standing *in loco parentis* for maintenance and education of child.

Liability of estate for expenses incurred by trustee.

Cited in *Wylly v. Collins*, 9 Ga. 223, on power of trustee to charge estate with current necessary expense.

Presumption of payment from union of debtor and creditor in one person.

Cited in *Williams v. Moseley*, 2 Fla. 304, holding payment results from such union.

Rank of claims against estate of decedent.

Cited in *Rice v. Cannon*, Bail. Eq. 172, holding bond debt is to take precedence over simple contract.

Appellate review of findings in equity.

Cited in *Rather v. Young*, 56 Ala. 94, holding where evidence in chancery causes is taken *viva voce* the chancellor's findings on the facts is regarded like a verdict at law, and is not disturbed by an appellate court, unless manifestly contrary to weight of evidence; *Sinclair v. Moore*, 1 Hill, Eq. 431, on power of appellate court to revise chancellor's findings.

16 AM. DEC. 639, COLEMAN v. SHELTON, 2 M'CORD, EQ. 126.

Lien and rights of pledgee.

Cited in reference notes in 57 A. S. R. 464, on dependence of pledgee's lien on possession; 68 A. S. R. 35, on necessity of retention of possession of article pledged.

Cited in notes in 49 A. D. 736, on rights of pledgee; 49 A. D. 733, on effect of redelivery to pledgeor.

16 AM. DEC. 641, SMITH v. DANIEL, 2 M'CORD, EQ. 143.

Life estate in personalty.

Cited in reference note in 67 A. D. 454, on life estates in personal property.

Title of purchaser of trust property.

Cited in *Sullivan v. Latimer*, 35 S. C. 422, 14 S. E. 933, holding he takes it subject to the trust.

Cited in reference notes in 26 A. D. 91, on title acquired by conveyance from trustee in trust deed; 52 A. D. 144; 75 A. D. 232,—on purchaser from trustee, with knowledge of trust, taking subject to trust.

Cited in note in 64 A. D. 201, on effect of notice of trust upon grantee.

Relative rights of remainderman and life tenant of chattels.

Cited in *Joyce v. Gunnels*, 2 Rich. Eq. 259, holding court will not enjoin tenant

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for life from removing slaves, unless there is proof of danger, without such proof remainderman is only entitled to an inventory.

Cited in reference note in 64 A. S. R. 920, on tenant for life as trustee for remaindermen.

Cited in note in 14 A. S. R. 629, on mode of determining rights and remedies of reversioners and remaindermen.

Injunction against waste.

Cited in note in 9 E. R. C. 494, on enjoining waste by tenant.

16 AM. DEC. 643, TEAGUE v. DENDY, 2 M'CORD, EQ. 207.

Jurisdiction to enforce bond of administrator.

Cited in *Ross v. Chambers*, 1 Bail. L. 548, holding ordinary possesses no jurisdiction to call sureties to administration bond to an account for doing of their principal.

Cited in note in 51 A. D. 528, on remedy on bond of executor or administrator and statute affecting remedy.

Suits against administrator and sureties jointly.

Cited in *Wilson v. Waterman*, 6 Rich. Eq. 255, on question of suit against administrator and sureties jointly for account.

Distinguished in *Gayden v. Gayden*, M'Mull. Eq. 435, holding coadministrators liable jointly at law upon their administration bond; *McBee v. Crocker*, M'Mull. Eq. 485, holding bill will lie in court of equity for an account as well against the sureties to an administration bond as against the administrator.

Overruled in *Taylor v. Taylor*, 2 Rich. Eq. 123; *Crane v. Moses*, 13 S. C. 561; *Burnside v. Robertson*, 28 S. C. 583, 6 S. E. 843,—holding surety may be joined in suit against administrator for account.

Effect of answer to merits.

Cited in reference notes in 34 A. D. 266, on answer to merits as waiver of legal objection insisted on in answer; 71 A. D. 699, on effect of answer to merits to deprive defendant of legal objections insisted on in answer.

Distributive rights in estates.

Cited in *Jenks v. Trowbridge*, 48 Mich. 94, 11 N. W. 822, holding such rights not affected by antecedent circumstances connected with decedent's source of acquisition, but depend on state of things at his death.

Use of corpus of estate of minor for support.

Cited in *Rhode v. Tuten*, 34 S. C. 496, 13 S. E. 676, holding it proper where mother had not sufficient means of her own to support them.

Cited in note in 49 A. D. 657, on guardian's expenditure of more than income of ward.

Computation of interest on accounts.

Cited in *Fairfield v. Bonner*, 2 Hill, L. 468, holding open account does not bar interest, and if administrator agree to pay interest on it he would be personally liable; *Dixon v. Hunter*, 3 Hill, L. 204, on question of proper method for computing interest.

Cited in reference note in 39 A. D. 493, as to when administrator is chargeable with interest.

Expenditures by executors, guardians, trustees, and other.

Cited in *Ashley v. Holman*, 44 S. C. 145, 21 S. E. 624; *Guerrey v. Capers*, Ball. Eq. 159,—holding they should not exceed current income of trust estate.

Cited in reference notes in 45 A. D. 117, on allowance of expenses, charges, and disbursements to executors and administrators; 70 A. D. 595, on allowance for expenses for services which administrator could not be supposed competent to render.

— Cost of keeping accounts.

Cited in *Steel v. Holladay*, 20 Or. 462, 26 Pac. 562; *Jenkins v. Hanahan*, Cheves, Eq. 129,—holding executors not entitled to charge their estate with the expense of an accountant to arrange their accounts.

Duty of executors and administrators in management of estate.

Cited in *Pulliam v. Pulliam*, 10 Fed. 53, holding executor liable for delay in selling cotton of estate.

Cited in note in 78 A. S. R. 204, on powers of executors as to employment of agents.

Effect of grant of letters to person interested in estate.

Cited in *Whitworth v. Oliver*, 39 Ala. 286, holding where debtor becomes the administrator of the estate of his deceased creditor the presumption of payment arises, and the debt is extinguished, without reference to his solvency or insolvency.

Mode of keeping account with trust estate.

Cited in *Foteaux v. Lepage*, 6 Iowa, 123, holding trustee must produce vouchers of all expenditures made by him, and, where this cannot be done, proof of the payment or expenditure must be given by his own oath or by other sufficient testimony.

16 AM. DEC. 648, MYERS v. MYERS, 2 M'CORD, EQ. 214.

Construction of wills.

Cited in reference note in 73 A. D. 276, on words in will which will pass title to realty.

Cited in note in 66 A. S. R. 60, on conveying and encumbering property by general description.

— Giving effect to testator's intention.

Cited in reference notes in 27 A. D. 607; 45 A. D. 610,—on intention of testator as controlling construction of will; 39 A. D. 582, on ascertainment of testator's intent in construing will; 29 A. D. 274, on seeking testator's intention by taking entire will together; 45 A. D. 719, on admissibility of extrinsic evidence as to intention of testator.

In whom property given to a class of persons vests.

Cited in *Voorhies v. Otterson*, 66 N. J. Eq. 172, 57 Atl. 428; *Sharman v. Jackson*, 30 Ga. 224,—holding gift to a class of persons, and not by name, will take in all who shall answer the description at the time the gift shall take effect; *Chasmer v. Bucken*, 37 N. J. Eq. 415, holding as to bequest in terms immediate and so intended to be by testator with description of the persons to take in general none take who do not fall within the description at time of testator's death; *Wilson v. Corbin*, 1 Pars. Sel. Eq. Cas. 347, holding in bequests to children or other persons designated as a class, the court always endeavors to construe the period of distribution as late as it can.

Cited in reference notes in 45 A. D. 424, on legacies to a class; 33 A. D. 138, on right of posthumous child to inherit or take bequest; 27 A. S. R. 592, on effect of death of testator upon bequests to class.

Cited in note in 21 A. D. 446, on rights of after-born child to take under legacy to a class.

Gifts by will to children as class or as individuals.

Cited in *Hill v. Thomas*, 11 S. C. 346; *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64; *Robinson v. Harris*, 73 S. C. 469, 6 L.R.A.(N.S.) 330, 53 S. E. 755; *McGregor v. Toomer*, 2 Strobb. Eq. 51; *Keitt v. Andrews*, 4 Rich. Eq. 349,—holding an immediate gift to children to take effect in possession at testator's death, means children living at that time; *Morton v. Morton*, 8 Barb. 18; *Waddell v. Waddell*, 68 S. C. 335, 47 S. E. 375; *Oswald v. Givens*, Rich. Eq. Cas. 326,—holding as to legacy left to children as a class, with no time fixed for distribution to be made, the legacy vests at testator's death, in such as are then *in esse*, but where a future time is fixed for distribution, all who are *in esse* at period of distribution will be entitled to take; *McLain v. Howald*, 120 Mich. 274, 77 A. S. R. 597, 79 N. W. 182, holding testamentary gift, to take effect upon termination of life estate of widow to "each of the children" of a named daughter, includes those born during lifetime of the widow; *Holeman v. Fort*, 3 Strobb. Eq. 66, 51 A. D. 665, holding deed of gift to "the joint heirs" of daughter and son-in-law of the donor operated only in favor of the two children *in esse* at time of its delivery; *Tindal v. Neal*, 59 S. C. 4, 36 S. E. 1004, holding devise to children of A "alive at death of my wife—for and during terms of their natural lives and after their death to their respective children forever," passes a vested transmissible interest to all the children of A alive at death of the wife, opening and letting in children born before falling in of second life estate; *McBride's Estate*, 152 Pa. 192, 25 Atl. 513, on gifts to children not *in esse*; *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333, on question of exclusion of after-born children.

Use of child's estate for support.

Cited in *Johnson v. Johnson*, 2 Hill, Eq. 277, 29 A. D. 72, holding father's duty to maintain child so long as he is able; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Newport v. Cook*, 2 Ashm. (Pa.) 332,—where parent has not sufficient means to maintain and educate child, equity will make him an allowance out of estate of child for that purpose; *Kendall v. Kendall*, 60 N. H. 527, holding parent having possession of a fund in trust for his infant child, and of sufficient ability to maintain and educate the child, may be allowed a reasonable sum for its support and education, respect being had to the circumstances of case and relative estates of parent and child; *Alston v. Alston*, 34 Ala. 15, holding in determining father's ability to support child, it is proper to consider the amount of his estate, the number of his children, the condition of his family, his expenses and income, and the amount of his children's fortune; *Reed's Appeal*, 4 Walk. (Pa.) 500, holding that where testator directed an estate to be accumulated for his grandchildren, the court may apply a portion thereof to the maintenance and education of the legatees, where parents have not sufficient ability; *Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66, holding it in the power and discretion of the ordinary to allow use of ward's estate for his support when he became satisfied that his father was unable to educate him out of his own estate.

Cited in reference notes in 73 A. D. 77, on duty of father to maintain minor child; 44 A. D. 715, on father's liability for maintenance of child; 64 A. D. 279, on liability of father to support children; 93 A. S. R. 944, on parent's legal obligation to support and maintain infant children; 36 A. D. 540, on liability of father for necessities furnished minor child; 54 A. D. 208, as to when maintenance of child out of his estate will be allowed.

Cited in notes in 16 A. D. 662, 663, as to when parent may support child out of its estate; 57 L.R.A. 729, on obligation of parent who has ability to support child as affected by latter's interest in trust estate or other property.

Right of parent or trustee to reimbursement for money paid out for estate.

Cited in *Palmer v. Miller*, Cheves, Eq. 62, 34 A. D. 602, holding executor entitled to allowance for beneficial improvements on trust estate; *Ex parte Palmer*, 2 Hill, Eq. 215, holding executor will be allowed compensation for improvements such as the court would have authorized, and whether they are such depends on the fact whether they are beneficial to all concerned; *Dickinson v. Conniff*, 65 Ala. 581, holding trustee had no power to erect permanent improvements on a vacant lot to the extent of four times its value; *Woodard v. Wright*, 82 Cal. 202, 22 Pac. 1118, holding they are justified in making ordinary repairs and improvements and in insuring the property, and are allowed to hold the estate until reimbursed.

Cited in reference note in 56 A. D. 761, on trustee's right to reimbursement for improvements and expenditures on trust estate.

Cited in notes in 7 L.R.A. 176, on parent's obligation to support infant child; 57 A. D. 226, 227, on claim of parent or one standing *in loco parentis* for maintenance and education of child; 19 A. S. R. 71, on liens against trust estates in favor of creditors or trustees.

Trustee dealing with trust fund.

Cited in reference notes in 44 A. D. 723, on right of trustee to deal with trust fund for his own benefit; 59 A. D. 433, on enforceability of contract between director and corporation; 35 A. S. R. 558, on burden of proof between persons in fiduciary relations.

Following trust funds into property.

Cited in *Green v. Green*, 56 S. C. 193, 46 L.R.A. 525, 34 S. E. 249, holding that where trust fund constituted only part of the money laid out in the purchase, the court has usually given a lien merely on the land for the trust money and interest.

Overruled in *O'Neale v. Dunlap*, 11 Rich. Eq. 405, holding ward has choice between property itself and restoration of his money invested in it.

Compound interest.

Cited in reference notes in 35 A. D. 141, as to when compound interest is allowable; 78 A. D. 494, on compounding interest as usury.

— Liability of trustee, etc., for.

Cited in *Hurd v. Goodrich*, 59 Ill. 450, holding only in cases of gross delinquency is it so charged; *Wright v. Wright*, 2 M'Cord, Eq. 185, holding as general rule interest is not to be calculated with annual rests on moneys in executor's hands; *Re Harland*, 5 Rawle, 323, on question as to when compound interest allowable.

Cited in notes in 29 L.R.A. 622, on liability of executors, trustees, etc., for compound interest; 29 L.R.A. 643, on allowance of compound interest against executors, trustees, etc., for nonperformance of trusts for accumulation.

Settlement of accounts of trustees.

Cited in *Ex parte Cassel*, 3 Watts, 408, stating principles upon which they will be charged upon settlement of their accounts.

Right to disinherit heirs by will.

Cited in *Crane v. Doty*, 1 Ohio St. 279, denying right so far as concerns intestate lands.

16 AM. DEC. 664, SCREVEN v. BOSTICK, 2 M'CORD, EQ. 410.**Executors de son tort.**

Cited in reference notes in 20 A. D. 462, on executor *de son tort*; 65 A. D. 140, as to when intermeddling with goods will convert one into executor *de son tort*; 45 A. D. 778, as to how executor *de son tort* is constituted and liability of.

Cited in note in 85 A. D. 426, on liability of executor *de son tort*.

Bill in aid of execution.

Cited in *Dargan v. Waring*, 11 Ala. 988, 46 A. D. 234, holding judgment creditor may resort to equity not only to subject the equitable interests of his debtor, but for the purpose of removing impediments to the sale at its value, of an estate which may be reached by a *fi eri facias*.

Cited in reference note in 66 A. D. 658, on injunction against debtors disposing of property.

Bill to subject equitable estate to execution.

Cited in *Perry v. Nixon*, 1 Hill, Eq. 336, holding judgment creditor entitled to have equitable estate of debtor subjected to execution; *Parish v. Lewis*, *Freem. Ch. (Miss.)* 299; *McElwain v. Willis*, 9 Wend. 548; *Dawson v. Coffey*, 12 Or. 513, 8 Pac. 838; *Roper v. McCook*, 7 Ala. 318,—holding judgment creditor must show that an execution issued and was returned “no property found.”

Cited in notes in 4 L.R.A. 354, on suit to set aside fraudulent conveyance; 25 A. D. 313, on creditor's right to resort to equity to reach assets; 66 A. S. R. 287, on who may maintain creditors' bill to set aside fraudulent conveyance.

Exhaustion of legal remedy before bringing creditors' suit.

Cited in *Kennedy v. Simons*, *Dud. Eq.* 141; *Ginn v. Brown*, 14 R. I. 524,—holding debtor's insolvency does not dispense with necessity of obtaining judgment at law before resorting to equity; *Brown v. M'Donald*, 1 Hill, Eq. 297, holding rule that creditor must first obtain judgment at law has no application when court of equity is asked to give effect to its own judgments; *Ragsdale v. Holmes*, 1 S. C. N. S. 91, holding it not necessary that simple and contract creditors of a decedent should exhaust their remedies at law before exhibiting a creditors' bill in equity against executors of decedent for an account of assets, payment of debts, etc.; *Eno v. Calder*, 14 Rich. Eq. 154, holding creditor of estate had remedy at law by *assumpsit*, and not entitled to equitable relief; *Salt Lake Hardware Co. v. Tintic Milling Co.* 13 Utah, 423, 45 Pac. 200. on question of necessity of return *nulla bona* in suit against insolvent corporation.

Cited in reference notes in 90 A. D. 288, on necessity of creditor's exhausting remedy at law before filing creditors' bill; 34 A. D. 368, on necessity of judgment creditor showing exhaustion of legal remedies before resorting to equity; 44 A. D. 722, on necessity of creditor having judgment and execution unsatisfied to maintain bill to reach debtor's equitable assets or property fraudulently transferred.

Cited in notes in 52 A. R. 674, on conditions precedent to judgment creditor's suit; 66 A. S. R. 277, on issuance and return of execution *nulla bona* as prerequisite to filing of creditors' bill.

16 AM. DEC. 667, LOWNDES v. CHISOLM, 2 M'CORD, EQ. 455.**Subrogation of surety.**

Cited in *Pride v. Boyce*, *Rice, Eq.* 275, 33 A. D. 78, holding surety who pays debt of principal entitled to benefit of any security which creditor may have

taken from principal debtor; *Kaminer v. Hope*, 18 S. C. 561, on right of sureties to be subrogated to creditor; *Watkins v. Worthington*, 2 Bland, Ch. 509, on the equities between principal and sureties and between sureties when they pay claim.

Cited in reference note in 34 A. D. 762, on subrogation of surety paying debt to rights of creditor as to collateral securities and other remedies.

Cited in notes in 68 L.R.A. 529, 530, on subrogation of sureties paying judgment against principals to collateral securities; 99 A. S. R. 485, on rights and securities to which payer is entitled to be subrogated.

Jurisdiction of equity to correct mistakes.

Cited in *Wyche v. Greene*, 11 Ga. 159, holding agreements, whether executed or executory, within or without the statute of frauds, whether for the conveyance of real or personal property, will be reformed by courts of equity, on ground of mistake; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976, holding where deed is executed and word "heirs" omitted by mistake, and not because of ignorance that such word was necessary to convey estate of inheritance, the mistake may be corrected and fee declared; *Annelly v. De Saussure*, 12 S. C. 488; *McDow v. Brown*, 2 S. C. 95,—on question of when equity will relieve against mistake.

—Mistake of law.

Cited in *Whitehill v. Dacus*, 49 S. C. 273, 27 S. E. 200, holding equity has jurisdiction to set aside contract on ground of mistake of law; *Hopkins v. Mazyck*, 1 Hill, Eq. 242, holding that there is a distinction between ignorance and mistake of law, the first is not susceptible of proof and cannot therefore be relieved; but mistake may be proved, and when proven relief will be afforded; *Hutchison v. Fuller*, 67 S. C. 280, 45 S. E. 164; *Cunningham v. Cunningham*, 20 S. C. 317,—on distinction between ignorance of law and mistake of law; *Nowlin v. Pyne*, 47 Iowa, 293; *Neufville v. Stuart*, 1 Hill, Eq. 159; *Heacock v. Fly*, 14 Pa. 540; *McLucas v. Durham*, 20 S. C. 302; *Boulware v. Harrison*, 4 Rich. Eq. 317; *Munro v. Long*, 35 S. C. 354, 28 A. S. R. 851, 14 S. E. 824; *Brockington v. Camlin*, 4 Strobb. Eq. 189; *Champlin v. Laytin*, 18 Wend. 407, 31 A. D. 382,—as to whether relief will be granted on ground of mistake of law.

Cited in reference notes in 34 A. D. 200; 38 A. D. 735,—on equitable relief against ignorance or mistake of law.

Cited in note in 55 A. S. R. 504, on ignorance or mistake of law as ground for relief.

Distinguished in *Maner v. Washington*, 3 Strobb. Eq. 171, holding ignorance of law founded upon the improper or erroneous construction of deed or will, will not entitle a party to be relieved from his contracts, made in conformity with such erroneous construction.

—Mistake as to title offered at judicial sale.

Cited in *Norman v. Norman*, 26 S. C. 41, 11 S. E. 1096, holding purchaser, mistakenly believing that a judgment, under which he purchased, was older than mortgage lien, cannot be relieved of his bid upon ground of mistake of fact or mistake of law; *Barrett v. Bath Paper Co.* 13 S. C. 128, on question of setting aside judicial sale on ground of mistake.

Recovery of money paid under mistake of law.

Cited in *Culbreath v. Culbreath*, 7 Ga. 64, 50 A. D. 375, holding money so paid may be recovered in an action for money had and received, where there is full knowledge of all the facts, provided that the mistake is clearly proven,

and the defendant cannot, in good conscience, retain it; *McKee's Case*, 12 Ct. Cl. 504, holding that where accounting officers, in mistake of law, have certified a balance in favor of a party upon an invalid obligation and that party brings suit founded upon the same contract, the defendants may set up as a counter-claim and recover back the money paid on the accounting-officers' settlement; *Healey v. United States*, 29 Ct. Cl. 115, holding money paid for government land at a higher price than statute requires may be recovered back though paid without objection or protest.

Mortgagee in possession.

Cited in *Givens v. M'Calmont*, 4 Watts, 460, holding him chargeable with waste; *Gubbings v. Harper*, 1 Legal Gaz. 212, holding mortgagee in possession entitled to allowance for repairs, but not for improvements, adding to convenience of premises.

Right as to improvements by one in possession under prima facie title.

Cited in *Lumb v. Pinckney*, 21 S. C. 471, holding him entitled to compensation for improvements.

Rights of senior mortgagee.

Cited in note in 9 L.R.A. 678, on right of senior mortgagee to disbursements.

16 AM. DEC. 672, NASH v. HARRINGTON, 2 AIK. (VT.) 9.

Demand and notice as to indorsers of overdue paper.

Cited in *Rosson v. Carroll*, 90 Tenn. 90, 12 L.R.A. 727, 16 S. W. 66; *Landon v. Bryant*, 69 Vt. 203, 37 Atl. 297; *McKewer v. Kirtland*, 33 Iowa, 348,—holding demand, and notice not later than next day, necessary to bind indorsers of note indorsed after maturity; *Fortner v. Parham*, 2 Smedes & M. 151, on same point; *Aldis v. Johnson*, 1 Vt. 136, holding same rule applicable to non-negotiable notes.

Cited in reference notes in 43 A. D. 289, on right of indorser of overdue note to demand and notice; 44 A. D. 262, on right of indorser of overdue note to reasonable demand and notice; 29 A. D. 586, on necessity of demand and notice to indorser of past due note.

Cited in notes in 46 L.R.A. 805, on demand and notice to charge indorser of negotiable paper after maturity; 46 L.R.A. 804, on rights of holder of negotiable paper transferred after maturity as against indorser.

Time for notice to indorser.

Cited in *Turner v. Iron Chief Min. Co.* 74 Wis. 355, 17 A. S. R. 168, 5 L.R.A. 533, 43 N. W. 149, holding that note payable on demand must be presented for payment and notice of nonpayment given within reasonable time after transfer to bind indorser.

Question of law as to reasonableness of demand.

Cited in reference notes in 30 A. D. 360, on reasonable demand and notice as question of law; 71 A. D. 713, on reasonable demand and notice as question for jury; 66 A. D. 477, on due diligence in presentment, etc., of negotiable instruments as question of law.

Cited in note in 34 A. D. 284, on what is a reasonable demand and notice as question of law.

Effect of indorsement of overdue paper.

Cited in *Smith v. Caro*, 9 Or. 278, on note indorsed long after due being treated as though indorsed on day of payment.

Cited in reference note in 35 A. S. R. 175, on indorsement of negotiable instruments after maturity.

Adoption of law merchant.

Cited in *Ripley v. Greenleaf*, 2 Vt. 129, on following the rules of the law merchant as to demand and notice.

Cited in reference note in 69 A. D. 115, on law merchant as part of common law.

Insolvency as affecting necessity of demand.

Cited in reference notes in 43 A. D. 248, on insolvency of maker of note as affecting necessity for notice to indorser; 18 A. D. 652, on effect of insolvency of maker to dispense with necessity of notice to charge indorser.

16 AM. DEC. 675, KING v. HARRINGTON, 2 AIK. (VT.) 33.

Recording assignment of mortgage.

Cited in note in 55 A. S. R. 851, on necessity of recording assignment of mortgage.

Effect of assigning secured note.

Cited in reference note in 76 A. D. 76, on assignment of note secured by mortgage as carrying with it mortgage.

Right of one of several mortgagees to have foreclosure.

Cited in *Page v. Pierce*, 26 N. H. 317, holding that mortgage securing several notes may be foreclosed by holder of one note in his own name where the other notes have been paid; *Johnson v. Brown*, 31 N. H. 405, on same point.

Parties to foreclosure suit.

Cited in note in 37 L.R.A. 741, on comortgagees as parties in proceeding to enforce mortgage for part of mortgage debt.

16 AM. DEC. 678, JONES v. COOPER, 2 AIK. (VT.) 54.

Contingent claims against insolvent estates.

Cited in *Lowry v. Stevens*, 6 Vt. 113, holding that such claims against decedent's insolvent estate cannot be allowed by commissioners.

Bar of claims by nonpresentment.

Cited in *Sparhawk v. Buell*, 9 Vt. 41, holding that claim for legacy not presented to commissioner of insolvency is not barred by statute of limitations.

Cited in reference note in 40 A. D. 193, as to when contingent claims against estate of deceased debtor need not be presented for allowance.

Cited in note in 40 A. D. 313, on necessity of demand before bringing action.

Breach of condition of indemnity bond.

Cited in reference note in 75 A. D. 172, as to when condition of indemnity bond is broken.

Condition in bond.

Cited in reference note in 75 A. D. 173, on request as part of condition of bond conditioned to account "when thereto requested."

16 AM. DEC. 684, CHAPPEL v. MARVIN, 2 AIK. (VT.) 79.

Delivery of key as delivery of goods.

Cited in *Giffert v. Wilson*, 18 Ill. App. 214, holding delivery of key to room containing mortgaged goods sufficient as change of possession; *Packard v. Dunsmore*, 11 Cush. 282, holding delivery of key to building containing goods sold,

sufficient as against subsequent attachment; *Marsh v. Fuller*, 18 N. H. 360, holding delivery of key to chest, with words "of gift of chest and contents," sufficient delivery to give title to donee.

Cited in notes in 5 E. R. C. 98, on constructive delivery of possession of chattels; 37 A. R. 16, on delivery satisfying statute of frauds.

16 AM. DEC. 686, FLETCHER v. HOWARD, 2 AIK. (VT.) 115.

Change of possession as requisite to title to chattels.

Cited in *Patton v. Cardiner Bros.* 72 Vt. 47, 47 Atl. 110, holding that upon consideration being paid title passes as between the parties without change of possession; *Ward v. Camp*, 67 Vt. 461, 32 Atl. 236, on same point; *Wright v. Maxwell*, 9 Ind. 192, holding sale of chattel complete where deposited with third party to be delivered upon payment of price.

Cited in reference notes in 20 A. D. 199; 29 A. D. 363,—on retention of possession of personal property by vendor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 30 A. D. 262, on retention of possession by vendor or mortgagor as evidence of fraud; 61 A. D. 169, on necessity for delivery of personal property to pass title; 30 A. D. 476, on necessity of continued change of possession on sale of chattels; 69 A. D. 776, on effect upon his pledge of pledgee redelivering pledge to pledgeor.

Cited in notes in 97 A. D. 345, on what delivery sufficient as against creditors and subsequent purchasers; 49 A. D. 325, on delivery and acceptance to take verbal sale of goods out of the statute of frauds; 49 A. D. 733, on effect of redelivery to pledgeor.

Possession requisite to pledge or mortgage.

Cited in *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666, holding transfer of possession necessary to validity of pledge; *Watson v. Williams*, 4 Blackf. 26, 28 A. D. 36, holding that mortgagor's possession of mortgaged property may be explained by parol, as against subsequent attachment.

Priority as between two sales of same chattel.

Cited in *Winslow v. Leonard*, 24 Pa. 14, holding that equally valid contracts of sale of same chattel to two persons vests title in the first to obtain possession.

Cited in reference note in 31 A. D. 40, on purchaser first acquiring possession obtaining title.

Fraud upon others as defense.

Cited in *Gifford v. Ford*, 5 Vt. 532, holding that party to mortgage cannot set up fraud as to others, to avoid his contract.

Failure to instruct as error.

Cited in *Campbell v. Campbell*, 54 Wis. 90, 11 N. W. 456, holding refusal of court to instruct upon any pertinent point of law, ground for reversal.

Cited in reference note in 26 A. D. 433, on necessity of instructions on question of law on evidence adduced.

Cited in note in 99 A. D. 124, on duty and rights of party demanding instructions.

16 AM. DEC. 689, SELICK v. MUNSON, 2 AIK. (VT.) 150. Adhered to on later case between same parties in 2 Vt. 13.

Application of payments by creditor.

Cited in *Brown v. Lacy*, 83 Ind. 436, holding that payments cannot be applied to unjust or unlawful demands.

Cited in reference notes in 37 A. D. 625, on application of payments; 39 A. D. 599, on how application of payments is made.

16 AM. DEC. 691, BARRETT v. BUXTON, 2 AIK. (VT.) 167.

Contracts by intoxicated persons.

Cited in J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 9 L.R.A. (N.S.) 970, 111 N. W. 602, holding that intoxication, in order to make contract voidable, must be so excessive as to render party unable to comprehend the consequences of his act; Johnson v. Harmon, 94 U. S. 371, 24 L. ed. 271, holding contract entered into by person so intoxicated as not to know what he was doing, voidable; Donelson v. Posey, 13 Ala. 752, on same point; Blagg v. Hunter, 15 Ark. 246, holding same of deed of gift of slaves made while donor was so intoxicated as to deprive him of understanding; Prentice v. Achorn, 2 Paige, 30, setting aside deed executed by plaintiff's ancestor while deprived of reason by intoxication; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753, holding note signed while intoxicated good in hands of bona fide holder for consideration; Breasted v. Farmers' Loan & T. Co. 8 N. Y. 299, 59 A. D. 482, on invalidity of contracts entered into while incompetent from intoxication.

Cited in reference note in 34 A. D. 353, on habitual intemperance of one party to contract as ground for refusing specific performance.

Cited in notes in 107 A. S. R. 540, as to whether contract of intoxicated persons is void or voidable; 2 L.R.A.(N.S.) 667, on how far contract is invalidated by intoxication; 107 A. S. R. 538; 54 L.R.A. 440,—on degree of intoxication as affecting validity of contract made with intoxicated person; 107 A. S. R. 540, on right of party to contract to plead intoxication.

Contractual incapacity of mind.

Cited in Allen v. Berryhill, 27 Iowa, 534, 1 A. R. 309 (dissenting opinion), on contracts of insane persons being void; Bliss v. Connecticut & P. Rivers R. Co. 24 Vt. 424, on the law taking account of the state of mind, not the causes producing it.

16 AM. DEC. 696, MARTIN v. BIGELOW, 2 AIK. (VT.) 184.

Riparian rights.

Cited in reference notes in 26 A. D. 390, on rights of riparian proprietor; 37 A. D. 238, on right of riparian owner to natural flow of stream; 38 A. D. 112, on right of riparian proprietor to use of water flowing through his land; 38 A. S. R. 829, on right of action for draining waters.

Cited in notes in 21 A. D. 51, on rights in water course; 6 E. R. C. 218, on right of riparian owner to use of natural stream; 79 A. D. 638, on riparian owner's right to natural flow of stream; 54 A. D. 794, on right of riparian owner to natural and uninterrupted flow of stream; 23 A. D. 513, on extent of owner's right in stream flowing through his land; 10 E. R. C. 218, on inapplicability of common-law doctrine of riparian rights to portions of the United States; 9 L.R.A. 812, on damages recoverable for diversion of water of stream.

Rights under prior appropriation of water in stream.

Cited in Davis v. Fuller, 12 Vt. 178, 36 A. D. 334; Hoy v. Sterrett, 2 Watts. 327, 27 A. D. 313,—holding that prior appropriation of water gives no rights as against proper use thereof by upper riparian owner; Tucker v. Jewett, 11 Conn. 311, on right of first appropriator of water in a stream to protection in his enjoyment of the water.

Cited in notes in 30 L.R.A. 668, on right of prior appropriation of water; 22 L. ed. U. S. 414, on common-law rule as to title to water by appropriation; 41 L.R.A. 743, on ancient use of water of stream as between upper and lower proprietors; 43 A. D. 272, 274, on rights acquired by prior appropriation of water of stream.

Common law.

Cited in note in 22 L.R.A. 506, on limitation of adoption of common law in United States.

16 AM. DEC. 698, RAYMOND v. ROBERTS, 2 AIK. (VT.) 204.

Parol evidence as to writing.

Cited in reference notes in 33 A. D. 751, on parol evidence to vary written agreement; 24 A. D. 129, on parol evidence to vary or contradict written contract.

Cited in notes in 21 A. D. 213, on parol evidence to vary or explain written contract; 19 A. D. 534, on evidence of oral warranty where contract of sale has been reduced to writing.

Parol evidence to explain receipt.

Cited in *Vaughan v. Mason*, 23 R. I. 348, 50 Atl. 390, holding that receipt for money also embodying an agreement cannot be varied or explained by parol.

Cited in reference notes in 11 A. S. R. 394, on parol testimony to contradict receipts; 25 A. D. 363, on parol evidence to explain or contradict receipt; 34 A. D. 183, on parol evidence to vary effect of receipt; 45 A. D. 130, on receipt as evidence of payment.

Cited in note in 11 E. R. C. 233, on parol evidence to explain or contradict receipt.

Construction of contemporaneous contracts.

Cited in *Wing v. Cooper*, 37 Vt. 169; *Strong v. Barnes*, 11 Vt. 221, 34 A. D. 684,—holding that different contemporaneous writings on same subject between same parties should be construed together.

Cited in reference notes in 34 A. D. 685, on construing together different instruments executed at the same time; 13 A. S. R. 351, on construing together instruments executed at same time between same persons relating to same subject-matter.

16 AM. DEC. 702, ALLEN v. HUNTINGTON, 2 AIK. (VT.) 249.

Validity of judgment.

Cited in reference notes in 30 A. D. 677; 35 A. D. 421,—as to when judgments are void.

Cited in note in 11 A. S. R. 821, on validity of judgments rendered without jurisdiction.

Effect of erroneous judgment before reversal.

Cited in *Earle v. Earle*, 91 Ind. 27 (opinion on rehearing); *Smith v. Hess*, 91 Ind. 424; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90, 23 Pac. 908 (opinion on rehearing),—holding that judgment of court of general jurisdiction is not void unless want of jurisdiction appears on the face of the record; *Wood v. Kinsman*, 5 Vt. 588, holding that erroneous judgment of court having jurisdiction is effective until reversed upon direct attack.

Cited in reference notes in 22 A. D. 722, on void and erroneous judgments; 32 A. D. 656, on validity of irregular judgment until set aside; 32 A. D. 540, on conclusiveness of judgment.

Mode of attacking judgment.

Cited in reference note in 52 A. S. R. 239, on direct and collateral attack on judgment.

Erroneous process.

Cited in reference notes in 25 A. D. 600, on what is erroneous and irregular process; 24 A. D. 324, on distinction between erroneous and irregular process.

Jurisdiction under defective process.

Cited in *Carruth v. Tighe*, 32 Vt. 626, holding that court may take jurisdiction though process is defective.

Distinguished in *State Treasurer v. Cook*, 6 Vt. 282, holding that recognizance ordered by justice under void complaint is void.

Protection afforded by erroneous judgment.

Cited in reference notes in 77 A. D. 640, on justification under erroneous judgment after reversal; 2 A. S. R. 728, on protection afforded by erroneous judgment for acts done under it.

Effect of vacation of judgment.

Cited in note in 60 A. S. R. 663, on effect of order vacating judgment.

16 AM. DEC. 705, LYMAN v. WHITE RIVER BRIDGE CO. 2 AIK. (VT.) 255.**Liability of corporation for wrongs.**

Cited in *State v. Vermont C. R. Co.* 27 Vt. 103, holding railroad corporation liable to indictment for maintaining nuisance.

Cited in reference notes in 25 A. D. 202; 41 A. D. 262,—on corporation's liability for torts; 36 A. D. 84, on liability of corporation for injuries done by it; 76 A. D. 694, on trespass against private corporations; 75 A. D. 728, on right to maintain trespass *quare clausum fregit* against private corporation.

Cited in notes in 13 A. D. 596, on liability of corporation for torts; 24 L.R.A. 593, on liability for property destroyed by mob.

Corporation acting through agents.

Cited in reference notes in 54 A. D. 345, on corporations as acting through agents; 34 A. D. 329, on corporate liability for acts of agents.

16 AM. DEC. 710, MITCHELL v. WALKER, 2 AIK. (VT.) 266.**Prescriptive rights.**

Cited in *Downer v. Dana*, 19 Vt. 338, on right to easement by adverse possession.

Cited in reference notes in 69 A. D. 504, as to how title by prescription may be established; 20 A. D. 526, on prescription for water rights; 39 A. S. R. 54, on presumption of conveyance from lapse of time; 39 A. D. 686, on presumption of grant from long-continued adverse possession.

— Conditions in grant.

Cited in *Watkins v. Peck*, 13 N. H. 360, 40 A. D. 156, holding that grant upon condition may be presumed from adverse usage for statutory period.

Title by adverse possession.

Cited in *Colvin v. Burnet*, 17 Wend. 564, holding that pleadings must allege possession for statutory period to have been adverse; *Hinchman v. Whetstone*, 23 Ill. 185, on question whether adverse possession for statutory period transfers, or confers title.

Cited in reference note in 36 A. D. 683, on claim of title in adverse possession.

— **Effect of acknowledging owner's right.**

Cited in *Weed v. Keenan*, 60 Vt. 74, 6 A. S. R. 93, 13 Atl. 804, holding that oral acknowledgment of superior right in another interrupts the adverse possession; *Ripley v. Yale*, 19 Vt. 156, on possession adverse to grantor from whom it is derived.

Cited in reference notes in 6 A. S. R. 95, on effect of admission by occupant, of owner's right to land, on claim of adverse possession; 51 A. D. 540, on what is sufficient acknowledgment of true owner's title to interrupt running of statute of limitations in favor of an adverse possession.

Liability for diverting water.

Cited in note in 62 L.R.A. 580, on liability for withdrawing water from reservoir.

16 AM. DEC. 715, BRADFORD v. BROOKS, 2 AIK. (VT.) 284.

Retrospective statutes.

Cited in reference note in 40 A. D. 496, on retrospective statutes.

Cited in notes in 50 A. D. 394, as to when statutes of limitations are constitutional; 45 L.R.A. 612, on vested right in defense of statute of limitations in civil actions.

— **Acts granting new trials or appeals after time therefor has expired.**

Cited in *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33, holding act granting appeal in case already appealed to highest court having jurisdiction, unconstitutional; *Lohrstorfer v. Lohrstorfer*, 140 Mich. 551, 70 L.R.A. 621, 104 N. W. 142, holding act permitting court to reinstate appeals dismissed for nonpayment of fees, unconstitutional as to appeals dismissed before its passage; *Lawson v. Jeffries*, 47 Miss. 686, 12 A. R. 342, holding ordinance of constitutional convention granting new trials upon certain final judgments unconstitutional; *Davidson v. Johannot*, 7 Met. 388, 41 A. D. 448; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209 (dissenting opinion),—on unconstitutionality of statute renewing right of action already barred by statute of limitation; *Andrews v. Beane*, 15 R. I. 451, 8 Atl. 540, on unconstitutionality of act extending time for appeal after such time has once expired.

Time for presenting claim against estate.

Cited in reference note in 60 A. S. R. 444, on necessity of presenting claim against decedent's estate within prescribed time.

16 AM. DEC. 720, STEELE v. BATES, 2 AIK. (VT.) 338.

Bill of exceptions.

Cited in reference note in 61 A. S. R. 850, on sufficiency of bill of exceptions.

Variance.

Cited in note in 62 A. D. 119, as to when variance between allegation and proof is material.

Right of trial court to reserve question for review.

Cited in *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, holding that trial court may on its own motion reserve a question of law for consideration at law term.

Service of summons obtained by fraud.

Cited in *Van Horn v. Great Western Mfg. Co.* 37 Kan. 523, 15 Pac. 562, holding that service of summons obtained by fraudulently inveigling one into the jurisdiction for that purpose will be set aside.

Cited in reference notes in 5 A. S. R. 867, on setting aside process procured by fraud; 15 A. S. R. 551, on effect of service on one decoyed within jurisdiction for that purpose; 29 A. D. 225, on right to avoid fraudulent process; 64 A. S. R. 537, on setting aside process for illegal service.

Cited in notes in 6 A. S. R. 180, on effect of decoying party within jurisdiction; 25 L.R.A. 733, on effect of fraud and deceit on privilege of nonresident witnesses from suit.

Conclusiveness of judgment.

Cited in reference note in 26 A. S. R. 955, as to when judgment is *res judicata*.

16 AM. DEC. 725, MOON v. HAWKS, 2 AIK. (VT.) 390.

Possession as evidence of sale or ownership.

Cited in *Bullard v. Billings*, 2 Vt. 309, holding that possession may be submitted to the jury with other evidence to show sale to possessor; *Tate v. Tate*, 85 Va. 205, 7 S. E. 352, holding possession of personal property presumptive proof of ownership.

Cited in reference notes in 20 A. D. 199, on retention of possession by vendor or mortgagor; 45 A. D. 129, on possession as evidence of title to chattel; 11 A. S. R. 633, on possession of personalty as evidence of ownership; 46 A. D. 325; 55 A. D. 52,—on possession of personal property as *prima facie* evidence of ownership; 55 A. D. 415, on liability of chattel to debts or disposition of one in mere possession without owner's consent.

Grounds for new trial.

Cited in reference note in 24 A. D. 319, as to when new trial may be granted.

16 AM. DEC. 729, MYERS v. BROWNELL, 2 AIK. (VT.) 407.

New trial for newly discovered evidence.

Cited in *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582, holding new trial should not be granted for newly discovered evidence unless it ought to produce a different verdict.

Cited in reference notes in 24 A. D. 319; 32 A. D. 35,—as to when new trial will be granted; 17 A. D. 351; 38 A. D. 105; 53 A. D. 184, 185; 11 A. S. R. 757,—on right to new trial on ground of newly discovered evidence; 54 A. D. 304, on requisities of newly discovered evidence to be ground for new trial; 38 A. D. 731, on discovery of accumulative evidence as ground for new trial.

Admissibility of declarations.

Cited in reference notes in 77 A. D. 346, as to when declarations of third persons are admissible in evidence; 40 A. D. 198, on admissibility of declarations against interest; 52 A. D. 262, on competency of admissions of party against interest, as evidence; 53 A. D. 732, on admissibility of declarations of deceased person against interest.

Parol evidence to vary certificate of recording officer.

Cited in *Carpenter v. Sawyer*, 17 Vt. 121, holding parol evidence by recording officer admissible as to such record; *Bartlett v. Boyd*, 34 Vt. 256, holding parol evidence admissible to vary clerk's certificate as to time instrument was received in his office.

16 AM. DEC. 733, BARNARD v. STEVENS, 2 AIK. (VT.) 429.

Time of levy of execution.

Cited in *Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312, holding that execution

cannot be levied after return day thereof; *Shultz v. Smith*, 17 Kan. 306; *Wal-drop v. Friedman*, 90 Ala. 157, 24 A. S. R. 775, 7 So. 510,—holding levy made under execution after return day, void.

— **Completion of sale after return day.**

Cited in *Johnson v. Bemis*, 7 Neb. 224, holding that officer may sell property levied upon after return day of execution.

Cited in reference notes in 61 A. S. R. 391, on sale under execution after return day; 85 A. D. 603, on right of officer who levies upon personal property to sell it after return day without writ of *venditioni exponas*.

Cited in notes in 15 A. D. 523, on sales after return day; 76 A. D. 84, on officer's power after return day of writ, by *venditioni exponas* or otherwise, to sell property.

Distinguished in *Hombs v. Corbin*, 20 Mo. App. 497, holding that officer may retain possession of property levied upon, after return of execution.

Amending officer's return on process.

Cited in *Pond v. Campbell*, 56 Vt. 674, holding that court has discretionary power to permit sheriff to amend the return as to attachment of property; *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919, holding that only power which may permit officer to amend his return is the tribunal issuing it.

Cited in reference notes in 20 A. D. 60; 24 A. D. 39; 26 A. D. 689; 29 A. D. 499; 41 A. D. 363,—on amendments of returns to writs; 31 A. D. 166, on amendment of return to summons or other writ.

Right to fees on execution paid to creditor before levy.

Distinguished in *Joslyn v. Tracy*, 19 Vt. 569, holding that sheriff holding execution need not accept amount of debt unless his fees are tendered.

Liability of execution creditor.

Cited in reference note in 57 A. D. 707, as to when execution creditor is liable as a tortfeasor.

16 AM. DEC. 738, HUNTER v. FULCHER, 5 RAND (VA.) 126.

Notice to take deposition.

Cited in reference notes in 42 A. D. 609, on notice of taking depositions; 46 A. D. 298, on requisites of notice to take depositions.

Cited in note in 39 A. D. 533, on necessity for giving notice of taking of deposition.

Adjournment of taking of depositions.

Cited in *Harris v. Harris*, 89 Va. 762, 17 S. E. 871, on necessity of adjourning from day to day in taking deposition; *Bennett v. Bennett*, 37 W. Va. 396, 38 A. S. R. 47, 16 S. E. 638, holding deposition taken May 15, 1890, adverse party not appearing under adjournment from March 19, 1890, "until 15th —, 1890" inadmissible.

Use of depositions.

Cited in reference note in 29 A. D. 567, on admissibility of depositions as evidence.

Proof of foreign laws.

Cited in *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 64 A. S. R. 715, 36 L.R.A. 271, 26 S. E. 421, holding foreign law proved by authenticated copy of act or so much of it as is relevant; *Swift v. Fitzhugh*, 9 Port. (Ala.) 39, holding it necessary to produce only that part of act relating to the controversy.

Cited in reference notes in 19 A. D. 561, on proof of foreign laws; 52 A. D. 256, on mode of proving foreign statutory law; 83 A. D. 451, on judicial notice of laws of other states.

16 AM. DEC. 741, GRAFF v. CASTLEMAN, 5 RAND. (VA.) 195.

Rights of persons dealing with trustees or fiduciaries.

Cited in *Smith v. Henning*, 10 W. Va. 598, holding purchaser from executor selling for payment of debts, not ordinarily bound to see that such purpose is in fact subserved; *Davis v. Christian*, 15 Gratt. 11, holding purchaser for full value from executor continuing a partnership under the will was not chargeable with executor's fraud even though a bond of indemnity was exacted from latter; *Jones v. Clark*, 25 Gratt. 642, holding it a devastavit to sell purchase-money bonds for a large discount when funds were not needed, and that buyers were chargeable; *Harding v. Turner*, 78 Va. 438, holding sales of like bonds to purchaser for full value, and to creditor of executor and principal legatee in satisfaction of personal debt, were good; *Calloway v. Price*, 32 Gratt. 1, holding creditor, conniving with representative of surety to throw liability on estate of latter equally in wrong with representative; *Utterback v. Cooper*, 28 Gratt. 233, holding lien of mortgage to one loaning money to administrator for latter's private use was junior to earlier mortgage by administrator to secure purchase money, the lender having had foreknowledge of the facts; *Wilkinson v. Holloway*, 7 Leigh, 277, holding payment by cancelling indebtedness owing from attorney to debtor and bond for balance not binding on client, where there was notice of agency of attorney.

Cited in reference notes in 44 A. D. 723, on right of trustee to deal with trust fund for his own benefit; 26 A. D. 91, on title acquired by conveyance from trustee in trust deed; 59 A. D. 423, on liability of director to account for secret profits.

Cited in notes in 78 A. S. R. 193 on power of executors to sell personal assets; 11 A. D. 389, on sales for executor's private purposes.

Following trust property.

Referred to as a leading case in *Morrison v. Page*, 9 Dana, 428, holding purchaser of note from executor takes subject to trust of which he had notice.

Cited in *Sacia v. Berthoud*, 17 Barb. 15, holding pledgee knowingly taking bond belonging to estate as collateral for loan to administrator, a trustee; *M'Kennan's Appeal*, 1 Grant. Cas. 364, holding appropriation of assets by executor to his own liabilities, a mismanagement, entitling interested parties to demand security; *Downman v. Rust*, 6 Rand. (Va.) 587, holding purchaser from assignee for creditors takes subject to legacies which he knew were a charge on land in hands of assignor; *Lee v. Lee*, 67 Ala. 406, holding guardian and borrower without security of trust funds with notice joint and several trustees to beneficiary.

Notice of equities.

Cited in *Price v. McDonald*, 1 Md. 403, 54 A. D. 657, holding information which ought to have put purchaser on inquiry, sufficient notice; *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797, on notice implied from failure to use ordinary prudence in investigation.

Cited in note in 64 A. D. 202, on constructive notice.

— From possession.

Cited in *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 A. S. R. 285, 2 S. E. 713, holding possession in third persons affects purchaser with notice; *Baynard v. Norris*,

5 Gill, 468, 46 A. D. 647, holding purchaser takes subject to equities of occupant, which might have been discovered by inquiry.

— **Recitals.**

Cited in *Reed v. Bachman*, 61 W. Va. 452, 123 A. S. R. 996, 57 S. E. 769, holding purchaser or lessee chargeable with notice of recitals in deeds in chain of title; *Christian v. Hughes*, 12 Tex. Civ. App. 622, 36 S. W. 298, holding grantee assuming payment of grantor's purchase-money notes bound by recital in deed to latter as to existence of trust deed; *Warren v. Ireland*, 29 Me. 62, holding statement of assignment of demand in appraiser's certificate in the making of levy notice to attaching creditor.

Cited in reference notes in 69 A. S. R. 798, on recitals in instruments as notice; 49 A. D. 170; 52 A. D. 66,—on recitals in deeds as notice; 22 A. D. 764, on notice by recitals in patents and other instruments; 14 A. S. R. 539, on what notice is imparted through recitals of deed; 43 A. D. 131, as to when vendee is charged with notice of recitals in title papers.

Cited in note in 20 A. D. 276, as to whom recitals in patents are evidence against.

Estoppel by recitals.

Cited in reference notes in 56 A. D. 107, on recitals as estoppels; 22 A. D. 714; 51 A. D. 115,—on recitals in deeds as estoppels; 25 A. D. 117; 47 A. D. 145,—as to when recitals in deeds operate as estoppel; 67 A. D. 363, on recitals in deeds as estoppel to strangers; 22 A. D. 478, on estoppel by recitals in deed as to third persons; 42 A. S. R. 265, on estoppel by deed as to grantee.

Representatives as trustee.

Cited in *Leavens v. Butler*, 8 Port. (Ala.) 380, on liability of executors and administrators as trustees in equity.

Settlement of accounts of personal representative.

Cited in reference note in 35 A. D. 516, on settlement of accounts of executors and administrators.

16 AM. DEC. 755, REES v. CONOCOCHIEAGUE BANK, 5 RAND. (VA.) 326.

Pleading and proof of incorporation.

Cited in *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 158, holding it unnecessary in action *ex contractu* to plead in corporation or call plaintiffs a corporation; *Hart v. Baltimore & O. R. Co.* 6 W. Va. 336, holding corporation may sue and be sued by its name without averment of incorporation; *State Cent. Bank v. Knowlton*, 12 Wis. 624, 78 A. D. 769, holding plaintiff in suit by corporate name need not aver itself to be a corporation; *State v. Dry Fork R. Co.* 50 W. Va. 235, 40 S. E. 447, holding indictment against corporation need not aver that it is a corporation; *Snyder v. Philadelphia Co.* 54 W. Va. 149, 102 A. S. R. 941, 63 L.R.A. 896, 46 S. E. 366, 1 A. & E. Ann. Cas. 225, on setting forth of corporate name as an implied allegation of incorporation; *Jackson v. Bank of Marietta*, 9 Leigh, 240, holding incorporation need not be averred but must be proved under general issue; *Phenix Bank v. Curtis*, 14 Conn. 437, 36 A. D. 492, holding general issue admits capacity of corporation to sue, but not to enter into contract in question; *Anderson v. Kanawha Coal Co.* 12 W. Va. 526, holding plaintiff in assumpsit against corporation, on issue of nonassumpsit must prove incorporation; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227, holding it unnecessary by statute for plaintiff to

prove its incorporation unless denied by plea under oath; *West Virginia Cent. Land Co. v. Calhoun*, 16 W. Va. 361, holding plaintiff must prove its incorporation upon general issue or in case of defense without plea, though otherwise upon special plea impliedly admitting existence; *Gillett v. American Stove & Hollow Ware Co.* 29 Gratt. 565, holding suit in corporate name imports a corporation dispensing with proof in absence of verified plea.

Cited in reference note in 35 A. D. 530, on necessity of corporation plaintiff's alleging its corporate existence.

Cited in notes in 29 A. D. 375, on allegation of corporate existence; 24 A. D. 58, on necessity of corporation proving its incorporation under general issue.

Indorsement in blank, and its effect.

Cited in reference notes in 35 A. D. 217, on blank indorsement of negotiable instrument; 32 A. S. R. 403, on effect of indorsement of negotiable instrument in blank; 44 A. D. 540, on title vesting in holder under blank indorsement.

Cited in note in 1 L.R.A. 712, on effect of blank indorsement.

—Action by indorsee.

Cited in *Bowers v. Trevor*, 5 Blackf. 24, holding blank indorsement sufficient to sustain suit by bona fide holder in his own name; *Worthington v. Curd*, 15 Ark. 491, holding blank indorsement passes title so as to vest right of action in transferee; *Brummel v. Enders*, 18 Gratt. 873, on right to recover without filling in assignment.

Cited in reference notes in 36 A. D. 126, on effect of blank indorsement to give right of action; 27 A. D. 522, on presumption that holder under blank indorsement is owner and vested with right of action.

Deduction of indorsement of credit on note or bond.

Distinguished in *Eib v. Pindall*, 5 Leigh, 109, holding oyer of bond does not give oyer of an indorsement.

Judgment by default.

Cited in reference note in 50 A. D. 221, on rendition, validity, and effect of judgments by default.

Necessity of writ of inquiry on default.

Distinguished in *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167, holding it unnecessary where defendant appeared and pleaded; *Commercial Union Assur. Co. v. Everhart*, 88 Va. 952, 14 S. E. 836, holding insurance policy not a contract for payment of sum certain and absolutely, and that inquest was essential.

—Power and duty of clerk to allow credits.

Cited in *Brewis v. Lawson*, 76 Va. 36, holding failure to include indorsed credit on bond in computing office judgment presumptively a clerical, and not a collusive, omission; *James River & K. Co. v. Lee*, 16 Gratt. 424, holding it necessary in every office judgment in ejectment.

16 AM. DEC. 759, BROWN v. TOELL, 5 RAND. (VA.) 543.

Impeachment of judgment in equity for legal defenses.

Cited in *Thomas v. Phillips*, 4 Smedes & M. 358, holding judgment on illegal contract will not be set aside in equity without excuse for failure to defend at law; *Mann v. Drewry*, 5 Leigh, 296 (dissenting opinion), on refusal of equity to relieve without proof of excuse for failure to defend at law.

Cited in notes in 86 A. S. R. 63, on relief in equity from statutory forfeitures; 54 A. D. 466, on equitable relief against judgment at law where no

defense was interposed; 32 L.R.A. 323, on general equitable jurisdiction as to injunction against judgments where there is a failure to defend at law; 54 A. S. R. 228, on exception to rule that known defenses must have been presented at law, to entitle to relief in equity; 31 L.R.A. 770, on injunction against judgment because of payment, where there was a failure to defend at law.

— For usury in debt.

Cited in *Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143, holding bill under statute for relief against judgment at law on ground of usury is one for discovery and relief; *Snyder v. Middle States Loan, Bldg. & Constr. Co.* 52 W. Va. 655, 44 S. E. 250, on whether equity will relieve against judgment at law on usurious transaction.

Cited in note in 31 L.R.A. 761, 762, on injunctions against judgments for usury.

Distinguished in *Bell v. Fergus*, 55 Ark. 536, 18 S. W. 931, holding judgment by consent on appearance entered not impeachable in equity for usury.

Pleading existence of legal defenses.

Cited in *Bloss v. Hull*, 27 W. Va. 503, holding bill for relief against judgment on ground of usury must put the usury directly in issue; *Smith v. Nicholas*, 8 Leigh, 330, holding facts constituting usury must be distinctly alleged and clearly proved according to allegation.

Effect of subsequent usury.

Cited in *Moseley v. Brown*, 76 Va. 419, holding lender entitled to principal and legal interest less sum paid on subsequent usurious agreement of forbearance.

Variance between bill and proofs.

Cited in *Wren v. Moncre*, 95 Va. 369, 28 S. E. 588, holding chancery will not allow recovery for fraudulent representations not relied on in pleadings.

Effect of improper evidence received without objection.

Cited in *Thomas v. Winne*, 53 C. C. A. 613, 122 Fed. 395, holding appellate court will disregard irrelevant evidence, though admitted without objection.

Judgment by default.

Cited in reference note in 50 A. D. 221, on rendition, validity, and effect of judgments by default.

16 AM. DEC. 761, JONES v. MASON, 5 RAND. (VA.) 577.

Ademption of legacies generally.

Cited in reference note in 28 A. D. 700, on ademption of legacies.

Advancement as satisfaction of legacy.

Cited in *Moore v. Hilton*, 12 Leigh, 1, holding subsequent advancement to child, a satisfaction of legacy, *pro tanto*; *Hansbrough v. Hove*, 12 Leigh, 316, 37 A. D. 659, holding devise of slaves and realty to child adeemed by subsequent gift of like property by marriage contract.

Cited in reference note in 28 A. D. 113, as to what is presumed to be an advancement.

Cited in notes in 23 A. D. 756, on advancements; 95 A. S. R. 349, on requisites for ademption by advancement to children; 2 E. R. C. 37, on ademption of legacy by one *in loco parentis* by making advance.

Distinguished in *Strother v. Mitchell*, 80 Va. 149, holding gift before will not chargeable as advancement unless so provided by terms of will; *Brown v. Dortch*, 12 Heisk. 740, holding life tenant with remainder to children chargeable in collation of advancements with full value of property, and not merely a life interest.

— **By gifts not in kind.**

Cited in *Carmichael v. Lathrop*, 108 Mich. 473, 32 L.R.A. 232, 66 N. W. 350, holding question dependent on intent regardless of difference in character of bequest and advancement; *Kelly v. Kelly*, 6 Rand. (Va.) 176, 18 A. D. 710; *May v. May*, 28 Ala. 141,—holding fact that advancements and bequests are not *ejusdem generis*, immaterial if there was an intention to substitute.

Cited in note in 2 E. R. C. 55, on presumption of ademption raised by subsequent gift.

Parol evidence of ademption.

Cited in note in 2 E. R. C. 272, on competency of parol evidence to show ademption of legacy.

Rebuttal of presumption of ademption.

Cited in *Hattersley v. Bissett*, 50 N. J. Eq. 577, 25 Atl. 332, holding presumption that deed is advancement may be explained by extrinsic evidence.

Effect of failure to reply in equity.

Cited in *Wood v. Wood*, 50 W. Va. 570, 40 S. E. 416, holding answer is to be taken as true when cause is brought on for hearing without replication.

Right to costs in equity.

Cited in *Coleman v. Coleman*, 2 Pearson (Pa.) 511, refusing costs where accounts were intricate and party filing bill had slept on his rights; *Coleman v. Brooks*, 15 Phila. 302, 39 Phila. Leg. Int. 158, requiring defendant succeeding on main issue to pay costs resulting from failure to sustain claim in answer.

16 AM. DEC. 776, ANDERSON v. COM. 5 RAND. (VA.) 627.

Indictable offenses at common law.

Cited in *Com. v. Turner*, 5 Rand. (Va.) 678, holding malicious, cruel, and excessive beating of one's own slave, not indictable.

— **Offenses against chastity.**

Cited in *Com. v. Jones*, 2 Gratt. 555, holding simple incontinence not punishable at common law; *Com. v. Isaacs*, 5 Rand. (Va.) 634, holding fornication not indictable at common law; *State v. Foster*, 21 W. Va. 767, holding simple fornication or adultery not indictable otherwise than under Code unless accompanied by publicity so as to be indictable at common law; *Com. v. Freeloove*, 150 Masa. 66, 22 N. E. 435, holding defendant may assume that indictment for adultery was brought under statute though not so informed in terms.

Cited in reference notes in 32 A. D. 403, on nonindictability at common law of adultery and fornication; 56 A. D. 190, as to when joint indictment for fornication and adultery sufficient; 97 A. D. 471, on punishment of adultery, fornication, etc., at common law.

Cited in notes in 32 A. D. 289, on adultery; 87 A. D. 405, on seduction as criminal offense; 51 A. D. 91, on conspiracies to seduce or procure prostitution; 107 A. S. R. 225, on acts of indecent or obscene character as public nuisance.

16 AM. DEC. 780, SMOCK v. DADE, 5 RAND. (VA.) 639.

Motion as substitute for audita querela or writ of error.

Cited in *Shuford v. Cain*, 1 Abb. (N. S.) 302, Fed. Cas. No. 12,823; *Brown v. Branch Bank*, 20 Ala. 420; *Steele v. Boyd*, 6 Leigh, 547, 29 A. D. 218; *Barnes v. Robinson*, 4 Yerg. 185; *Job v. Walker*, 3 Md. 129,—upholding remedy by motion instead of audita querela for matter arising subsequent to judgment;

Stroheim v. Deimel, 23 C. C. A. 467, 46 U. S. App. 639, 77 Fed. 802, holding order discharging person from imprisonment under *capias* upon motion as final as if by *audita querela*; *Bolling v. Anderson*, 1 Tenn. Ch. 127, on the history of the adoption of remedy by motion in the nature of error *coram nobis* in substitution for *audita querela*.

Cited in notes in 15 A. D. 695, on writ of *audita querela*; 20 L. ed. U. S. 405, as to nature of *audita querela* and when it will lie.

Power of attorney or agent.

Cited in reference notes in 26 A. D. 168; 31 A. D. 704; 42 A. D. 656,—on authority of attorney at law; 65 A. D. 383, on continuance of attorney's authority until judgment is satisfied.

Cited in notes in 76 A. D. 260, on effect of payment to attorney; 15 A. D. 131, on authority of agent to collect or receive money only; 21 E. R. C. 36, on necessity that agent with authority to receive payment receive money.

— To receive satisfaction of judgment.

Cited in *Chalfants v. Martin*, 25 W. Va. 394, holding payment of judgment to attorney valid in absence of bad faith; *Harper v. Harvey*, 4 W. Va. 539, denying power to accept payment of judgment in Confederate state notes; *Chapman v. Cowles*, 41 Ala. 103, 91 A. D. 508, denying power to accept depreciated paper money in payment of judgment; *Lewis v. Woodruff*, 15 How. Pr. 539, denying power, as between plaintiff and defendant, to accept anything in satisfaction of judgment except full amount in money; *Barr v. Rader*, 31 Or. 225, 49 Pac. 962, denying power to authorize sheriff to accept certificate of indebtedness from garnishee in payment of execution; *Maddox v. Rader*, 9 Mont. 126, 22 Pac. 386, holding mortgagee's attorney has no implied authority to authorize sheriff to receive credit bids.

Distinguished in *Smith v. Lambert*, 7 Gratt. 138, holding attorney's receipt of bond under agreement to collect and remit proceeds to holder of judgment a valid payment, though attorney failed to remit after collection.

— To dismiss suit or discharge claim.

Cited in *Simpson v. Brown*, 1 Wash. Terr. 247, upholding power to discontinue suit by virtue by general power as attorney on record; *Saleski v. Boyd*, 32 Ark. 74, holding general retainer does not carry power to compromise case and consent to judgment; *McClintock v. Helberg*, 168 Ill. 384, 48 N. E. 145, denying implied authority to materially lessen client's security; *McCarver v. Nealey*, 1 G. Greene, 360, denying power to accept anything but money for demand in hands for collection; *Wiley v. Mahood*, 10 W. Va. 206, denying power to commute debt without express authority or subsequent ratification.

— To commute debt due to principal.

Cited in *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1, denying power of receiver to commute debt in hands for collection.

Payment as a defense.

Cited in reference note in 33 A. S. R. 354, on payment as defense to judgment.

Liability of attorney to client.

Cited in *Tuley v. Barton*, 79 Va. 387, holding attorney vested with general discretionary powers only liable for bad faith.

16 AM. DEC. 782, PRENTIS v. COM. 5 RAND. (VA.) 697.

Privilege from arrest or process.

Cited in *Turnbull v. Thompson*, 27 Gratt. 306, holding claim of exemption

from process because in military service comes too late after judgment; *Neale v. Utz*, 75 Va. 480, holding default based on process served while defendant was on trial for felony, not subject to collateral attack; *Peters v. League*, 13 Md. 58, 71 A. D. 622, holding equity will not relieve against judgment for service of garnishee process on member of city council while in discharge of duties.

Annotation cited in *First Nat. Bank v. Genesee Town Co.* 51 Kan. 215, 32 Pac. 902, holding default based on process irregularly served on nonresident of county not subject to collateral attack; *Thornton v. American Writing Mach. Co.* 83 Ga. 288, 20 A. S. R. 320, 9 S. E. 679, holding service of garnishee process on suitor not void but voidable upon proper action within proper time.

Cited in note in 76 A. S. R. 542, on remedy for service of process on privileged person.

— **Legislator's privilege.**

Cited in *State ex rel. Isenring v. Polacheck*, 101 Wis. 427, 77 N. W. 708, holding legislator's exemption from arrest waived by voluntary appearance and plea without objection and citing annotation on this point.

Cited in note in 23 L.R.A. 633, on privileges of members of Congress and state legislature from arrest.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 17 AM. DEC.

17 AM. DEC. 33, SLAUGHTER v. FROMAN, 5 T. B. MON. 19.

Duties, powers, and liabilities of administrator *de bonis non* generally.

Cited in reference notes in 44 A. D. 472, on powers and liabilities of administrators *de bonis non*; 39 A. D. 724, on powers of administrator *de bonis non*.

Cited in note in 24 A. D. 385, on duty of administrator *de bonis non*.

Property vesting in administrator *de bonis non*.

Cited in reference notes in 33 A. D. 77, on right of administrator *de bonis non* to possession of decedent's personalty; 60 A. D. 551, on right of administrator *de bonis non* to unadministered assets; 52 A. D. 193, on right of administrator *de bonis non* to all of unadministered goods of decedent; 22 A. D. 37, on rights of administrator *de bonis non* to proceeds of property sold by first administrator.

Cited in notes in 108 A. S. R. 420, on property which vests in administrator *de bonis non*; 40 L.R.A. 71, on goods remaining *in specie* passing to administrator *de bonis non*; 40 L.R.A. 42, on property remaining *in specie* or unadministered passing to administrator *de bonis non*; 24 A. D. 387, on meaning of term "administered;" 40 L.R.A. 42, on claims against predecessor for accounting, balance, conversion, or devastavit passing to administrator *de bonis non*.

Administrator's right to compel predecessor to account.

Cited in *Re Latz*, 33 Hun, 618, sustaining right of administrator to compel predecessor to account; *United States use of Wilson v. Walker*, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277, holding administrator *de bonis non* appointed in place of one removed not entitled to demand from latter proceeds of claim against government; *Warfield v. Brand*, 13 Bush, 77, denying right of administrator *de bonis non* to receive from predecessor fund held in trust for support of widow.

Cited in notes in 40 L.R.A. 73, on right of administrator *de bonis non* to require predecessor to account; 108 A. S. R. 429, on actions by administrators *de bonis non* against predecessors for balances in their hands or for an accounting.

Accounting by estate of deceased administrator.

Cited in *Walton v. Walton*, 2 Abb. Pr. N. S. 428, sustaining right of administrator *de bonis non* to maintain action against estate of deceased administrator for assets unadministered; *Lucas v. Donaldson*, 117 Ind. 139, 19 N. E. 758, holding estate of deceased administrator not liable for costs of action when administrator not guilty of neglect of duty; *Kinney v. Keplinger*, 71 Ill. App. 334, holding administrator of deceased executor required to account for moneys in latter's hands at time of death; *Bradshaw v. Com.* 3 J. J. Marsh. 632, sustaining right of administrator *de bonis non* to compel surety of deceased administrator to account for goods of estate.

Administrator's liability for coadministrator's acts.

Cited in *Anderson v. Miller*, 6 J. J. Marsh. 568, holding two administrators under same bond liable for each other's acts; *People v. Townsend*, 37 Barb. 520, denying right of administrator to escape liability by permitting coadministrator to take entire charge of estate; *Lacey v. Davis*, 5 Redf. 301, holding executor not liable for negligent investment by coexecutor of which he had no knowledge and which he tried to recover.

Cited in notes in 11 L.R.A.(N.S.) 306, 307, on effect of giving bond for proper performance of duties, on liability for default of coexecutor permitted to manage estate; 11 L.R.A.(N.S.) 308, on nature of liability for default of coexecutor permitted to manage estate where bond for proper performance of duties has been given.

Compelling distribution of estate.

Cited in *Turley v. Young*, 5 J. J. Marsh. 133, holding one distributee of estate not entitled to decree of distribution unless all parties brought in.

Necessary parties.

Cited in reference note in 42 A. D. 187, on who are necessary parties.

17 AM. DEC. 35, MOORE v. TANNER, 5 T. B. MON. 42.**Conclusiveness of judgment.**

Cited in reference notes in 22 A. D. 722, on void and erroneous judgments; 29 A. D. 372, on conclusiveness of erroneous judgments until reversed; 19 A. D. 594, on collateral attacks on judgments of courts of competent jurisdiction.

— Of probate of will.

Cited in *Speed v. Ewing*, 5 J. J. Marsh. 460, 22 A. D. 41, holding probate of foreign will devising property in Kentucky not conclusive in that state; *Kentucky Land & Immigration Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31, holding judgment of county court admitting will to probate not subject to collateral attack; *Reed v. Reed*, 91 Ky. 267, 11 L.R.A. 513, 15 S. W. 525, sustaining power of executors to give title to property which probated will authorizes them to sell; *Steele v. Renn*, 50 Tex. 467, 32 A. R. 605, holding bona fide purchaser from legatee under forged will not affected by annulment; *Newman v. Waterman*, 63 Wis. 612, 53 A. R. 310, 23 N. W. 696, holding probated will conclusive against child unprovided for by mistake.

Cited in notes in 21 L.R.A. 681, 682, on jurisdictional conclusiveness of probate decree; 75 A. D. 722, on probate and administration proceedings and their effect *as res judicata*; 60 A. D. 353, on proceedings as to probate of wills as proceedings *in rem*; 90 A. D. 137, on avoiding probate of will on ground that testator made a subsequent will.

Nonresident administration.

Cited in *Courtney v. Pradt*, 160 Fed. 561, denying right to sue executor of non-resident in court of state other than where appointed; *Epping v. Robinson*, 21 Fla. 36, holding statute granting letters to foreign administrators not exclusive of power to grant letters generally within state; *Davenport v. Gentry*, 9 B. Mon. 427, sustaining power of court to grant letters of administration on estate of nonresident to resident having judgment against former; *Taylor v. Barron*, 35 N. H. 484, holding administrator appointed in one state without authority to collect debts due in another.

Cited in note in 35 A. D. 486, on appointment of ancillary administrator.

Effect of subsequent revocation of probate.

Cited in notes in 21 L.R.A. 152, on validity of acts done by personal representative under letters subsequently revoked where the court had jurisdiction; 21 L.R.A. 154, on validity of payments by personal representative under letters subsequently revoked in case where the court had jurisdiction.

Payment to one without authority.

Cited in *Holmes v. Field*, 12 Ill. 424, holding one making payment bound at peril to know authority of payee to receive same.

Validity of administrator's sale.

Cited in *Adams v. Jeffries*, 12 Ohio, 253, 40 A. D. 477, holding administrator's sale without showing heirs parties to proceeding, void.

Administration of living person's estate.

Cited in note in 73 A. D. 126, on administration on estate of living person.

17 AM. DEC. 42, HALL v. AMOS, 5 T. B. MON. 89.**What constitutes conversion.**

Cited in note in 24 A. S. R. 799, on conversion by words alone.

What necessary to maintain trover.

Cited in reference note in 48 A. D. 76, on necessity of plaintiff in trover showing title in himself and possession at the time of conversion.

Cited in note in 18 L.R.A.(N.S.) 1276, on right to maintain action to recover property *in specie* against one not in possession.

17 AM. DEC. 44, WITHERS v. RICHARDSON, 5 T. B. MON. 94.**Statute of frauds.**

Cited in *Seddon v. Rosenbaum*, 85 Va. 928, 3 L.R.A. 337, 9 S. E. 326, upholding oral agreement to sell corporate stock at end of three years if not previously called.

Cited in note in 63 A. D. 533, on statute of frauds as affecting promise of marriage.

When right of action accrues.

Cited in *Curtis v. United States*, 34 Ch. Cl. 1, holding that right of action on contract accrues when contract completed.

When statute of limitations operative.

Cited in *Central P. R. Co. v. United States*, 24 Ct. Cl. 145, holding statute operative from time right of action accrues.

Proof of promise to marry.

Cited in reference note in 44 A. D. 179, on proof of promise in action for breach of promise.

Proof of entire conversation.

Cited in *Forest v. Forest*, 6 Duer, 102, sustaining right of other party to give evidence of residue of conversation.

**17 AM. DEC. 46, BRECKENRIDGE v. WATERS, 5 T. B. MON. 150,
Later case between same parties in 4 Dana, 620.****Rescission of conveyance.**

Cited in *Terrill v. Herron*, 4 J. J. Marsh. 519, holding decree compelling conveyance proper where party not entitled to rescission of contract.

Notice of defective title.

Cited in *Ryerson v. Willis*, 8 Daly, 462, holding that one purchasing with knowledge of adverse claim takes subject to same.

17 AM. DEC. 50, ALEXANDER v. LIVELY, 5 T. B. MON. 159.**Construction of patent.**

Cited in reference note in 24 A. S. R. 737, on applicability to land patents of rules of construction of private conveyance.

Cited in note in 2 E. R. C. 767, on construction of legislative grant.

Correction of mistakes in grant.

Cited in *Woods v. Kennedy*, 5 T. B. Mon. 175, holding mistakes in directions in grant corrected by fixed lines and points; *Hogg v. Lusk*, 120 Ky. 419, 86 S. W. 1128, holding mistakes in survey corrected by reference to plot; *Williamson v. Simpson*, 16 Tex. 433, holding surveyor's mistakes subject to correction by extrinsic evidence; *Davis v. Commonwealth Land & Lumber Co.* 141 Fed. 740, holding running lines backward and in reverse order to locate lost corners proper when location otherwise impossible; *Conover v. Russ*, 29 Fla. 338, 10 So. 585, holding official maps of county competent to show which of two counties land situated; *Stafford v. King*, 30 Tex. 257, 94 A. D. 304, holding that failure of government surveyor to locate land does not invalidate patent if land may be located; *Ferris v. Coover*, 10 Cal. 589, holding that lines actually intended by parties to grant will control if ascertainable; *Doe ex dem. Martin v. King*, 3 How. (Miss.) 125, holding survey and map made under direction of government not competent to change Spanish grant made prior to 1795.

Certainty of judgment.

Cited in *Four Mile Land & Coal Co. v. Slusher*, 107 Ky. 664, 55 S. W. 555, holding judgment for breach of covenant of warranty properly made certain by reference to pleadings.

17 AM. DEC. 53, JACKSON v. MURRAY, 5 T. B. MON. 184.**Oral contracts affecting land.**

Cited in reference notes in 33 A. D. 140, on statute of frauds as to contracts affecting realty; 22 A. D. 218, on what contracts as to land are within statute of frauds; 33 A. D. 604, as to when contract affecting realty must be in writing. How agent's authority evidenced.

Cited in reference notes in 36 A. S. R. 418, on appointment by parol of agent to sell land; 24 A. D. 128, on necessity of written authority to execute contract within statute of frauds; 40 A. D. 409, as to how authority to execute deed must be given; 53 A. D. 605, as to how delegation of authority to execute sealed instrument must be given; 55 A. D. 343, on necessity that authority to execute sealed

instrument be under seal; 24 A. D. 128, on necessity of seal to authority to execute deed.

Cited in notes in 55 A. D. 344, on authority of agent authorized by parol to execute contract for sale of land in vendor's name; 8 E. R. C. 629, on necessity that power of attorney to execute deed be under seal; 2 E. R. C. 280, on necessity of sealed writing to authorize agent to execute deed.

Ratification.

Cited in reference notes in 84 A. D. 614, on parol ratification of agent's unauthorized contract under seal; 24 A. D. 128, on parol ratification of agent's unauthorized deed.

Cited in note in 27 A. D. 343, on ratifying of unauthorized execution of written instrument.

Perfection of title.

Cited in *Metcalfe v. Dallam*, 4 J. J. Marsh. 196, holding vendor entitled to reasonable time to perfect title before rescission of contract of sale.

Part performance of contract.

Cited in note in 53 A. D. 543, as to what acts are part performance of contract of sale of land.

Enforcement of partly performed contract.

Cited in reference notes in 24 A. D. 255, on part performance of oral agreement as to lands taking case out of statute of frauds; 52 A. D. 294, on specific enforcement of verbal agreement for sale of land when partly performed.

Cited in note in 32 A. D. 129, 130, on enforcement at law of contracts which have been partly performed.

Compelling acceptance of defective title.

Cited in reference notes in 34 A. S. R. 678, on perfect title as essential to specific performance; 96 A. D. 591, on effect upon vendor's right to specific performance, of defects of title; 35 A. D. 520, on refusal of specific performance where complainant cannot make good title.

17 AM. DEC. 60, HOWARD'S WILL, 5 T. B. MON. 199.

Attestation of will.

Cited in reference notes in 35 A. D. 370, on sufficiency of attestation of will; 40 A. D. 602, as to when attestation of will is sufficient.

Cited in note in 40 A. D. 231, on execution, publication, and attestation of wills.

Proof of testator's sanity.

Cited in *Perkins v. Perkins*, 39 N. H. 163; *Sechrest v. Edwards*, 4 Met. (Ky.) 163,—holding testator's sanity at time will executed provable by evidence other than testimony of witnesses.

Cited in reference note in 38 A. S. R. 379, on weight of testimony of attesting witness as to mental capacity.

Cited in notes in 39 L.R.A. 721, on weight of opinions of subscribing witnesses as to sanity or insanity; 6 L.R.A. (N.S.) 576, on weight of testimony of subscribing witness against competency of testator; 39 L.R.A. 719, on contradiction of subscribing witnesses as to sanity or insanity; 15 A. D. 129, on proving competency of testator where attesting witnesses testify to incompetency.

Proof of will.

Cited in *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 A. D. 424, holding will provable when all subscribing witnesses dead.

Cited in note in 77 A. S. R. 476, 478, on weight and effect of testimony of subscribing witness on probate of will.

17 AM. DEC. 65, McCURDY v. BREATHITT, 5 T. B. MON. 232.

Parol correction of written instrument.

Cited in *Wyche v. Greene*, 11 Ga. 159, holding parol evidence admissible to correct errors in bill of sale of slave.

Cited in reference notes in 22 A. D. 212; 25 A. D. 213; 27 A. D. 295; 28 A. D. 259,—on parol evidence to vary written agreement; 41 A. D. 505, on parol evidence to prove fraud or duress.

Cited in notes in 5 L.R.A. 159, on showing mistake by parol evidence in equity; 6 L.R.A. 46, on parol evidence to show mistake in written contract.

Power of equity to correct mistakes.

Cited in *German Nat. Bank v. Butchers' Hide & Tallow Co.* 97 Ky. 34, 29 S. W. 882, sustaining equity's power to correct errors in negotiable paper; *Smith v. Jordan*, 13 Minn. 264, Gil. 246, 97 A. D. 232, sustaining equity's power to reform bill of sale so as to express intention of parties although written in language agreed upon.

Cited in note in 5 L.R.A. 156, on power of court of equity to relieve from mistake in contract.

17 AM. DEC. 67, GREATHOUSE v. BROWN, 5 T. B. MON. 280.

Change of possession after sale.

Cited in *Laughlin v. Ferguson*, 6 Dana, 111, holding contract of sale with permission to vendor to repurchase, void without change of possession; *Vanmeter v. Estill*, 78 Ky. 456, holding sale of chattels without change of possession valid as to antecedent creditors.

Cited in reference note in 49 A. D. 65, on possession by vendor after sale as evidence of fraud.

— After judicial sale.

Cited in *Clark v. Cox*, 118 Mo. 652, 24 S. W. 221, holding public sale under deed of trust not void because grantor remains in possession.

Cited in reference notes in 64 A. S. R. 726, on judicial sales under statute of frauds; 26 A. D. 256, on nonapplicability of statute of frauds to judicial sales; 36 A. S. R. 343, on change of possession on execution sale; 64 A. D. 655, on effect of possession of personal property being retained by defendant in execution after sale.

Cited in note in 15 A. D. 671, on retention of possession of chattels sold on execution.

Instruction to jury.

Cited in *Proctor v. Hart*, 5 Fla. 465, holding court's refusal to charge abstract propositions, no error.

17 AM. DEC. 69, ELLIOT v. WARING, 5 T. B. MON. 338.

Necessary parties.

Cited in reference notes in 39 A. D. 383; 42 A. D. 187,—on who are necessary parties.

Wife's equities.

Cited in reference note in 39 A. D. 639, on wife's equitable right to maintenance

where husband is compelled to come into equity to get property belonging to her.

Cited in note in 23 A. D. 566, on wife's equity.

Liability of wife's property for husband's debts.

Cited in Baldwin v. Love, 2 J. J. Marsh. 489, holding wife's property not reduced to husband's possession not liable; Smith v. Peyton, 6 T. B. Mon. 263, holding wife's interest in slaves given her during life of father not liable before father's death; Martin v. Martin, Hoffm. Ch. 462; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545,—denying right of husband's creditors to take wife's property reducing her to want; Van Epps v. Van Deusen, 4 Paige, 64, holding that husband's assignee for creditors takes wife's property subject to right to support therefrom; Carleton v. Banks, 7 Ala. 32 (dissenting opinion), on right of husband's creditors in wife's estate.

Assignability of judgment.

Cited in note in 78 A. S. R. 47, on assignability of judgments at common law and under statutes.

17 AM. DEC. 74, EVANS v. SMITH, 5 T. B. MON. 363.

Repetition of words as slander.

Cited in Davis v. Sladden, 17 Or. 259, 21 Pac. 140, holding slanderous words not justified as being repetition of what another said.

Cited in reference note in 66 A. D. 348, on liability for repetition of slander already in circulation.

Evidence in action for slander.

Cited in note in 55 A. S. R. 611, on right to prove other origin of defamatory charge, in mitigation of damages.

Distinguished in Porter v. Henderson, 11 Mich. 20, 82 A. D. 59, holding in action for slander charging perjury, evidence inadmissible that plaintiff called defendant liar and perjured wretch.

Admissibility of declarations.

Cited in reference notes in 42 A. D. 609, on admissibility of declarations as part of *res gestæ*; 40 A. D. 198, as to when declarations are admissible in evidence as part of *res gestæ*.

— Admissions of husband.

Cited in Shaddock v. Clifton, 22 Wis. 114, 94 A. D. 588, holding statement by husband as to cause of accident admissible in action by husband and wife for injuries.

Evidence as to compromise.

Cited in Jenness v. Jones, 68 N. H. 475, 44 Atl. 607, holding independent admissions in course of compromise, admissible; Illinois C. R. Co. v. Manion, 113 Ky. 7, 101 A. S. R. 345, 67 S. W. 40, holding letter offering to compromise claim for extra work admissible on question of extent of work; Courtland v. Tarlton, 8 Ala. 532, holding letter offering to pay what was right inadmissible in assumpsit against writer; Colburn v. Groton, 66 N. H. 151, 22 L.R.A. 763, 28 Atl. 95, holding question whether payment of claim admission of liability or purchase of peace for court.

Cited in reference notes in 76 A. S. R. 551, on evidence of offers of compromise; 101 A. S. R. 350, on admissibility of statements made during negotiation for compromise; 82 A. D. 213, on admissibility of statements of fact made in negotiations for compromise.

Proof of bad character.

Cited in *Dimick v. Downs*, 82 Ill. 570, holding plaintiff's want of chastity not provable in action for assault and battery.

— Of witness.

Cited in *Gilbert v. Sheldon*, 13 Barb. 623, holding proof of witness's general bad character admissible; *United States v. Vansickle*, 2 McLean, 219, Fed. Cas. No. 16,609, holding particular acts of unchastity not provable against witness on prosecution for corruption of officer; *Merriman v. State*, 3 Lea, 393, denying right to impeach witness in murder prosecution by proving birth of bastard children; *Turner v. King*, 98 Ky. 253, 32 S. W. 941, denying right in will contest to show that witness had sixteen years before been prostitute; *Com. v. Welch*, 111 Ky. 530, 63 S. W. 984, holding statute that witness shall not be impeached by evidence of particular wrongful acts applicable to defendant in criminal case.

Annotation cited in *McInenry v. Irvin*, 90 Ala. 275, 7 So. 841, denying right in action for trespass to impeach witness by showing bad character for virtue.

Cited in reference notes in 21 A. D. 154; 36 A. D. 765; 39 A. D. 529,—on impeachment of witness; 20 A. D. 94, on evidence of character of witness; 40 A. S. R. 791; 44 A. S. R. 203,—on impeachment of witnesses by proof of bad character; 45 A. D. 230, on impeachment of witness by evidence of general bad character; 28 A. D. 723, on evidence of general moral character to impeach witness; 73 A. D. 162, on extent of inquiry to entire moral character, in impeachment of witness; 53 A. S. R. 890, on evidence of truth and veracity.

Cited in notes in 14 L.R.A.(N.S.)701, 705, on impeachment of character of witnesses; 82 A. S. R. 30, on impeachment of witness by proof of character; 73 A. D. 771, on impeachment of witness on ground of character or reputation; 53 A. S. R. 480, on mode of impeachment by showing want of chastity.

17 AM. DEC. 77, FARIS v. DURHAM, 5 T. B. MON. 397.**Right to attack judgment for fraud.**

Cited in reference notes in 42 A. D. 331, on right to impeach judgment for fraud or collusion; 30 A. D. 722, on voidability of judgment given to delay or defraud creditors.

Cited in notes in 67 L.R.A. 600, on conclusiveness of judgment on which action to set aside alleged fraudulent conveyance is based, as to defense of fraud in transaction; 67 L.R.A. 605, on conclusiveness of judgment on which action to set aside fraudulent conveyance is based as against attack by grantee on ground of fraud.

Rights of party to fraud.

Cited in *Overshiner v. Wisheart*, 59 Ind. 135, holding note executed pursuant to fraudulent scheme by maker and payee to cheat third party, uncollectible; *Johnson v. Stebbins-Thompson Realty Co.* 177 Mo. 581, 76 S. W. 1021, holding grantee from insolvent with knowledge of latter's fraudulent intent precluded from questioning creditor's judgment.

17 AM. DEC. 81, BROWN v. BEAUCHAMP, 5 T. B. MON. 413.**What is champerty.**

Cited in reference notes in 29 A. D. 136, on what is champerty; 42 A. D. 197, on champerty and maintenance.

Cited in notes in 27 A. R. 320, on champerty; 15 A. D. 317, defining maintenance; 4 L.R.A. 113, on champerty and maintenance.

Validity of champertous agreements.

Cited in *Peck v. Henrich*, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927, (affirming 6 App. D. C. 273); *Backus v. Byron*, 4 Mich. 535,—holding agreement to prosecute ejectment at own expense for portion of land to be recovered, void; *Johnson v. Van Wyck*, 4 App. D. C. 294, 41 L.R.A. 520, holding attorney's agreement to prosecute ejectment at own expense for half of recovery, void; *Boardman v. Thompson*, 25 Iowa, 487, holding contract to prosecute negligence action for 25 per cent of recovery, void; *Quigley v. Thompson*, 53 Ind. 317, holding contract to pay upon outcome of illegal suit, void; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024, holding contract to furnish evidence to win suit, void; *Lucas v. Allen*, 80 Ky. 681, holding agreement of clerk of board of aldermen to give information against city in actions for recovery of taxes for part of recovery, void; *Waller v. Marks*, 100 Ky. 541, 38 S. W. 894, holding agreement of heir to discontinue contest proceedings for bequest omitted by mistake, valid; *Barker v. Barker*, 14 Wis. 132, holding champertous agreement validated by blood relationship of parties.

Cited in notes in 15 A. D. 319, on existence in this country of doctrines of champerty and maintenance; 15 A. D. 320, on invalidity of stipulation by attorney for compensation out of recovery; 14 L.R.A. 746, on champertous contracts of laymen for defense of suits.

17 AM. DEC. 84, MORRISON v. CALDWELL, 5 T. B. MON. 426.

Estoppel.

Cited in notes in 57 A. D. 452, on estoppel by representations, silence, etc.; 57 A. R. 433, on estoppel by omission to speak.

—To claim land generally.

Cited in *Clay v. Chenault*, 123 Ky. 615, 96 S. W. 1125, holding heir conveying to others estopped from claiming interest as against deceased heir; *Houser v. Austin*, 2 Idaho, 204, 10 Pac. 37, holding one not estopped from showing extent of leased premises in absence of proof that lessee relied on statements.

Cited in reference note in 56 A. D. 362, on estoppel of owner of land in asserting title where he acquiesces in or invites its disposition to another.

Cited in note in 27 A. D. 119, on estoppel of person entering under another's title to deny such title.

—After-acquired title.

Cited in reference notes in 62 A. S. R. 863, on conveyance of after-acquired title; 41 A. S. R. 722, on estoppel to claim after-acquired title.

Cited in notes in 58 A. D. 584, as to when subsequently acquired title by grantor vests in grantee; 23 A. D. 673, on grantor's after-acquired title inuring to benefit of his grantee.

Trustee's acquisition of adverse interest.

Cited in *Bowling v. Dobyns*, 5 Dana, 434, holding estate entitled to benefit of trustee's purchase of outstanding title; *Price v. Evans*, 26 Mo. 30, holding trustee's purchase of adverse title not inure to benefit of *cestui que trust* when latter without title; *Grumley v. Webb*, 44 Mo. 444, 100 A. D. 304, holding trustee's renewal of lease in own name inures to benefit of *cestui que trust*, although landlord refuses to renew to latter.

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Cited in note in 47 A. S. R. 506, on effect of trustee's purchase of outstanding title.

Trustee's right to reimbursement.

Cited in *Baugh v. Walker*, 77 Va. 99, holding trustee in trust deed entitled to reimbursement for sum paid to discharge vendor's lien.

Damages as ground for rescission.

Cited in *Terrill v. Herron*, 4 J. J. Marsh. 519, holding right to damages for breach of contract not ground.

17 AM. DEC. 96, MITCHELL v. VANCE, 5 T. B. MON. 528.

Validity of bonds.

Cited in *Morgan v. Hale*, 12 W. Va. 713, holding bond for taxes void under statute; *Porter v. Daniels*, 11 W. Va. 250, sustaining bond taken by sheriff to suspend execution; *Moore v. Allen*, 3 J. J. Marsh. 612, denying authority of jailer to take bond from debtor to keep jail limits; *Whitsett v. Womack*, 8 Ala. 466, holding replevin bond not executed as required by statute unenforceable.

Liability of officer.

Cited in *Potts v. Com.* 4 J. J. Marsh. 202, 20 A. D. 213, holding officer liable on bond for failure to sell property levied on.

Validity of agreements.

Cited in reference notes in 40 A. D. 524; 94 A. S. R. 508,—on contracts against public policy.

— With officers.

Cited in *Kick v. Merry*, 23 Mo. 72, 66 A. D. 658, holding promise to reward policeman for doing duty, void; *Packard v. Tisdale*, 50 Me. 376, holding action not maintainable by collector upon promise to pay tax in consideration of his forbearance to collect as required by law.

Cited in reference notes in 55 A. S. R. 619, on invalidity of contracts with public officers; 66 A. D. 660, on lack of consideration for promise to reward constable for arresting criminal.

Cited in note in 66 A. D. 511, on invalidity of agreements to influence action of officers.

Demurrer to answer.

Cited in *Young v. Duhme*, 4 Met. (Ky.) 239, holding whole pleadings brought before court by demurrer to answer.

17 AM. DEC. 98, CROCKETT v. LASHBROOK, 5 T. B. MON. 531.

Title by adverse possession.

Cited in *Taylor v. Cox*, 2 B. Mon. 429, holding occupation for twenty years under junior patent superior to conflicting senior patent; *Shrieve v. Summers*, 1 Dana, 239, holding patentee protected as to land inclosed twenty years before ejectment; *Brown v. Anderson*, 90 Ind. 93, holding title acquired by occupancy for twenty years of land to fence not on line.

Cited in reference notes in 42 A. S. R. 649, on title by adverse possession; 72 A. D. 142, on what adverse possession is sufficient to maintain ejectment.

Cited in note in 95 A. S. R. 675, on force and effect of prescriptive title in ejectment suit.

Ejectment against landlord and tenant.

Cited in *Peters v. Allison*, 1 B. Mon. 232, 36 A. D. 574, holding landlord dis-

charged by discontinuance of ejectment against tenant; *Buford v. Gaines*, 6 J. J. Marsh. 34, sustaining right of landlord to defend for tenant in ejectment.

Conclusiveness of judgment.

Cited in reference note in 24 A. D. 319, on effect of judgment in ejectment.

Cited in notes in 37 A. D. 592; 54 A. D. 546,—on conclusiveness of judgment in ejectment; 96 A. D. 784, on scope of estoppel of verdict on judgment in second action.

Order of restitution.

Cited in *Norton v. Sanders*, 3 J. J. Marsh. 3, holding order of restitution proper when property taken under void process; *Frank v. Hickman*, 7 J. J. Marsh. 635, holding order of restitution not proper on motion in favor of tenant not evicted on writ.

Cited in reference note in 26 A. D. 437, as to when writ of restitution will be granted.

Estoppel by plea in former suit.

Cited in *Hill v. Huckabee*, 70 Ala. 183, holding sworn plea alleging removal of administratrix in former action estoppel to denying removal in subsequent suit; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157, holding in action whether paper bore corporate seal, evidence admissible to show that in former suit it was so regarded by defendants; *Pepper v. Shepherd*, 4 Mackey, 269, denying right of beneficiary in action to enforce trust to claim same satisfied by first sale, and also to demand second sale.

Cited in reference note in 58 A. D. 382, on pleas in action of trespass *quare clausum fregit*.

Estoppel to show truth of statements.

Cited in *Morgan v. Spangler*, 14 Ohio St. 102, holding party making admissions not estopped as to strangers hearing them from showing truth.

Plea of liberum tenementum.

Cited in *McInerney v. Irvin*, 90 Ala. 275, 7 So. 841, holding defective conveyance provable in trespass by one holding by adverse possession without plea of *liberum tenementum*.

Cited in reference notes in 30 A. D. 346; 45 A. D. 126,—on plea of *liberum tenementum* in trespass *quare clausum fregit*; 24 A. S. R. 737, on manner of raising question of title in possessory actions.

17 AM. DEC. 111, OVERTON v. LACY, 6 T. B. MON. 13.

Rights of purchaser on judicial sale.

Cited in *Mead v. Altgeld*, 33 Ill. App. 373, holding purchaser of real estate on judicial sale entitled to good title beyond reasonable doubt.

17 AM. DEC. 115, RICE v. SPOTSWOOD, 6 T. B. MON. 40.

Necessary parties.

Cited in reference note in 39 A. D. 383, on who are necessary parties.

17 AM. DEC. 118, MILLS v. LEE, 6 T. B. MON. 91.

Compromise of claims.

Cited in *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17, sustaining compromise of doubtful claims; *Jarrett v. Nickell*, 4 W. Va. 276, holding that court will not investigate different claims for purpose of setting aside compromise.

Cited in reference notes in 26 A. D. 61, on compromise of doubtful claim; 90 A. D. 242, on setting aside compromise of doubtful claim for fraud; 57 A. D. 219, on setting aside compromise for fraud or imposition only.

Cited in note in 15 L.R.A. 439, as to whether claim must be doubtful to sustain a compromise.

Silence as fraud.

Cited in *Smith v. Fisher*, 5 J. J. Marsh. 188, holding vendor's silence as scarcity of iron in region not ground for setting aside sale of iron wells.

Cited in reference notes in 16 A. S. R. 260, on concealment as fraud; 44 A. D. 463, as to when suppression of truth constitutes fraud; 27 A. D. 550, on suppression of the truth or suppression of untruth as ground for rescission; 90 A. D. 428, on concealment of defects, fraud, or surprise as vitiating contract of sale

Sufficiency of consideration.

Cited in *Adams v. Morton*, 37 Iowa, 255, holding doubtful claim sufficient consideration to support agreement to share *pro rata* in distribution of attached property; *Thompson v. Nelson*, 28 Ind. 431, denying recovery of money paid in settlement of bastardy proceedings instituted in belief that plaintiff pregnant; *Nicewanger v. Bevard*, 17 Ind. 621, holding compromise of fraudulent bastardy proceeding no consideration for vote.

Cited in reference note in 67 A. D. 305, on compromise of doubtful claim as consideration for a contract.

17 AM. DEC. 127, WEBBER v. COX, 6 T. B. MON. 110.

Irregularities in levy and sale on execution.

Cited in *Satterwhite v. Melczer*, 3 Ariz. 162, 24 Pac. 184 (dissenting opinion), on sheriff's reduction to possession of property levied upon; *Ganong v. Green*, 64 Mich. 488, 31 N. W. 461, holding execution sale not invalidated by failure to insert name of party in notice; *Draper v. Bryson*, 17 Mo. 71, 57 A. D. 257, holding sheriff's sale not invalidated as to innocent purchaser by failure to give notice of sale.

Cited in reference note in 24 A. D. 409, on want of, or defect in, notice of sheriff's sale.

Cited in notes in 39 A. D. 573, on sufficiency of notice of sale on execution; 44 A. D. 240, on effect of execution or judicial sale in case of failure to advertise or properly give notice; 21 L. ed. U. S. 466, as to whether purchaser at judicial sale is protected against irregularities in the proceedings or sale.

—Directory provisions of statute as to.

Cited in *Hibberd v. Smith*, 67 Cal. 547, 56 A. R. 726, 4 Pac. 473; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Blood v. Light*, 38 Cal. 649, 99 A. D. 441,—holding statute as to manner of executing levy, directory; *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563, holding statute as to notice of judicial sale, directory.

17 AM. DEC. 130, ALLEN v. YOUNG, 6 T. B. MON. 136.

Verdict for defendant for lack of proof.

Cited in *Binewicz v. Haglin*, 103 Minn. 297, 15 L.R.A. (N.S.) 1096, 115 N. W. 271, sustaining verdict for defendant in negligence action where no evidence as to how accident happened.

Impeachment of witness.

Cited in reference notes in 21 A. D. 154; 36 A. D. 765; 39 A. D. 529,—on impeachment of witness; 45 A. D. 230, on impeachment of witness by evidence of

general bad character; 28 A. D. 723, on evidence of general moral character to impeach witness; 73 A. D. 162, on extent of inquiry to entire moral character, in impeachment of witness.

Cited in notes in 73 A. D. 771, on impeachment of witness on ground of character or reputation; 82 A. S. R. 30, on impeachment of witness by proof of character; 14 L.R.A.(N.S.) 701, on impeachment of character of witnesses.

17 AM. DEC. 132, TAYLOR v. BRADSHAW, 6 T. B. MON. 145.

Relief in equity against judgment.

Cited in *Vardeman v. Edwards*, 21 Tex. 737, sustaining equity's refusal to set aside judgment of court of law in absence of fraud.

Cited in notes in 21 A. D. 530, as to when equity will not relieve against judgment at law; 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed; 19 A. D. 609, as to how and when new trial at law is obtainable in equity.

Silence as fraud.

Cited in *Smith v. Fisher*, 5 J. J. Marsh. 188, holding failure of vendor of iron mills to disclose scarcity of iron in region no ground for setting aside sale; *Williams v. Beazley*, 3 J. J. Marsh. 577, denying liability for fraud in remaining silent as to correctness of opinion of stranger with reference to contract.

Admissions by demurrer.

Cited in reference note in 44 A. D. 723, on admission of all allegations well pleaded by demurrer.

17 AM. DEC. 136, BLIGHT v. BANKS, 6 T. B. MON. 192.

Who are bona fide purchasers.

Cited in reference notes in 25 A. D. 532, defining bona fide purchaser; 24 A. D. 235, on who are bona fide purchasers; 41 A. D. 268, on who are bona fide holders; 25 A. D. 108; 42 A. D. 627; 4 A. S. R. 417,—on necessity of payment of consideration before notice to constitute one a bona fide purchaser.

Constructive notice.

Cited in reference notes in 1 A. D. 695, on constructive notice of prior unrecorded conveyance; 50 A. D. 407, on record of defectively acknowledged deed as notice to subsequent purchasers and encumbrancers.

Jurisdiction of equity.

Cited in reference notes in 57 A. D. 200, on rules governing exercise of equity; 42 A. D. 470, on decree of possession by court of equity.

Cited in notes in 74 A. S. R. 388, on jurisdiction of equity to enforce liens; 46 A. D. 92, on equity's jurisdiction to remove encumbrances and claims likely to lessen value of land.

Bona fide purchaser's protection against lien.

Cited in *Deskins v. Big Sandy Co.* 121 Ky. 601, 89 S. W. 695, holding doctrine of bona fide purchaser without notice inapplicable to purchase of equitable title on judicial sale; *Houston v. Stanton*, 11 Ala. 412, holding purchaser without knowledge of lien protected to extent of payments before notice; *McLaurie v. Thomas*, 39 Ill. 291, holding residue purchased by one with notice of unpaid purchase price and that balance free of lien, chargeable with whole sum.

Cited in reference notes in 29 A. D. 66, on rights of innocent purchasers; 38 A. S. R. 826, on validity of vendor's lien as against purchaser without notice; 24 A.

D. 692, on nonenforceability of lien against subpurchaser for valuable consideration without notice.

Cited in note in 10 E. R. C. 544, on protection of bona fide purchaser against equities.

Vendor's lien.

Cited in reference notes in 52 A. D. 66, on vendor's lien on conveyance of land; 50 A. D. 548, on enforceability of vendor's lien against vendee or those claiming under him.

Loss of lien on land.

Cited in *Brown v. Morison*, 5 Ark. 217, holding lien on land for purchase price lost by taking vendee's votes with personal security.

Cited in reference notes in 24 A. D. 692, on waiver of purchase-money lien; 81 A. D. 241, on effect of taking note or bond on vendor's lien; 47 A. D. 111, on waiver of vendor's lien by taking security other than vendees.

Cited in notes in 21 L. ed. U. S. 859, as to how liens are waived; 28 A. D. 199, on existence, waiver, and assignability of vendor's lien.

Discharge of lien for costs.

Cited in *Aurora ex rel. Williams v. Lindsay*, 146 Mo. 509, 48 S. W. 642, holding city's lien for costs discharged by owner's payment of taxes upon collector's statement that no suit is pending.

Compliance with statute as to sale.

Cited in *Brownfield v. Dyer*, 7 Bush, 506, holding judgment for sale of slaves void unless record show compliance with statute; *Alexander v. Aud*, 121 Ky. 105, 88 S. W. 1103, holding officers required to sell land for taxes presumed to have complied with statute.

Cited in reference note in 42 A. D. 484, on necessity of strict compliance with statute as to tax sale.

Proof of tax sale.

Cited in *McCready v. Sexton*, 29 Iowa, 356, 4 A. R. 214, holding treasurer's certificate of tax sale evidence as to manner of sale.

Bona fides as to note.

Cited in *Colby v. Parker*, 34 Neb. 510, 52 N. W. 693, holding proof of indorsee's absence of knowledge necessary after proof of usury in note; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521, holding proof of payment before notice of defect necessary to show bona fides.

Collateral attack on judgment.

Cited in *Newcomb v. Newcomb*, 13 Bush, 544, 26 A. R. 222, holding immunity of judgment of divorce from collateral attack inapplicable where wife confined in asylum in another state constructively served.

Validity and effect of tax sale.

Cited in reference notes in 36 A. S. R. 961, as to when tax sales are defeated; 76 A. D. 406, on tax sale of land on which no taxes were due conveying no title.

Sale after discharge of judgment.

Cited in *Lee v. Rogers*, 2 Sawy. 549, Fed. Cas. No. 8,201, holding sale to bona fide purchaser under paid judgment, void.

What subject to levy.

Cited in reference notes in 24 A. D. 436; 26 A. D. 231,—on property subject to

execution; 28 A. D. 268, on property subject to attachment of execution; 32 A. D. 167, on equitable interests as not subject to execution.

Establishment of title.

Cited in *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720, holding bill in equity maintainable by one gaining title by adverse possession to have title judicially determined; *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 239, 119 A. S. R. 199, 8 L.R.A.(N.S.) 682, 88 Pac. 356, sustaining *ex parte* proceedings for establishment of lost record title where no adverse claimants; *Coleman v. Kenton*, 5 J. J. Marsh. 44, holding proceedings relating to title to land void for failure to bring in heirs of former owner.

Remedy in case of lost deed.

Cited in *Lancy v. Randlett*, 80 Me. 169, 6 A. S. R. 169, 13 Atl. 686, holding bill in equity maintainable for discovery of lost deed.

Cited in reference note in 54 A. D. 457, on equity decreeing execution of substitute for lost or destroyed deed.

Record of copy of conveyance.

Cited in *Central Trust Co. v. Georgia P. R. Co.* 83 Fed. 386, holding record of copy of railroad mortgage not good as constructive notice; *Shelton v. Armor*, 13 Ala. 647, holding copy of deed offered in evidence as recorded instrument, inadmissible.

Publication of notice.

Cited in *Brown v. Woods*, 6 J. J. Marsh. 11, holding certificate of publication of notices by editor instead of printer, insufficient.

17 AM. DEC. 157, COOK v. VIMONT, 6 T. B. MON. 284.

Conclusiveness of decision.

Cited in *Boyd v. State*, 53 Ala. 601, holding decision of court on merits conclusive between parties.

Cited in reference notes in 24 A. D. 615, as to when former judgment is a bar; 52 A. D. 225, as to when judgments are not a bar to subsequent actions.

Cited in notes in 21 A. D. 327, on *res judicata*; 23 A. D. 449, on *res judicata* as estoppel; 26 A. D. 609, as to when former judgment is a bar or estoppel; 26 A. D. 610, on inadmissibility and effect of former recovery as evidence under general issue.

17 AM. DEC. 159, FRANKFORT & S. T. CO. v. CHURCHILL, 6 T. B. MON. 427.

Corporation as bound by acts of agent.

Cited in *Rives v. Montgomery South Pl. Road Co.* 30 Ala. 92, holding corporation not bound by declarations of officers as to location of railroad; *Wall v. Niagara Min. & Smelting Co.* 20 Utah, 474, 59 Pac. 399, holding corporation not bound by unaccepted contract made by promoter.

Cited in reference notes in 43 A. D. 472, on corporate ratification of acts of agents; 34 A. D. 329, on corporate liability for acts of agents; 51 A. D. 73, on agent's implied authority to bind corporation.

Cited in notes in 13 A. S. R. 29, on liability of corporation for contracts of its members; 26 L.R.A. 550, on receiving benefits from contracts of promoters so as to render corporation liable.

Injunction against judgments.

Cited in reference note in 91 A. D. 452, as to when injunctions against judgments will issue.

17 AM. DEC. 161, RANKIN v. RANKIN, 6 T. B. MON. 531.**Who may make will.**

Cited in *Shields v. Shift*, 36 La. Ann. 644, denying power of one to make will whose property is subject to confiscation.

Life sentence as affecting property rights.

Cited in *Avery v. Everett*, 110 N. Y. 317, 6 A. S. R. 368, 1 L.R.A. 264, 18 N. E. 148, holding life estate not defeated by sentence to life imprisonment; *Davis v. Laning*, 85 Tex. 39, 34 A. S. R. 784, 18 L.R.A. 82, 19 S. W. 846, holding descent not cast under statute by life imprisonment.

Cited in note in 17 L.R.A. (N.S.) 502, as to when suspension of civil or political rights of one under sentence commences.

17 AM. DEC. 166, GRAHAM v. GRAHAM, 6 T. B. MON. 561.**Right to dower.**

Cited in notes in 81 A. D. 326; 116 A. S. R. 900,—on right to dower in equitable estate of husband.

Widow's right to house.

Cited in *Doe ex dem. Shelton v. Carrol*, 16 Ala. 148; *Inge v. Murphy*, 14 Ala. 289,—holding until assignment of dower widow entitled to reside in deceased husband's house.

Cited in reference note in 76 A. D. 358, on payment of rents of deceased husband's mansion to widow until assignment of dower.

Cotenant's liability for repairs and to account.

Cited in *Ward v. Ward*, 40 W. Va. 611, 52 A. S. R. 911, 29 L.R.A. 449, 21 S. E. 746, denying right of tenant in common to compel cotenant to contribute to cost of repairs already made; *O'Bannon v. Roberts*, 2 Dana, 54; *Autrey v. Frieze*, 59 Ala. 587,—holding tenant in common bound to account to cotenant for profits of land.

Cited in notes in 29 L.R.A. 450, on liability of cotenants for improvements; 52 A. S. R. 935, on cotenant's liability for improvements on common property; 28 L.R.A. 854, on liability of coparceners to account for use and occupation and rents and profits; 28 L.R.A. 855, on deduction on account by cotenant for use and occupation and rents and profits.

17 AM. DEC. 168, MORFORD v. MASTIN, 6 T. B. MON. 609.**Prerequisites to recovery on entire contract.**

Cited in *Badgley v. Heald*, 9 Ill. 64, holding full performance of entire contract for services necessary to recovery; *Eldridge v. Rowe*, 7 Ill. 91, 43 A. D. 41, denying right to recover for time worked under entire contract requiring payment at end of term; *Escott v. White*, 10 Bush, 169, sustaining right to recovery on *quantum meruit* under contract for services defectively executed.

Cited in reference notes in 51 A. D. 629, on contracts held to be indivisible; 63 A. S. R. 202, on conditions precedent to recovery on contract; 82 A. S. R. 190, on right to recovery where one party fails to perform contract; 26 A. D. 625, on necessity of averring performance or offer thereof by plaintiff.

Cited in notes in 59 A. S. R. 283, on full performance of entire contract; 59 A.

S. R. 287, as to when complete performance is essential to cause of action on building and analogous contracts; 23 A. D. 705, on loss of right to recover, under contract, special covenants of which are not complied with; 54 A. D. 479, on failure to comply with terms of special contract as affecting right to recover thereon.

Waiver of breach of contract.

Cited in *Ludlow Lumber Co. v. Kuhling*, 119 Ky. 251, 115 A. S. R. 254, 83 S. W. 634, sustaining right to recovery for breach of contract in defective construction of house after going into possession.

Cited in reference note in 74 A. D. 165, on acceptance of work as waiver of its quality.

Cited in notes in 37 A. S. R. 540, on acceptance of part performance of contract of construction, as waiver of full performance; 115 A. S. R. 257, on using and paying for building as waiver of imperfect performance of contract to erect structure; 16 L.R.A.(N.S.) 489, on effect of use of building by owner as an acceptance of work of construction or repair.

Necessity of demand.

Cited in reference note in 26 A. D. 620, on demand as prerequisite to action.

Sufficiency of demand for performance.

Cited in *Stringham v. Davis*, 23 Wash. 568, 63 Pac. 230, holding demand for cows to be given in payment for work made upon custodian, sufficient.

17 AM. DEC. 175, GOICOECHEA v. LOUISIANA STATE INS. CO. 6 MART. N. S. 51.

Warranties in marine policy.

Cited in *Empire Parish Packet Co. v. Union Ins. Co.* 32 La. Ann. 1081, holding insurer discharged by breach of warranty in marine insurance policy.

Cited in notes in 40 A. D. 349, as to what constitutes warranty in insurance policy; 40 A. D. 349, on necessity that warranty in policy be strictly kept.

Distinguished in *Caldwell v. Western M. & F. Ins. Co.* 19 La. 42, 36 A. D. 667, holding warranty of seaworthiness not broken by occasional absence of deck-hand.

Construction of insurance contracts.

Cited in note in 14 E. R. C. 14, on rules of construction of contracts of insurance.

— Conflict between written and printed parts of policy.

Cited in *Goss v. Citizens' Ins. Co.* 18 La. Ann. 97; *The Orient*, 16 Fed. 916,—holding warranty of seaworthiness not broken by occasional absence of deck printed.

Cited in reference note in 51 A. S. R. 881, on control of written over printed matter in insurance policy.

17 AM. DEC. 179, BARRERA v. ALPUENTE, 6 MART. N. S. 69.

Conflict of laws.

Cited in *Scott v. Key*, 11 La. Ann. 232, holding right of illegitimate child to inherit determined by law of domicile; *Caballero v. The Executor*, 24 La. Ann. 573 (dissenting opinion), on domicile of origin as determining condition of minor.

Cited in reference notes in 46 A. D. 485, on how domicile is determined; 35 A. S. R. 100, on conflict of laws relative to majority of infants.

Cited in note in 5 A. D. 741, on law of domicile.

— As to contracts.

Cited in *Milliken v. Pratt*, 125 Mass. 374, 28 A. R. 241, holding validity of contract determined by law of place where made.

Cited in reference notes in 31 A. D. 270, on law governing contract; 26 A. D. 491, on law governing interpretation, construction, and validity of contracts.

17 AM. DEC. 183, STYLES v. McNEIL, 6 MART. N. S. 296.

Notice of transfer of judgment.

Cited in *Delassize's Succession*, 8 Rob. (La.) 259, holding notice to debtor of assignment of judgment not required to be in any particular form; *Ayles v. Hawley*, 9 La. Ann. 362, holding transfer of judgment incomplete without notice to debtor; *Johnson v. Boice*, 40 La. Ann. 273, 8 A. S. R. 528, 4 So. 163, holding record of transfer of judgment insufficient notice to debtor.

Cited in reference note in 85 A. D. 156, on necessity of notice of assignment of judgment or chose in action.

17 AM. DEC. 184, YOCUM v. BULLIT, 6 MART. N. S. 324.

Validity of transfer.

Cited in *Evans v. Laughton*, 69 Wis. 138, 33 N. W. 573, holding insolvent's absolute deed to daughter to secure advances valid as to creditors to extent of advances actually made.

Cited in reference note in 50 A. D. 804, on conveyances to hinder, delay, or defraud creditors.

Action to declare sale void.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233; *Drummond v. Clinton & P. H. R. Co.* 7 Rob. (La.) 234,—holding action to set aside conveyance necessary to reach property conveyed by debtor to third person.

Annotation cited in *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169, sustaining right of creditor obtaining lien upon debtor's property to maintain action in equity to set aside fraudulent conveyances.

Cited in reference note in 28 A. D. 137, on mode of setting aside fraudulent conveyances.

Levy on property transferred by debtor.

Cited in *Ford v. Douglas*, 5 How. 143, 12 L. ed. 89, denying right of execution creditor to levy on property transferred by judgment debtor to another; *Weathers v. Pecot*, 52 La. Ann. 932, 27 So. 538; *Markham v. O'Connor*, 23 La. Ann. 688,—holding ownership of property of vendee of judgment creditor not subject to attack on injunction by former to stay execution sale.

Liability for wrongful levy.

Cited in *Barney v. De Russy*, 1 Rob. (La.) 75, holding action by sheriff to best of knowledge no defense to levy on property of wrong person; *Monday v. Wilson*, 4 La. 338; *Presas v. Lanata*, 11 Rob. (La.) 288,—holding creditor liable for seizing property sold by debtor to third person.

What constitutes gift.

Cited in *D'Orgenoy v. Droz*, 13 La. 382, holding transfer without price, gift.

17 AM. DEC. 187, STACKPOLE v. HENNEN, 6 MART. N. S. 481.

Libel or slander in judicial proceedings.

Cited in *Clemmons v. Danforth*, 67 Vt. 617, 48 A. S. R. 836, 32 Atl. 626, holding

words spoken in proceeding to enforce claim against decedent's estate not material to issue, not privileged.

Cited in reference notes in 20 A. D. 649, on liability for words spoken in judicial proceedings; 34 A. D. 340, on privilege as to words spoken in judicial proceedings; 34 A. D. 707, on liability of counsel for words spoken at trial; 123 A. S. R. 648, 649, on protection of attorney and counsel in respect to libel or slander in course of judicial proceedings.

Cited in notes in 22 A. D. 420; 27 A. D. 158; 33 A. D. 541,—on privileged communications; 6 A. S. R. 825, on words used in course of trial in absence of malice not constituting slander.

Distinguished in *Monroe v. H. Weston Lumber Co.* 49 La. Ann. 594, 21 So. 742, sustaining liability for libel in pleadings and brief in action.

Right to recover for slander.

Cited in *Carlin v. Stewart*, 2 La. 73; *Miller v. Holstein*, 16 La. 395,—holding that absence of statutory provision does not deprive one of right to damages for slander by another.

17 AM. DEC. 195, TREMOULET v. OENAS, 6 MART. N. S. 541.

Reliance by sheriff on statute of limitations.

Cited in note in 23 A. D. 191, on sheriff's right to plead limitations as to money received on execution which is payable immediately.

17 AM. DEC. 196, PERCY v. MILLAUDON, 6 MART. N. S. 616.

Allowance for improvements.

Cited in *Jordan v. Anderson*, 29 La. Ann. 749, holding wife entitled to benefit of improvements made on her property by husband; *Coffin v. Heath*, 6 Met. 76, holding doctrine of contribution applicable to improvements by co-owner.

Cited in reference note in 35 A. S. R. 420, on lien of one cotenant on moiety of another.

Cited in notes in 29 L.R.A. 450, on liability of cotenants for improvements; 62 A. D. 484, on right of cotenant to contribution for improvements.

Distinguished in *Griffin v. Waters*, 1 Rob. (La.) 149, holding claim for improvements not allowable on partition.

Improvements to property held in common.

Cited in *Kidder v. Rixford*, 16 Vt. 169, 42 A. D. 504, holding tenant not liable for portion of ground cleared by cotenant without farmer's knowledge.

Cited in reference note in 30 A. D. 524, on improvements by one cotenant.

17 AM. DEC. 199, BEALE v. DELANCY, 6 MART. N. S. 640.

Fraudulent sales.

Cited in *Planters' Bank v. Watson*, 9 Rob. (La.) 267, holding sale without change of possession void as to creditors of vendor; *Moore v. Wood*, 100 Ill. 451, holding conveyance with secret trust for grantor to defraud creditors, void; *Dupuy v. Dupont*, 11 La. Ann. 226 (dissenting opinion), on relationship of parties as proof of fraudulent sale; *Benoit v. Benoit*, 3 La. 223, holding that action should be brought in court of ordinary jurisdiction to set aside conveyance when there are no assets of the estate on which the court of probate can act.

Cited in reference notes in 21 A. D. 432; 26 A. D. 386,—as to when conveyance from father to son is fraudulent.

17 AM. DEC. 201, RIPLEY v. BERRY, 5 ME. 24.**Rules as to fixing boundaries.**

Cited in *Hall v. Davis*, 36 N. H. 569, holding position of monuments controlling as to location of land; *Staub v. Hampton*, 117 Tenn. 706, 101 S. W. 776, holding stake set in agreed corner controlling as to boundary; *Griffin v. Bixby*, 12 N. H. 454, 37 A. D. 225, holding marks set by committee to set off dower conclusive; *Bethel v. Albany*, 65 Me. 200, holding decision of commissioners as to town lines conclusive; *Coleman v. Lord*, 96 Me. 192, 52 Atl. 645; *Thomas v. Patten*, 13 Me. 329,—holding when lot number in plan only description courses therein controlling.

Cited in note in 4 L.R.A. 426, on descriptions in deeds.

17 AM. DEC. 203, GRAVES v. FISHER, 5 ME. 69.**Boundary on water.**

Cited in note in 42 L.R.A. 503, on effect of bounding grant on river or tide water on existence of strips between land granted and water.

Award by arbitrators.

Cited in notes in 2 L.R.A. 181, on judgment on arbitration award; 25 A. R. 46, as to what will invalidate arbitrators' award.

— Previous opinion formed by referee.

Cited in *Tyler v. Dyer*, 13 Me. 41, holding unfairness not imputable to referee to locate boundary whose decision after hearing evidence is contrary to his judgment.

Referee's report as basis of judgment.

Cited in *Hecker v. Fowler*, 2 Wall. 123, 17 L. ed. 759, holding report of referee appointed by court proper basis for judgment.

17 AM. DEC. 206, DEARBORN v. PARKS, 5 ME. 81.**Oral promise to pay debt of another.**

Cited in *Bennett v. Merchantville Bldg. & L. Asso.* 44 N. J. Eq. 116, 13 Atl. 852; *Todd v. Tobey*, 29 Me. 219,—holding promise to pay debt of another within statute of frauds; *Spann v. Cochran*, 63 Tex. 240; *Coffin v. Bradbury*, 89 Me. 476, 36 Atl. 988,—holding promise to pay own debt in effect not within statute; *Besshears v. Rowe*, 46 Mo. 501, holding promise to pay debt of another for which promisor also liable, not within statute; *Rowe v. Whittier*, 21 Me. 545, holding writing necessary to validity of agreement to pay debt for which another not liable; *Stewart v. Campbell*, 58 Me. 439, 4 A. R. 296, holding oral promise to pay another's debt in consideration of creditor's forbearance to sue, void; *True v. Harding*, 12 Me. 193, holding sureties' indorsement of vote not void for want of consideration; *Fullam v. Adams*, 37 Vt. 391, holding retainer of attorney sufficient consideration to uphold promise to pay him debt due from another, if promise in writing; *Cosmopolitan L. Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166, holding promise of one insurance company to pay loss owing by another based upon consideration, original undertaking; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Robinson v. Gilman*, 43 N. H. 485,—holding original undertaking created by promise to pay another's debt upon receipt of consideration; *Jones v. Palmer*, 1 Dougl. (Mich.) 379, holding debtor's guaranty on note of third party transferred to creditor, original undertaking; *Goodwin v. Bowden*, 54 Me. 424, holding promise of agent of debtor to pay creditor debtor's money in his hands, original undertaking; *Mulerone v. American Lumber Co.* 55 Mich. 622, 22 N. W. 67, holding

statute of frauds inapplicable to agreement to pay third party's debt when such party discharged from original indebtedness; *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. 551, holding statute of frauds inapplicable to case of novation.

Cited in reference notes in 26 A. D. 249, as to when promise to answer for debt of another must be in writing; 24 A. D. 746, on what promises will be considered original.

Cited in notes in 23 A. D. 155, on parol promise to pay debt of another; 21 A. D. 556, on parol undertaking to answer for debt or default of another; 95 A. D. 262, 263, on consideration in new promise to take case out of statute of frauds.

— **Promise by purchaser.**

Cited in *Brown v. Attwood*, 7 Me. 356, holding promise of vendee of boat to pay vendor's debt to another not void under statute of frauds; *Maxwell v. Haynes*, 41 Me. 559, holding vendee's oral promise to creditor of vendor to pay latter's debt not within statute of frauds; *Putney v. Farnham*, 27 Wis. 187, 9 A. R. 459, holding vendee's oral agreement to pay part of purchase price to vendor's creditor, not within statute and not subject vendee to garnishment by creditor; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994, holding grantees agreement in deed to pay existing mortgage enforceable by mortgagee; *Heath v. Coreth*, 11 Tex. Civ. App. 91, 32 S. W. 56, holding grantee agreeing to assume payment of lien not bound where wrong lot conveyed; *Morgan v. Overman Silver Min. Co.* 37 Cal. 534, holding agreement of transferee of debtor's property to pay latter's creditors valid although not under seal; *Lee v. Newman*, 55 Miss. 365; *Burbank v. Gould*, 15 Me. 118,—holding grantee's promise to pay part of consideration to third party for benefit of grantor valid although not in writing; *Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99, holding grantee taking land with promise to pay attorney having lien on same for services, liable.

Right of third person to sue on contract in his favor.

Cited in reference notes in 37 A. D. 654; 38 A. D. 692; 77 A. D. 172,—on right of third person to sue on contract made for his benefit; 22 A. S. R. 797, on parties where contract for benefit of third person.

Cited in notes in 39 A. S. R. 533, on promise for benefit of third person; 1 E. R. C. 706, on right of action on contract made for benefit of third person; 71 A. S. R. 200, 202, on right to enforce contract to pay another person's debt; 71 A. S. R. 184, on third person's right to enforce contract for his benefit; 35 A. D. 621, on right of third person to avail himself of contract made for his benefit; 25 L.R.A. 267, on right of third party to sue on contract made for his benefit; 25 L.R.A. 264, on right of third party to sue on contract made for his benefit as affected by statute of frauds.

Parol evidence as to manner of payment.

Cited in *Becker v. Knudson*, 86 Wis. 14, 56 N. W. 192, holding parol evidence admissible to show manner of payment of consideration in deed.

Acknowledgment of payment in deed.

Cited in *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572, holding acknowledgment not conclusive.

Competency of witness.

Cited in *Mitchell v. Cotton*, 2 Fla. 136, holding in action by payee against surety on note, principal competent witness to prove note usurious.

17 AM. DEC. 209, KENNEBEC BANK v. TUCKERMAN, 5 ME. 130.

Discharge of surety or indorser.

Cited in *Williams v. Moseley*, 2 Fla. 304, holding surety discharged by discharge

of maker of note; *Read v. Cutts*, 7 Me. 186, 22 A. D. 184, holding demand and notice unnecessary to charge one agreeing to pay debt in consideration of forbearance to sue; *Freeman's Bank v. Rollins*, 13 Me. 202, holding surety on note not discharged by mere delay of payee in suing maker; *Page v. Webster*, 15 Me. 249, 33 A. D. 608, holding indorser whose liability fixed not discharged by delay in enforcing collection against maker.

Cited in reference notes in 56 A. D. 676, on discharge of surety by giving further time pursuant to agreement; 61 A. D. 294, as to when time given to indorser of accommodation note does not release maker.

Cited in note in 23 A. D. 708, on release of surety by granting indulgence to principal.

17 AM. DEC. 211, GARDINER v. NUTTING, 5 ME. 140.

New promise removing bar of limitations.

Cited in reference note in 39 A. S. R. 924, as to who must make new promise which will remove bar of limitations.

Cited in note in 65 A. S. R. 690, on payment or acknowledgment by one joint debtor before statute of limitations has run.

Independent covenant or promise.

Cited in *State, Wagoner, Prosecutor, v. Watts*, 44 N. J. L. 126, holding covenant of surety not invalidated by invalidity of covenant of married woman; *Davis v. Davis*, 98 Me. 135, 56 Atl. 588, holding one not personally bound by acknowledgment of sum due made in representative capacity.

Joint debtors.

Cited in note in 65 A. S. R. 691, on maker and indorser as joint debtors.

Guaranty as special contract.

Cited in *Carpenter v. Thompson*, 66 Conn. 457, 34 Atl. 105, holding action on guaranty on non-negotiable note one on special contract subject to six-year statute of limitations.

Agreed statement of facts.

Cited in *Pillsbury v. Brown*, 82 Me. 450, 9 L.R.A. 94, 19 Atl. 858, holding technical questions as to pleadings waived by submission to court under agreed statement of facts; *Machias Hotel Co. v. Fisher*, 56 Me. 321; *Moore v. Philbrick*, 32 Me. 102, 52 A. D. 642,—holding defendant entitled to judgment upon agreed statement of facts when same would verify plea in bar of action.

17 AM. DEC. 214, WHITE v. PHILBRICK, 5 ME. 147.

Effect of judgment or bringing action.

Cited in *Jones v. Cobb*, 84 Me. 153, 24 Atl. 798, holding title to property converted not changed by owner's bringing trover.

Cited in reference note in 43 A. D. 667, on effect of judgment against one of several joint tortfeasors.

Cited in note in 42 A. S. R. 434, on vesting of title by judgment for value of personal property in action of trespass or trover.

—As bar to other action.

Cited in *Miller v. Hyde*, 161 Mass. 472, 42 A. S. R. 424, 25 L.R.A. 42, 37 N. E. 760, holding replevin not bound by former attachment; *Walker v. Fuller*, 29 Ark. 448, holding action for taking not barred by return of goods; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596, holding all joint wrongdoers discharged by satis-

faction by one; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129 (affirming 2 Cliff. 191, Fed. Cas. No. 9,963), holding unsuccessful action against one trespasser no bar to action against another; *Severy v. Nye*, 58 Me. 246, holding pendency of action against deputy sheriff for trespass no bar to one against sheriff for same cause; *Emery v. Fowler*, 39 Me. 326, 63 A. D. 627, holding judgment in trespass against master bar to action against servant for same cause; *Hopkins v. Hersey*, 20 Me. 449, holding unsuccessful action in trover against one trespasser no bar to action against another; *Wyman v. Bowman*, 71 Me. 121, holding action in trover not barred by pendency of one on replevin bond; *Cleveland v. Bangor*, 87 Me. 259, 47 A. S. R. 326, 32 Atl. 892, holding recovery of judgment without satisfaction against railway no bar to action against city based on same act; *Rendall v. Monroe School Dist. No. 2*, 75 Me. 358, holding recovery against tax collector for unlawful sale of property to pay school tax bar to assumpsit against school district.

Cited in reference notes in 26 A. D. 370, on judgment in trover as bar to action of trespass; 82 A. D. 597, on unsatisfied judgment against one joint tortfeasor as bar to action against the other.

Cited in notes in 54 A. D. 206, on judgment against one cotrespasser as bar to action against other; 63 A. D. 632, on judgment against one person as bar to action against another involving same subject-matter; 92 A. S. R. 887, on effect of issuing execution on judgment against one wrongdoer on liability of others; 58 L.R.A. 420, on effect of issuance of execution after obtaining several judgments against one joint tortfeasor and electing *de melioribus damnis* on liability of other.

17 AM. DEC. 218, *CRAM v. BURNHAM*, 5 ME. 213.

Cohabitation as evidence of marriage.

Cited in *Duncan v. Duncan*, 10 Ohio St. 181, holding marriage not established by cohabitation pursuant to mutual promise to marry in future; *Carter v. Parker*, 28 Me. 509, holding long-continued cohabitation evidence of marriage.

Cited in notes in 22 A. D. 161, on mode of proving marriage; 7 L.R.A. 801, on sufficiency of proof of marriage; 26 A. D. 484, on cohabitation as presumptive evidence of marriage relation; 14 L.R.A. 364, on cohabitation as proof of marriage where it begins unlawfully; 22 A. D. 72, on cohabitation and reputation as evidence of marriage.

Rights under void marriage.

Cited in note in 96 A. S. R. 270, on property rights growing out of void marriage entered into in good faith.

Validity of marriage.

Cited in *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281, sustaining marriage *per verba de presenti*; *McCombs v. State*, 50 Tex. Crim. Rep. 490, 123 A. S. R. 855, 9 L.R.A. (N.S.) 1036, 99 S. W. 1017, holding marriage when husband has wife living followed by cohabitation after divorce by latter, void; *State v. Murphy*, 6 Ala. 765, 41 A. D. 79, on validity of marriage induced by fraudulently representing that one has license, celebrated by one falsely representing himself as a justice of the peace.

Cited in note in 124 A. S. R. 114, on presumption of continuance of illicit nature of cohabitation illicit in inception.

Proof under general issue.

Cited in *Winslow v. Gilbreth*, 49 Me. 578, holding proof that plaintiffs on note not married inadmissible under general issue.

17 AM. DEC. 221, ALLEN v. SAYWARD, 5 ME. 227.

Estoppel as to after-acquired interest.

Cited in *Thompson v. Thompson*, 19 Me. 235, 30 A. D. 751, holding that covenant of seisin does not estop one from setting up after-acquired title; *Tillotson v. Doe*, 5 Ala. 407, 39 A. D. 330, holding grantor in quitclaim deed afterwards obtaining patent not estopped to set up latter; *Ham v. Ham*, 14 Me. 351, holding grantee in deed of release without warranty not estopped from contesting seisin of grantor; *Kimball v. Blaisdell*, 5 N. H. 533, 22 A. D. 476; *Pike v. Galvin*, 29 Me. 183 (dissenting opinion 30 Me. 539),—holding that after-acquired title passes to grantee under deed with covenant of warranty.

Cited in reference notes in 37 A. D. 52, on effect of acquisition of title after conveyance; 31 A. D. 62, on estoppel of grantor to claim land by subsequently acquired title; 49 A. D. 231, on effect of conveyance with warranty as conveyance of after-acquired title; 54 A. D. 636, on covenant of seisin in fee as estopping grantor to set up after-acquired title; 54 A. D. 635, on right of vendor in deed not containing covenant of warranty to assert after-acquired title.

Cited in notes in 23 L.R.A. 563, on doctrine of estoppel as applied to conveyance recorded before grantor obtained title; 58 A. D. 584, as to when subsequently acquired title by grantor vests in grantee.

Implied covenant of warranty in deed.

Cited in *Bates v. Foster*, 59 Me. 157, 8 A. R. 406, holding warranty not implied by words "give, grant, sell, and convey;" *Brandt v. Foster*, 5 Iowa, 287, holding no warranty of title in absence of covenant in deed; *Roebuck v. Dupuy*, 2 Ala. 535, holding warranty implied by use of term "give" in deed; *McDonough v. Martin*, 88 Ga. 675, 18 L.R.A. 343, 16 S. E. 59, holding failure of title under quitclaim deed no defense to action for purchase price.

Cited in note in 32 A. D. 355, on words from which covenants for title are implied.

17 AM. DEC. 228, STEARNS v. BURNHAM, 5 ME. 261.

Powers of administrator or executor outside of state or county.

Cited in *Dial v. Cary*, 14 S. C. 573, 37 A. R. 737; *Taylor v. Barron*, 35 N. H. 484,—denying power of administrator appointed in one state over property of decedent in another; *Brown v. Smith*, 101 Me. 545, 115 A. S. R. 339, 64 Atl. 915, holding ancillary letters necessary to recover debts owing by residents to estate of nonresident decedent; *Campbell v. Brown*, 64 Iowa, 424, 52 A. R. 446, 20 N. W. 745, denying power of nonresident executor under will not probated in state to sue therein on notes; *Rand v. Hubbard*, 4 Met. 252, holding administrator of nonresident indorsee appointed in state entitled to sue maker therein on note; *McCarty v. Hall*, 13 Mo. 480, denying power of administrator appointed under laws of another state to indorse note payable to decedent by citizen of Missouri; *Mackay v. Saint Mary's Church*, 15 R. I. 121, 2 A. S. R. 881, 23 Atl. 108, sustaining power of nonresident administrator to indorse note to indorsee so that latter may sue in state; *Reynolds v. McMullen*, 55 Mich. 568, 54 A. R. 386, 22 N. W. 41, holding local administrator only entitled to sell mortgage on property in state owned by nonresident decedent; *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 A. D. 298, 29 How. Pr. 240, sustaining right of assignee of foreign executor to maintain action in New York on debt; *Orcutt v. Orms*, 3 Paige, 459, holding administrator of one state entitled to property of decedent of ambulatory character in another state at time of death; *South-Western R. Co. v.*

Paulk, 24 Ga. 356, denying administrator's power to sue in official capacity in county other than where appointed; Vaughn v. Barrett, 5 Vt. 333, 26 A. D. 306, denying power of administrator appointed in another state to discharge debt due from citizen of Vermont to intestate.

Cited in reference note in 32 A. D. 107, on rights, power, liabilities, and duties of foreign administrators and executors.

Cited in note in 45 A. S. R. 673, on extraterritorial powers and liabilities of executors and administrators.

Administrator's power to transfer note.

Cited in Owen v. Moody, 29 Miss. 79; Lucas v. Byrne, 35 Md. 485,—sustaining administrator's power to transfer note belonging to estate.

Necessity of letters of administration.

Cited in Stagg v. Green, 47 Mo. 500, denying administrator's power to act before grant of letters.

Cited in note in 2 E. R. C. 91, on right of assignee of foreign administrator to maintain suit without grant of administration in place of suit.

Validity of letters of administration.

Cited in Moore v. Philbrick, 32 Me. 102, 52 A. D. 642, holding want of jurisdiction of court to appoint administrator, conclusive against validity of letters.

17 AM. DEC. 231, GORHAM v. CANTON, 5 ME. 266.

Admissibility of declarations.

Cited in Houston & T. C. R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659, holding evidence of declaration of witness as to how many had said they were going on excursion, inadmissible in action against railroad for breach of excursion agreement; Deveney v. Baxter, 157 Mass. 9, 31 N. E. 690, holding declarations as to deposit of money for deed admissible as part of *res gestæ* in action to recover same; Robinson v. State, 57 Md. 14, holding mother's declarations as to abandonment of husband admissible on trial of abductor of children; Abbott v. Hutchins, 14 Me. 390, 31 A. D. 59, holding servant's declarations as to ownership of chattels in his possession inadmissible in contest between him and master; Carter v. Buchannon, 3 Ga. 513, holding declarations of donor made on evening of day of gift showing gift, inadmissible as part of *res gestæ*.

Cited in reference notes in 42 A. D. 609, on admissibility of declarations as part of *res gestæ*; 40 A. D. 198, as to when declarations are admissible in evidence as part of *res gestæ*.

Cited in note in 95 A. D. 60, on necessity that acts and declarations be contemporaneous with principal transaction to be admissible as part of *res gestæ*.

—To show residence.

Cited in Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Ex parte v. Blumer, 27 Tex. 734; Wilson v. Terry, 9 Allen, 214,—holding declarations as to residence admissible on question of domicile; United States v. Penn, 13 Nat. Bankr. Reg. 464, Fed. Cas. No. 16,025, holding declarations of person charged with absconding of intention to return admissible to disprove charge; Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909, holding declarations of one as to intention of leaving certain place admissible to establish fact; Londonderry v. Andover, 28 Vt. 416, holding declarations as to former residence inadmissible to show such prior residence; Derby v. Salem, 30 Vt. 722, holding pauper's declarations as to residence inadmissible to show residence in proceeding to which he is not party; Knox v. Montville, 98 Me. 493, 57 Atl. 792, holding

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pauper's declarations of intention to return to another town inadmissible in action for payment of pauper supplies; *Cornville v. Brighton*, 39 Me. 333, holding pauper's declarations as to purpose of journey from one town to another admissible on question of domicil; *Etna v. Brewer*, 78 Me. 377, 5 Atl. 884; *Richmond v. Thomaston*, 38 Me. 232,—holding pauper's declarations made while in act of moving to another town admissible to show intention to change residence; *Corinth v. Lincoln*, 34 Me. 310, holding pauper's declarations as to his home inadmissible in contest over settlement; *Baring v. Calais*, 11 Me. 463, holding pauper's declarations as to place of residence admissible as part of *res gestæ* in contested settlement proceedings.

17 AM. DEC. 233, DODGE v. BARTOL, 5 ME. 286.

Contribution for jettison of goods carried on deck — According to custom.

Cited in *The William Gillum*, 2 Low. Dec. 154, Fed. Cas. No. 17,693, holding that ship and freight are liable on average for loss of pig iron carried according to custom on deck; *Cram v. Aiken*, 13 Me. 229, 29 A. D. 503, holding that owner is not liable to contribution for jettison for goods carried on deck according to custom and paying full freight; *Harris v. Moody*, 4 Bosw. 210, holding jettisoned goods carried on deck according to custom entitled to contribution for general average loss.

Cited in reference notes in 30 A. D. 714, on contribution for jettison of goods shipped on deck; 37 A. D. 676, on goods stowed on deck as subject of general average; 86 A. D. 385, on right of jettisoned goods shipped on deck to benefit of general average.

Cited in note in 14 E. R. C. 408, on loss of goods stored on deck as constituting general average loss.

— With shipper's consent.

Cited in *Lawrence v. Minturn*, 17 How. 100, 15 L. ed. 58, holding owners not liable for jettison of boilers carried on deck according to bill of lading; *Sproat v. Donnell*, 26 Me. 185, 45 A. D. 103, holding that owner is not liable for jettison of sugar box shooks with "clean" bill of lading, but carried on deck with shipper's knowledge; *Doane v. Keating*, 12 Leigh, 391, 37 A. D. 671, holding that goods carried on deck with owner's consent and jettisoned are not entitled to benefit of average.

— In violation of contract.

Cited in *The Delaware* (*The Delaware v. Oregon Iron Co.*) 14 Wall. 579, 20 L. ed. 779, holding that owner was liable for jettison of iron with "clean" bill of lading, but carried on deck; *The Rebecca*, 1 Ware, 187, Fed. Cas. No. 11,619, holding that vessel is liable for loss of goods carried on deck without shipper's consent.

Contribution by goods carried on deck.

Cited in *Harris v. Moody*, 30 N. Y. 266, 86 A. D. 375, holding that money in express crate, carried with all other freight on deck of Long Island Sound steamboat is liable on general average for jettison.

17 AM. DEC. 236, HOLBROOK v. BAKER, 5 ME. 309.

Possession of property by mortgagor or vendor.

Cited in *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256; *Beall v. Williamson*, 14 Ala. 55; *Watson v. Williams*, 4 Blackf. 26, 28 A. D. 36; *North*

v. Crowell, 11 N. H. 251; Ash v. Savage, 5 N. H. 545,—holding that possession of mortgaged chattel by mortgagor is not conclusive evidence of fraud; Tregear v. Etiwanda Water Co. 76 Cal. 537, 9 A. S. R. 245, 18 Pac. 658, holding mortgage of corporation stock, without delivery of possession, good as between the parties; Brinley v. Spring, 7 Me. 241, upholding right of mortgagor to retain possession of mortgaged property without vacating security.

Cited in reference notes in 29 A. D. 363, on retention of possession of personal property by vendor; 26 A. D. 552, on effect of retention of possession by mortgagor of personal property; 30 A. D. 262, on retention of possession by vendor or mortgagor as evidence of fraud.

Cited in note in 20 A. D. 663, on retention of possession by one giving mortgage to secure future advances.

Validity of mortgage to secure future advances.

Cited in Googins v. Gilmore, 47 Me. 9, 74 A. D. 472, holding valid, mortgage made to secure existing debt and future advances; Johnson v. Richardson, 38 N. H. 353, holding that mortgage of real estate to secure existing debt valid *pro tanto*, although intended also to secure future advances as to which it is void under statute.

Validity of levy on mortgaged chattels.

Cited in Keith v. Haggert, 4 Dak. 438, 33 N. W. 465, holding void, levy on mortgaged chattels without payment or deposit of debt as required by statute.

Measure of damages for levy on pledged property.

Cited in Soule v. White, 14 Me. 436, holding measure of damages for pledged personal property seized on execution to be value of property.

Attachment of pledged or mortgaged property.

Cited in Sargent v. Carr, 12 Me. 396, questioning whether, in absence of statutory authority, pledged personal property may be attached by tendering pledgee amount of his lien; Tannahill v. Tuttle, 3 Mich. 104, 61 A. D. 480, holding that the right to attach mortgagor's interest exists only when he is entitled to possession under agreement to that effect.

17 AM. DEC. 238, WEBSTER v. DRINKWATER, 5 ME. 319.

Waiver of tort.

Cited in Huganir v. Cotter, 102 Wis. 323, 72 A. S. R. 884, 78 N. W. 423, sustaining right to waive action for false representations in inducing one to enter contract to cut timber and recover on implied contract; Richardson v. Kimball, 28 Me. 463, sustaining right of purchaser of property under attachment to waive tort and recover in assumpsit for officer's injury thereto; Sandeen v. Kansas City, St. J. & C. B. R. Co. 79 Mo. 278; Osborn v. Bell, 5 Denio, 370, 49 A. D. 275; Starr Cash Car Co. v. Reinhart, 2 Misc. 116, 20 N. Y. Supp. 872; Alsbrook v. Hathaway, 3 Sneed, 454; Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133,—sustaining right of owner to waive tort for conversion and sue in assumpsit; Mann v. Locke, 11 N. H. 246, holding doctrine of waiving tort and bringing assumpsit only applicable where goods taken or detained have been sold; Norden v. Jones, 33 Wis. 600, 14 A. R. 782, sustaining right of one to waive tort for destruction of fence letting cattle into grain, and sue on contract; Tightmeyer v. Mongold, 20 Kan. 90, holding damages to crops caused by cattle recoverable as tort only; Linton v. Walker, 8 Fla. 144 (dissenting opinion), on right to maintain assumpsit for work and labor of negroes wrongfully held by third person.

Cited in reference notes in 22 A. D. 413; 49 A. D. 281; 50 A. D. 400; 79 A. D. 781; 18 A. S. R. 810; 49 A. S. R. 492,—on waiver of tort to sue in assumpsit; 58 A. D. 268, on right to waive tort and sue in assumpsit for conversion; 26 A. D. 481, on waiver of tort and suing *ex contractu*; 25 A. S. R. 227, 445, on right to waive tort and sue in contract; 20 A. D. 447, on waiver of tort and suit on implied contract; 58 A. D. 419, as to when party may waive tort and sue on implied contract.

Cited in notes in 17 A. D. 246, on waiving tort; 16 A. S. R. 661, on right to waive tort and sue in assumpsit; 40 A. D. 89, as to when tort may be waived and action brought in contract; 52 A. D. 753, on count for money had and received lying for money only.

Implied promise to pay.

Cited in *Stebbins v. Waterhouse*, 58 Conn. 370, 20 Atl. 480, holding promise to pay for use of team implied because use presumed beneficial; *Sheldon v. Sherman*, 42 N. Y. 484, 1 A. R. 569, holding implied promise to pay damages raised by removal of logs carried upon another's land by inevitable accident.

Personal liability of officer or agent.

Cited in *Strickland v. Burns*, 14 Ala. 511, holding property purchased by agent with principal's money regarded as money for which assumpsit maintainable.

Cited in reference notes in 20 A. D. 622, on liability of public officer or agent; 55 A. D. 692, on liability of public agents on contracts made for public.

17 AM. DEC. 248, GARDINER MFG. CO. v. HEALD, 5 ME. 381.

Parol variation of written instrument.

Cited in *Moody v. McCown*, 39 Ala. 586, denying admissibility to vary written agreement as to division of property so as to show it intended for use of wives.

Cited in reference notes in 22 A. D. 212; 25 A. D. 213; 27 A. D. 295; 28 A. D. 259,—on parol evidence to vary written agreement; 53 A. D. 726, on parol evidence to show different intention from that expressed in deed.

Merger of parol negotiations.

Cited in *Miner v. Downer*, 19 Vt. 14, holding parol negotiations merged in written partnership articles.

Validity of parol partition.

Cited in *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742; *Shepard v. Rinks*, 78 Ill. 188,—holding executed parol partition, valid; *Wood v. Fleet*, 36 N. Y. 499, 93 A. D. 528, sustaining parol partition followed by exclusive possession.

Timber as part of land.

Cited in *Olmstead v. Niles*, 7 N. H. 522, holding sale of standing timber with definite time for removal, conveyance of interest in land.

Cited in reference note in 83 A. D. 483, on effect of verbal sale of standing trees on subsequent purchaser without notice.

Remedy against cotenant.

Cited in reference notes in 61 A. D. 475, on assumpsit against cotenant; 23 A. D. 392, on assumpsit against cotenant for rents and profits; 66 A. D. 473, on right of tenant in common of personalty to sue in assumpsit cotenant who has sold the common property.

Cited in notes in 52 A. D. 760, on right of cotenant to maintain assumpsit

against cotenant for proceeds or rents and profits of common property; 28 L.R.A. 844, on remedy by action in assumpsit to compel cotenants to account for use and occupation and rents and profits.

Liability of cotenant for conversion.

Cited in *White v. Brooks*, 43 N. H. 402, holding tenant in common selling common property without cotenant's consent, guilty of conversion.

Process valid on face as protection.

Cited in *Winchester v. Everett*, 80 Me. 535, 6 A. S. R. 228, 1 L.R.A. 425, 15 Atl. 596, denying liability for refusal to release woman from custody because married, where judgment recovered against her as single.

Cited in reference note in 31 A. D. 704, on effect on title of purchaser at execution sale of errors or irregularities in the proceeding.

17 AM. DEC. 251, WATERSTON v. GETCHALL, 5 ME. 435.

Conditional sale.

Cited in *Cowan v. Adams*, 10 Me. 374, 25 A. D. 242, holding sale by agent instructed that property sold was to remain principal's until paid for not binding on latter though agent delivered possession before payment.

17 AM. DEC. 253, USHER v. HAZELTINE, 5 ME. 471.

Transfer in fraud of creditors.

Cited in *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Egery v. Johnson*, 70 Me. 258,—holding conveyance by insolvent grantor for inadequate consideration, void; *Carbniener v. Montgomery*, 97 Iowa, 659, 66 N. W. 900, holding conveyance to defraud creditors invalid as to subsequent and antecedent creditors; *Smith v. Lowell*, 6 N. H. 67, sustaining right of insolvent parent as against creditors to make provision for support of child; *Pike v. Collins*, 33 Me. 38, holding conveyance when grantor solvent not void as to subsequent creditors; *Pomeroy v. Bailey*, 43 N. H. 118, sustaining voluntary conveyance by solvent grantor; *McLean v. Weeks*, 65 Me. 411, holding accrual of debts after gift no bar to right of administrator of insolvent estate to recover same; *Harrison v. South Carthage Min. Co.* 106 Mo. App. 32, 79 S. W. 1160, holding unrecorded chattel mortgage void as to debts contracted after failure to record; *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429, holding conveyance made to avoid debt, part of which contracted prior thereto, void as to whole debt; *Chapman v. Hughes*, 61 Miss. 339, holding creditor whose claim contracted partly before and partly after conveyance, not subsequent creditor as to all; *Miller v. Miller*, 23 Me. 22, 39 A. D. 597, refusing to permit subsequent creditor to contest validity of conveyance by debtor.

Cited in reference notes in 39 A. D. 599, on who is a subsequent creditor not entitled to attack conveyance as fraudulent; 76 A. S. R. 574, on lien of judgment recovered for fraudulent conveyance.

Cited in notes in 21 A. D. 432, as to when conveyance from father to son is fraudulent; 19 A. S. R. 657, on who are subsequent creditors within rule as to fraudulent conveyances; 67 L.R.A. 595, on effect of time of alleged fraudulent conveyance on conclusive effect of judgment on which action to set aside conveyance is based.

Execution against debtor's property.

Cited in *Holmes v. Farris*, 63 Me. 318, holding execution wholly for antecedent debt necessary to justify taking of property under statute.

17 AM. DEC. 257, GIBSON'S CASE, 1 BLAND, CH. 138.**Trustee's sale of property.**

Cited in *Murdock's Case*, 2 Bland, Ch. 461, 20 A. D. 381, holding trustee of mortgaged property entitled to greater discretion as to sales than allowed master of chancery in England; *Glenn v. Wootten*, 3 Md. Ch. 514, holding trustee unable to sell property in mode prescribed by decree may dispose of it in different mode; *Markey v. Langley*, 92 U. S. 142, 23 L. ed. 701, holding trustee's sale of mortgaged premises, properly vacated for failure to make beneficial sale.

Right of trustee, etc., to compensation.

Cited in *Booth v. Bradford*, 114 Iowa, 562, 87 N. W. 685, holding trustee entitled to compensation for caring for trust property; *Simmons v. Tongue*, 3 Bland, Ch. 341, holding trustee's commissions for sale of deceased husband's lands may be awarded widow, in pursuance of agreement; *Goff v. Hedgecock*, 144 Ind. 415, 43 N. E. 644, holding mortgagees caring for and selling property entitled to compensation as against comortgagees.

Annotation cited in *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 A. S. R. 400, 81 N. W. 210, holding assignee for creditors not entitled to compensation when guilty of bad faith.

Cited in reference notes in 18 A. D. 271; 21 A. D. 88; 62 A. D. 211; 29 A. S. R. 133; 42 A. S. R. 467; 47 A. S. R. 193; 71 A. S. R. 680; 79 A. S. R. 407,—on compensation of trustees; 20 A. D. 402, on powers, duties, and compensation of trustees to make sale; 79 A. D. 122, as to when trustee is entitled to compensation; 69 A. S. R. 924, on compensation of officers; 63 A. S. R. 720, on illegal exaction of officers' fees.

Trustee acting by agent.

Cited in notes in 81 A. D. 336, on trustee's power to employ auctioneer to make sales; 93 A. S. R. 615, on trustee acting by agent in performance of ministerial duties.

17 AM. DEC. 275, HALL'S CASE, 1 BLAND, CH. 203.**Testamentary provision in lieu of dower.**

Cited in *Green v. Saulsbury*, 6 Del. Ch. 371, Appx. 33 Atl. 623; *Steele v. Steele*, 64 Ala. 438, 38 A. R. 15,—holding rights of widow electing to accept testamentary provision in lieu of dower not superior to creditors; *Beekman v. Vanderveer*, 3 Dem. 619, holding widow accepting testamentary provision, in lieu of dower not entitled to preference over claims of creditors to extent of dower; *Calder v. Curry*, 17 R. I. 610, 24 Atl. 103, holding rights of widow taking under will in lieu of dower not superior to those of other legatees; *Thomas v. Wood*, 1 Md. Ch. 296, holding partial failure of devise to widow in lieu of dower not entitle her to compensation from residue of estate; *Durham v. Rhodes*, 23 Md. 233, holding devise in lieu of dower entitled to preference although in excess of value of dower; *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64, denying right of husband to transfer property to wife in lieu of dower and thus defeat rights of creditors.

Cited in reference notes in 28 A. D. 459; 31 A. D. 237,—on devise in lieu of dower; 61 A. D. 715, as to when devise or legacy will be regarded as in lieu of dower; 21 A. S. R. 934, on election to take under husband's will; 43 A. D. 757, as to when election as to dower is necessary.

Cited in notes in 3 L.R.A. 497, on widow's right of dower; 17 A. D. 516, on devise in lieu of dower; 51 A. D. 579, as to when dower is barred by pro-

vision in will; 10 E. R. C. 347, on election by widow between testamentary provision and dower; 26 A. D. 503, on election between benefits conferred by will and share in community property.

17 AM. DEC. 277, CHASE'S CASE, 1 BLAND, CH. 206.

Appointment of receiver.

Cited in *Blain v. Everitt*, 36 Md. 73, on right to appoint receiver to work land during term where tenant is insolvent; *Micon v. Moses*, 72 Ala. 439, sustaining appointment of receiver before answer in bill in equity by judgment creditor to reach assets; *Ulman v. Clark*, 75 Fed. 868; *Whyte v. Spransy*, 19 App. D. C. 450, sustaining appointment of receiver of rents and profits pending ejectment; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1088, holding plaintiff in ejectment not entitled to appointment of receiver when possibility of winning suit slight; *Jackson v. King*, 9 Kan. App. 180, 58 Pac. 1013; *Durbin v. Northwestern Scraper Co.* 36 Ind. App. 123, 73 N. E. 297,—holding insolvent's title not divested by appointment of receiver; *Van Roun v. Superior Court*, 58 Cal. 358, holding lien of attachment not affected by appointment of receiver for insolvent debtor; *Adams v. Hackett*, 7 Cal. 187, holding subject-matter of partnership accounting not affected by appointment of receiver.

Cited in reference note in 57 A. S. R. 219, as to when receivers will be appointed.

Cited in notes in 72 A. S. R. 30, as to when it is proper to appoint a receiver; 64 A. D. 484, as to when and over what property receiver will be appointed; 72 A. S. R. 72, on insolvency as ground for appointment of receiver; 64 A. D. 489, on appointment of receiver of trust property; 72 A. S. R. 92, on appointment of receiver for rents and profits; 72 A. S. R. 91, on appointment of receiver for real property; 72 A. S. R. 95, on appointment of receiver in supplementary proceedings; 64 A. D. 492, 493, on appointment of receiver in foreclosure suits; 18 E. R. C. 474, on nature of office of receiver appointed either under mortgage deed, under statutory power, or by the court.

—Necessity.

Cited in *Kipp v. Hanna*, 2 Bland, Ch. 26, holding appointment of receiver in suit to recover certain interest in house property denied for want of necessity; *Hughes v. Hamilton*, 19 W. Va. 366; *Seiler v. Union Mfg. Co.* 50 W. Va. 208, 40 S. E. 547; *Clark v. Ridgely*, 1 Md. Ch. 70,—denying appointment of receiver in action to recover rents and profits, in absence of proof of possible loss; *Vause v. Woods*, 46 Miss. 120, denying appointment of receiver in suit against administrator where no breach of trust shown.

Effect of appointing receiver.

Cited in reference note in 75 A. D. 359, on effect of appointment of receiver on title.

Cited in note in 71 A. S. R. 353, on effect of appointing receiver.

Effect of answer on plea.

Cited in *Bank v. Dugan*, 2 Bland, Ch. 254, holding that answer overrules plea to same matter.

Demurrer as effected by plea.

Cited in *Pieri v. Shieldsboro*, 42 Miss. 493; *Glenn v. Sothoron*, 4 App. D. C. 125,—holding demurrer overruled by plea to same matter.

Bar to subsequent action.

Cited in *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171, holding subsequent action not barred by dismissal of prior action by consent of parties; *Murphy*

v. Creath, 26 Mo. App. 581; Martin v. McCarthy, 3 Colo. App. 37, 32 Pac. 551,—holding voluntary nonsuit no bar to another action; Royston v. Horner, 75 Md. 557, 24 Atl. 25, holding decree passed by consent of parties bar to subsequent action on same matter.

Cited in reference notes in 24 A. D. 502, on *res judicata* as estoppel; 24 A. D. 615, as to when former judgment is a bar; 60 A. D. 539, as to when decree dismissing bill is bar to another suit; 34 A. D. 679, as to when dismissal of bill is not a bar; 49 A. D. 503, on effect of agreement to dismiss suit as relinquishment of rights involved.

Cited in notes in 26 A. D. 609, as to when former judgment is a bar or estoppel; 96 A. D. 779, on necessity to conclusiveness of judgment that it be rendered on the merits.

Privileged communications between attorney and client.

Cited in Passmore v. Passmore, 50 Mich. 626, 45 A. R. 62, 16 N. W. 170, holding that privilege does not prevent client from testifying as to advice given by attorney; Oliver v. Cameron, MacArth. & M. 237, holding privilege as to communications between attorney and client waived by latter calling former as witness as to them.

Cited in notes in 22 A. D. 410; 25 A. D. 420; 27 A. D. 335; 66 A. S. R. 217,—on privileged communications to attorney; 66 A. S. R. 241, on waiver of privilege as to confidential communications to attorney.

Test of mortgage.

Cited in reference notes in 93 A. D. 116, on what constitutes a mortgage; 23 A. D. 379; 24 A. D. 458; 27 A. D. 348; 4 A. S. R. 707,—on deed absolute in form as mortgage; 28 A. D. 188; 31 A. D. 626,—as to when deed absolute in form will be treated as a mortgage; 36 A. D. 43, as to when absolute deed is considered as mortgage; 36 A. D. 102, on effect of absolute deed with agreement to reconvey; 20 A. D. 153; 23 A. D. 727; 25 A. D. 735; 42 A. S. R. 272,—on deed with agreement to reconvey as mortgage; 42 A. D. 246, on deed absolute on face accompanied by defeasance as a mortgage; 30 A. D. 400, as to whether instrument is a mortgage or conditional sale; 31 A. D. 36, on distinction between conditional sale and mortgage of realty; 42 A. D. 612, on intention as determining whether instrument is mortgage or conditional sale; 90 A. D. 351, on intention to secure indebtedness by conveyance or bill of sale as criterion of mortgage.

Cited in notes in 4 A. S. R. 700, on conditional sale as an equitable mortgage; 18 E. R. C. 13, as to test whether transaction is mortgage or conditional sale.

Rights of widow.

Cited in Henderson v. Chaires, 35 Fla. 423, 17 So. 574, holding widow to whom executors failed to set apart dower entitled to one third of net rents during time deprived; Helms v. Franciscus, 2 Bland, Ch. Md. 544, 20 A. D. 402, on wife's right to contract concerning vested right to dower or jointure.

Cited in reference notes in 41 A. S. R. 400, on dower in rent; 26 A. D. 231; 32 A. D. 634,—on what will bar dower.

Cited in notes in 39 A. S. R. 38, 39, on dower rights in rents and profits; 39 A. S. R. 35, on modes by which dower is set apart to widow; 23 A. D. 687, on bar of wife's dower by her conveyance; 21 L.R.A. 183, on right of dowress to mesne profits or damages for detention of dower.

Interest on claim against estate.

Cited in *Hammond v. Hammond*, 2 Bland, Ch. 308, holding creditor of estate entitled to interest on claim.

Acknowledgment by married woman.

Cited in reference note in 11 A. S. R. 244, on acknowledgments by married women.

Heirs' right to land.

Cited in *Johns v. Hodges*, 62 Md. 525, upholding restoration of possession to heirs at law when will declared invalid.

Parol evidence to explain written instrument.

Annotation cited in *Bever v. Bever*, 144 Ind. 157, 41 N. E. 944, holding parol evidence admissible to show life estate reserved in deed intended only as security.

Cited in reference notes in 22 A. D. 216; 34 A. D. 213,—on parol evidence to show that absolute deed was intended as a mortgage.

Common recoveries.

Cited in note in 26 A. D. 725, on common recoveries.

17 AM. DEC. 306, GIBSON v. TILTON. 1 BLAND, CH. 352.**Dissolution of injunction.**

Cited in *Allen v. Hawley*, 6 Fla. 142, 63 A. D. 198, holding dissolution of injunction granted before answer denying complaint in discretion of court; *Salmon v. Clagett*, 3 Bland, Ch. 125, holding motion to dissolve injunction and exceptions to answer to be decided at same time; *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563, sustaining power of court on motion to dissolve injunction to examine bill, answer, and exceptions; *Smith v. State*, 28 Fla. 408, 10 So. 894, holding sufficiency of bill raised on motion to dissolve injunction before answer.

Cited in reference notes in 29 A. D. 757, as to when dissolution of injunction is authorized; 29 A. S. R. 278, on right to dissolution of injunction on answer setting up new matter in avoidance; 63 A. D. 217, on sufficiency of answer to warrant dissolution of injunction; 71 A. D. 606, on consideration of objections to sufficiency of answer on motion to dissolve injunction; 65 A. D. 84, on exceptions to answer on motion to dissolve injunction.

What constitutes a contempt.

Cited in reference notes in 42 A. D. 162, on what is contempt of court; 49 A. D. 750, on practising an imposition on the court as contempt.

Compelling attendance of witnesses.

Cited in *Deale v. Esten*, 3 Bland, Ch. 433, sustaining power of commissioners to compel attendance of witness.

Distinguished in *Belt v. Blackburn*, 28 Md. 227, sustaining power of court to require taking of testimony on motion to dissolve injunction.

Lex loci as governing answer.

Cited in *Contee v. Dawson*, 2 Bland, Ch. 264, holding authentication of answer of resident defendant out of state governed by law of state where action brought.

17 AM. DEC. 311, OWING'S CASE, 1 BLAND, CH. 370.**Who are incompetent persons.**

Cited in reference note in 83 A. D. 523, on who are persons of unsound mind.

Cited in note in 29 A. D. 38, on meaning of term *non compos mentis*.

Validity of contract of incompetent person.

Cited in *Kelly v. McGuire*, 15 Ark. 555, holding contract by one of great mental weakness so as to be susceptible to undue influence, voidable; *Pyott v. Pyott*, 90 Ill. App. 210, holding marriage contract by one not able from mental weakness to care for property, void; *Hauber v. Leibold*, 76 Neb. 706, 107 N. W. 1042, holding party whose mind weakened by intoxication not competent to contract; *Keough v. Foreman*, 33 La. Ann. 1434, holding drunkenness not ground to avoid partnership settlement.

Cited in reference notes in 44 A. D. 463, on effect of weakness of intellect on contracts; 17 A. D. 731, on insanity affecting capacity to contract; 42 A. D. 335, on lunacy or unsoundness of mind and its effect on contract entered into; 27 A. D. 458, on circumstances indicating fraud and imposition, coupled with mental weakness, as ground for annulling contract; 59 A. D. 615, on setting aside contracts in equity for weakness of mind; 59 A. D. 615, on setting aside contract for old age; 41 A. S. R. 346, on setting aside in equity contracts of lunatics procured by fraud; 59 A. D. 615, on setting aside contract for inadequacy of consideration.

Cited in notes in 71 A. S. R. 426, on contracts of insane persons; 40 A. D. 437, on age or mental weakness as affecting power to contract; 19 A. D. 408, on insanity affecting testamentary capacity or capacity to contract; 16 E. R. C. 739, on avoidance of contract of alleged insane person.

— Deed.

Cited in *Wolcott v. Connecticut General L. Ins. Co.* 137 Mich. 309, 100 N. W. 569, holding conveyance by incompetent person for whom no guardian appointed, void; *Riley v. Carter*, 76 Md. 581, 35 A. S. R. 443, 19 L.R.A. 489, 25 Atl. 667, holding firm deed not void for lunacy of surviving partner; *Highberger v. Stiffer*, 21 Md. 338, 83 A. D. 593, holding proof of actual fraud unnecessary when grantee is in close relationship to incompetent grantor; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, holding deed obtained by son from insane mother by means of overpowering influence, property set aside.

Cited in reference notes in 83 A. D. 523, on avoidance of deed by lunatic; 66 A. D. 267, on imbecility as ground for avoiding deed or other contract; 36 A. D. 580, on right of grantor or heirs or representatives to avoid deed on ground of insanity.

Distinguished in *Sellman v. Sellman*, 63 Md. 520, denying right of grantor's children to maintain bill to set aside conveyance for incompetency of grantor, on ground of injury to future inheritance.

Action by incompetent person.

Cited in note in 64 L.R.A. 523, 530, on right of insane person to institute proceedings by next friend.

Determination of incompetency.

Cited in *Morgan's Case*, 3 Bland, Ch. 332, holding short interview insufficient to determine mental condition of person:

Fraud in procuring deed or will.

Cited in *Sears v. Shafer*, 1 Barb. 408, holding grantee's preparation of deed not shown to grantor till time of execution, suspicious circumstance.

Cited in notes in 20 L.R.A. 467, on gifts by will as affected by promise made to testator by his wife; 8 L.R.A. (N.S.) 698, 701, on impressing share of heir, devisee, or legatee with constructive trust because of his fraud in frustrating decedent's intention to give the property to a third person.

Appointment of guardian for incompetent person.

Cited in *Post v. Mackall*, 3 Bland, Ch. 486, holding appointment of guardian for incompetent defendant, without issuing writ de lunatic inquirendo proper.

Cited in reference note in 33 A. S. R. 430, on appointment of guardian *ad litem* of insane persons.

Jurisdiction over incompetent persons.

Cited in *Pennington v. Thompson*, 5 Del. Ch. 328, holding bill by next friend of incompetent person not so found by inquisition, proper method to set aside latter's deed; *Mims v. Mims*, 33 Ala. 98, denying right of husband not objecting to form of bill afterwards to object that insane wife should have sued by committee, and not next friend; *Johnson v. Safe Deposit & T. Co.* 104 Md. 460, 65 Atl. 333, holding complete incompetency unnecessary to give court jurisdiction.

Purchase by trustee, etc.

Cited in reference note in 53 A. D. 125, on right of agents, trustees, executors, administrators, guardians, and attorneys to purchase for their own benefit.

Power and duty of court as to rendering decree.

Cited in *Contee v. Dawson*, 2 Bland, Ch. 264, holding in settlement of trust estate court required to decree between codefendants in order to close case; *Scott v. Pinkerton*, 3 Edw. Ch. 70; *Horner v. Nitsch*, 103 Md. 498, 63 Atl. 1052,—sustaining right of court to decree in favor of either party on accounting; *Re Minturn*, 5 Dem. 508, holding one equitable owner of estate not devised by testator, upon another's promise to hold same in trust for former.

Proof of trust.

Cited in *Gaither v. Gaither*, 3 Md. Ch. 158, holding trust provable by parol.

Cited in note in 24 A. D. 413, 415, on parol evidence of trust in bequest.

Effect of death of party to suit.

Cited in *Hochgraef v. Hendrie*, 66 Mich. 556, 34 N. W. 15 (dissenting opinion), on effect on rights of heirs of what is done in suit after ancestor's death.

Cited in reference note in 56 A. D. 421, on abatement of action by death of party.

Defectiveness of prayer for relief.

Cited in *Dormitzer v. German Sav. & L. Soc.* 23 Wash. 132, 62 Pac. 862, holding right to equitable relief not defeated by defectiveness of prayer.

Supplemental bill.

Cited in *Secor v. Singleton*, 41 Fed. 725, holding one acquiring interest in subject of suit after decree entitled to enforce decree by filing supplemental bill.

Equitable jurisdiction.

Cited in *Frisby v. Parkhurst*, 29 Md. 58, 96 A. D. 503, decreeing specific performance of agreement between mother and daughter as to distribution of settlement upon former's death.

Cited in reference note in 41 A. D. 196, on right to award affirmative relief to defendant in equity.

Parol promise relating to real estate.

Cited in *Ramsdel v. Moore*, 153 Ind. 393, 53 L.R.A. 733, 53 N. E. 767; *Olliffe v. Wells*, 130 Mass. 221,—sustaining power of equity to enforce oral promise to hold absolute devise in trust for another; *Whitridge v. Parkhurst*, 20 Md. 62 (dissenting opinion), on validity of contract to settle real estate by will; *Gipatrik v. Glidden*, 81 Me. 137, 10 A. S. R. 245, 2 L.R.A. 662, 16 Atl. 464, holding parol promise of wife to dispose of remainder to heirs of husband, enforceable;

Orth v. Orth, 145 Ind. 184, 57 A. S. R. 185, 32 L.R.A. 298, 42 N. E. 277, holding parol promise to testator by sole beneficiary to dispose of part of estate in favor of another, void.

17 AM. DEC. 347, SHAW v. POOR, 6 PICK. 86.

Acknowledgment by one grantor.

Cited in *Allen v. Leominster Sav. Bank*, 134 Mass. 580, holding acknowledgment by one of two grantors sufficient; *Perkins v. Richardson*, 11 Allen, 538, holding office copy of lost deed of land by husband and wife, competent evidence, although acknowledged by husband only; *Hayden v. Peirce*, 165 Mass. 359, 43 N. E. 119; *Palmer v. Paine*, 9 Gray, 56,—holding acknowledgment by husband of deed made jointly with wife of land held by her, sufficient for record.

Record of conveyance.

Cited in *Edwards v. McKernan*, 55 Mich. 520, N. W. 20, holding conveyance of equitable interest within recording act.

Cited in reference note in 50 A. D. 469, on recording of unacknowledged or defectively acknowledged deed or mortgage.

17 AM. DEC. 349, GARDNER v. MITCHELL, 6 PICK. 114.

Cumulative evidence — What is.

Cited in *Parker v. Hardy*, 24 Pick. 246; *Waller v. Graves*, 20 Conn. 305,—defining cumulative evidence as additional proof of same character; *Mulock v. Mulock*, 28 N. J. Eq. 15, holding new evidence not cumulative when of a different character; *Casey v. State*, 20 Neb. 138, 29 N. W. 264, holding evidence of independent facts of different character establishing same defense, not cumulative; *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171, holding evidence of declarations of plaintiff in negligence action as to cause of accident differing from proof, not cumulative; *German v. Maquoketa Sav. Bank*, 38 Iowa, 366, holding evidence tending to establish controverted issue, and showing distinct fact, not cumulative; *Dundee Mfg. Co. v. Van Riper*, 33 N. J. L. 152, holding newly discovered evidence of memorandum of payment not cumulative in action for balance due; *Scofield v. Brown*, 7 Neb. 221, holding evidence of similar admissions to persons than those sworn, cumulative; *Gardner v. Gardner*, 2 Gray, 434, holding evidence of school fellows that boy able to write, cumulative of same evidence by teachers.

Cited in note in 14 L.R.A. 611, on admissions and declarations of party as cumulative evidence.

— As ground for new trial.

Cited in *Macy v. DeWolf*, 3 Woodb. & M. 193, Fed. Cas. No. 8,933; *Berry v. State*, 10 Ga. 511; *Alger v. Merritt*, 16 Iowa, 121; *Sanford v. Chicago & L. S. R. Co.* 2 Mich. N. P. 133; *Simmons v. Mann*, 92 N. C. 12; *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Burriss v. Wise*, 2 Ark. 33,—holding proof that newly discovered evidence not cumulative necessary before granting of new trial; *Conrad v. Sixbee*, 21 Wis. 383; *Hall & Co. v. Lyons & Co.* 29 W. Va. 410, 1 S. E. 582,—denying motion to set aside verdict upon new evidence not change result; *Com. v. Benesh, Thacher, Crim. Cas.* 684, holding one convicted of obtaining property under false pretenses not entitled to new trial to show what became of property;

Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109, holding new evidence in action for violation of patent of facts not previously shown, not cumulative; *Klopp v. Jill*, 4 Kan. 482, holding evidence on fact not in issue not cumulative and ground for new trial; *Roberts v. State*, 3 Ga. 310, denying new trial because

new evidence additional proof of defendant's conduct already admitted; *Watts v. Howard*, 7 Met. 478, holding new trial proper when new evidence of distinct character; *How v. Bodman*, 1 Disney (Ohio) 115, denying new trial on affidavit of witness stating matter of same general character given in evidence; *Alsop v. Commercial Ins. Co.* 1 Sumn. 451, Fed. Cas. No. 262, holding additional evidence of overvaluation not ground for new trial of action on insurance policy; *Gray v. Harrison*, 1 Nev. 502, holding corroborative evidence not ground for new trial.

Cited in reference notes in 38 A. D. 105; 53 A. D. 185,—on newly discovered evidence as ground for new trial; 38 A. D. 731, on discovery of cumulative evidence as ground for new trial.

Grounds for new trial generally.

Distinguished in *Indianapolis v. Tansel*, 157 Ind. 463, 62 N. E. 35, holding admissions by party after trial competent to support charge of misconduct as ground for new trial.

Laches as affecting new trial.

Cited in *Plymouth v. Russell Mills*, 7 Allen, 438, denying motion to set aside award for delay of four years in producing newly discovered evidence.

17 AM. DEC. 351, RE VANDINE, 6 PICK. 187.

Validity of municipal ordinances and regulations.

Cited in *Boston v. Shaw*, 1 Met. 130, holding ordinance requiring those using drains to pay for same on basis of previous assessment, unreasonable; *St. Louis v. Sternberg*, 69 Mo. 289, holding lawyer's annual license tax, void; *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985, sustaining ordinance imposing license tax on telephone instruments.

Cited in reference notes in 28 A. D. 264, on validity of municipal by-laws and ordinances; 90 A. D. 283, as to valid exercise of police power by municipal corporations; 41 A. D. 636, as to when statute is not in restraint of trade; 90 A. D. 284, on municipal regulations in restraint of trade; 41 A. D. 636, on stranger coming within city limits being bound by its by-laws.

Cited in notes in 41 L. ed. U. S. 520, on reasonableness of municipal ordinances; 34 A. D. 635, on invalidity of unreasonable municipal ordinances; 35 A. R. 703, on validity of ordinances regulating business.

—As to health and safety generally.

Cited in *Watertown v. Mayo*, 109 Mass. 315, 12 A. R. 694, sustaining ordinance prohibiting maintenance of slaughterhouse in city; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 A. R. 113, 11 N. E. 929, sustaining regulation of board of health requiring disinfection of rags; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 621, 80 A. S. R. 650, 58 S. W. 32, holding ordinance regulating speed of trains within city limits, reasonable; *Piqua v. Zimmerlin*, 35 Ohio St. 507, sustaining ordinance prohibiting sale of liquors on Sunday; *Yates v. Milwaukee*, 12 Wis. 674, holding ordinance regulating place of exposing hay for sale, reasonable; *Weeks v. McNulty*, 101 Tenn. 495, 70 A. S. R. 693, 43 L.R.A. 185, 48 S. W. 809, holding police regulation requiring fire escapes on hotel, valid; *Com. v. Cutter*, 156 Mass. 52, 29 N. E. 1146, sustaining regulation prohibiting accumulation of filth on stagnant water; *Schier v. Trinity Church*, 109 Mass. 1, holding recital in legislative act that cemetery is injurious to health, not subject to contradiction by church officers; *Heland v. Lowell*, 3 Allen, 407, 81 A. D. 670, denying city's liability for injuries to one from defect in bridge sustained while driving at rate prohibited by ordinance.

Cited in note in 47 A. S. R. 547, on validity of state quarantine and health regulations.

— As to collection of garbage.

Cited in *Iler v. Ross*, 64 Neb. 710, 97 A. S. R. 676, 57 L.R.A. 895, 90 N. W. 869; *State v. Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770,—sustaining ordinance prohibiting collection of garage without license; *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 475; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 A. & E. Ann. Cas. 275,—sustaining ordinance prohibiting one from collecting garbage not appointed; *Walker v. Jameson*, 140 Ind. 591, 49 A. S. R. 222, 28 L.R.A. 679, 37 N. E. 402; *Smiley v. MacDonald*, 42 Neb. 5, 47 A. S. R. 684, 27 L.R.A. 540, 60 N. W. 355,—holding exclusive privilege conferred by city to collect garbage, valid; *Nash v. District of Columbia*, 28 App. D. C. 598, 8 A. & E. Ann. Cas. 815, sustaining ordinance requiring destruction of garbage, although containing some elements of value; *Dupont v. District of Columbia*, 20 App. D. C. 477, sustaining police regulation requiring garbage wagons to be of certain construction and to have word "garbage" painted thereon; *Re Lowe*, 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710; *Ouray v. Corson*, 14 Colo. App. 345, 59 Pac. 876,—sustaining ordinance requiring scavenger's license; *State v. Hill*, 126 N. C. 1139, 50 L.R.A. 473, 36 S. E. 326 (dissenting opinion), on ordinance requiring scavenger's license.

Cited in notes in 38 L.R.A. 314, on municipal power as to removal of filth, etc.; 27 L.R.A. 541, on monopoly in contract for removal of garbage; 50 L. ed. U. S. 204, on monopoly in contract or ordinance for removal of garbage; 39 L.R.A. 653, on municipal power over nuisances affecting highways and waters, in regard to removal of garbage, etc.; 97 A. S. R. 688, on power of cities to create monopolies for removal of garbage and noxious substances.

— As to use of streets.

Cited in *Com. v. Stodder*, 2 Cush. 362, 48 A. D. 679, sustaining ordinance regulating use of vehicles in street; *Utica v. Blakeslee*, 46 How. Pr. 165, sustaining ordinance prohibiting use of vehicles of certain weight on paved streets, without tires of prescribed width; *Com. v. Bean*, 14 Gray, 52, sustaining ordinance prohibiting cattle going at large; *Marietta v. Fearing*, 40 Ohio, 427, holding ordinance relating to stray animals inapplicable to those owned by nonresidents; *Bott v. Pratt*, 33 Minn. 323, 53 A. R. 47, 23 N. W. 237, sustaining ordinance forbidding leaving horses unhitched in street; *Com. v. Plaisted*, 148 Mass. 375, 12 A. S. R. 566, 2 L.R.A. 142, 19 N. E. 224, sustaining ordinance prohibiting itinerant music in street; *Denver City R. Co. v. Denver*, 21 Colo. 350, 52 A. S. R. 239, 29 L.R.A. 608, 41 Pac. 826, sustaining license tax for operation of street cars.

Reasonableness of carrier's rules.

Cited in *Pullman Car Co. v. Krauss*, 145 Ala. 395, 4 L.R.A. (N.S.) 103, 40 So. 398, 8 A. & E. Ann. Cas. 218, holding rule of sleeping-car company against admission of passengers having contagious diseases, reasonable; *Gregory v. Chicago & N. W. R. Co.* 100 Iowa, 345, 69 N. W. 532, holding reasonableness of rule of carrier prohibiting passenger from having dog in car, and requiring carriage in baggage car, for court; *State v. Chovin*, 7 Iowa, 204 (dissenting opinion), on right of railroad company to charge increased fare when no ticket purchased.

What constitutes public work.

Cited in *Haley v. Boston*, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888, holding removal of ashes from city houses work of public nature.

Effect of by-law.

Cited in *Samuel v. Holladay*, Woolw. 400, Fed. Cas. No. 12,288, holding that

corporate by-law as to special meetings of board do not affect third parties dealing with corporation.

Cited in note in 7 E. R. C. 284, on reasonableness or validity of by-law made by private corporation.

17 AM. DEC. 356, HALL v. WILLIAMS, 6 PICK. 232.

Enforceability of foreign judgment.

Cited in McKim v. Odom, 12 Me. 94, holding that action of debt will not lie on chancery decree of another state; Latine v. Clements, 3 Ga. 426, holding action not maintainable against administrator with will annexed in Georgia on judgment obtained in another state against executor; Boston India Rubber Factory v. Hoit, 14 Vt. 92, holding assumpsit not maintainable in this state on foreign judgment; Kendrick v. Kimball, 33 N. H. 482, holding debt on judgment recovered against nonresident upon attachment and notice, maintainable in this state; Darrach v. Wilson, 2 Miles, (Pa.) 116, holding action on debt not maintainable under act 1705 upon judgment in foreign attachment; Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109, holding valid judgment of court of another state enforceable elsewhere under full-faith and credit clause; Moulin v. Trenton Mut. Life & F. Ins. Co. 24 N. J. L. 222, holding foreign judgment properly authenticated enforceable as domestic judgment.

— Where defendant was not served.

Cited in Woodward v. Tremere, 6 Pick. 354, holding judgment of another state not binding on one not served or appearing; McVicker v. Beedy, 31 Me. 314, 50 A. D. 666; Rangley v. Webster, 11 N. H. 299; Kittredge v. Emerson, 15 N. H. 227; Oakley v. Aspinwall, 4 N. Y. 513; Bates v. Delavan, 5 Paige, 299; Rathbone v. Terry, 1 R. I. 73; Price v. Hickok, 39 Vt. 292; Rape v. Heaton, 9 Wis. 328, 76 A. D. 269; Middlesex Bank v. Butman, 29 Me. 19,—holding judgment obtained without personal service unenforceable outside of state; Easterly v. Goodwin, 35 Conn. 273, holding judgment not based on personal service not enforceable in *personam*; Wood v. Watkinson, 17 Conn. 500, 44 A. D. 562; Kane v. Cook, 8 Cal. 449, holding judgment obtained by publication of summons on defendant out of state unenforceable against property in another state; Starbuck v. Murray, 5 Wend. 148, 21 A. D. 172, holding failure to serve process defense to action on judgment of another state; Sumner v. Marcy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609, holding judgment of one state not binding on property of corporation of another not property served; Earthman v. Jones, 2 Yerg. 484, holding judgment of foreign state against nonresident upon attachment without personal service, no proof of debt in courts of this state; Hanley v. Donoghue, 59 Md. 239, 40 A. D. 554, holding judgment of another state against two defendants not basis of action against one not summoned; Mervin v. Kumbel, 23 Wend. 293, holding that in action of debt on judgment of foreign court against two defendants, judgment is not proof of liability of one not served; Watson v. Steinan Bros. 19 R. I. 218, 61 A. S. R. 768, 33 Atl. 461; Wright v. Andrews, 130 Mass. 149,—holding judgment of foreign state against two defendants one of whom was not served, void as to both.

— Necessity of jurisdiction.

Cited in Goodrich v. Stevens, 116 Mass. 170; Gleason v. Dodd, 4 Met. 333,—holding jurisdiction of court necessary to full credit to foreign judgment; Jarvis v. Robinson, 21 Wis. 524, 94 A. D. 560, holding failure to acquire jurisdiction.

matter of defense to action on foreign judgment; *Harker v. Brink*, 24 N. J. L. 333, to point that judgment against one of whom the court had no jurisdiction will not be enforced in other state.

Judgment of other state as a bar.

Cited in *North Bank v. Brown*, 50 Me. 214, 79 A. D. 609, holding judgment on notes based upon personal service obtained after defense made, bar to action on same notes in another state; *Cochran v. Fitch*, 1 Sandf. Ch. 142, holding attachment against nonresident creditor of resident bar to suit in another state by creditor to enforce demand.

— Where defendant was not served.

Cited in *Newell v. Newton*, 10 Pick. 470; *Whittier v. Wendall*, 7 N. H. 257,— holding judgment of another state obtained without service no bar to another action in this state on same demand; *Odom v. Denny*, 16 Gray, 114, holding judgment of foreign state against two defendants one of whom was not served, no bar to action here against latter.

Judgment without service.

Cited in *Great West Min. Co. v. Woodmas of Alston Min. Co.* 12 Colo. 46, 13 A. S. R. 204, 20 Pac. 771, holding default judgment obtained without service, void; *Nichols v. Crittenden*, 74 Wis. 459, 43 N. W. 105, holding that action on joint contract cannot proceed where service has not been made upon all parties; *Scott v. Noble*, 3 Pittsb. 138, 16 Pittsb. L. J. 53, holding acceptance in one state of service of writ issued in another does not render judgment effectual in former state.

Extraterritorial jurisdiction of court.

Cited in *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 A. D. 300, denying extraterritorial jurisdiction of state courts; *Leith v. Leith*, 39 N. H. 20, holding foreign divorce void when both parties domiciled in this state; *Harding v. Alden*, 9 Me. 140, 23 A. D. 549, holding wife domiciled in state after desertion by husband to foreign state entitled to maintain action for divorce for subsequent adultery; *Middlebrooks v. Springfield F. Ins. Co.* 14 Conn. 301, denying right to sue foreign corporation in Connecticut although majority of stockholders reside therein; *Maxsom v. Sawyer*, 12 Ohio, 195, holding court of common pleas appointing guardian, empowered to authorize him to sell lands in another county; *Leonard v. Putnam*, 51 N. H. 247, 12 A. R. 106, denying guardian's power over ward's property in another state.

— Sufficiency of service to give jurisdiction.

Cited in *Sullivan v. La Crosse & M. Steam Packet Co.* 10 Minn. 386, Gil. 308, holding service of summons on managing agent of foreign corporation in state, void; *Peabody v. Hamilton*, 106 Mass. 217, holding service on defendant on foreign mail ship not yet moored at dock, valid; *Downer v. Shaw*, 22 N. H. 277, holding mere notice of pendency of action insufficient to give court of another state jurisdiction; *Ewer v. Myrick*, 1 Cush. 23, 48 A. D. 587, holding service by attachment of property in state insufficient notice of pendency of action; *Mowry v. Chase*, 100 Mass. 79, holding service of writ by arrest sufficient to give validity to judgment of foreign court; *Henderson v. Staniford*, 105 Mass. 504, 7 A. R. 551, holding insufficiency of service waived by plea of judgment of court of another state in bar of action.

Conclusiveness of record or judgment.

Cited in *Tarbox v. Hays*, 6 Watts, 398, 31 A. D. 478, holding judgment of justice of peace not subject to collateral impeachment; *Tucker v. Harris*, 13

Ga. 1, 58 A. D. 488, holding judgments of courts of ordinary subject to impeachment when irregular; Wiley v. Pratt, 23 Ind. 628; Newcomb v. Dewey, 27 Iowa, 381; Price v. Ward, 25 N. J. L. 225; Welsh v. Sykes, 8 Ill. 197, 44 A. D. 689,—holding record showing appearance by attorney subject to impeachment by proof of attorney's want of authority; Smith v. Silliman, 8 Conn. 111, sustaining right to impeach record by showing no appearance; Hunt v. Ellison, 32 Ala. 178, holding recital in decree that parties appeared conclusive against resident personally served; Hatchett v. Billingslea, 65 Ala. 16, holding settlement of executor's accounts not void because personal service of notice on administrator *de bonis non* not shown by record; Wyman v. Campbell, 6 Port. (Ala.) 219, 31 A. D. 677, holding orders of orphans' court conclusive until reversed; Cheever v. Wilson, 2 Legal Gaz. 244, on whether finding as to domicile in decree of divorce is conclusive or only *prima facie* sufficient.

Cited in note in 21 L.R.A. 848, on effect of judgment obtained on unauthorized appearance by attorney.

—Foreign record or judgment.

Cited in Easley v. McClinton, 33 Tex. 288, sustaining right to contradict record showing personal service when action brought in this state on foreign judgment; Shumway v. Stillman, 6 Wend. 447, holding appearance by attorney in action in foreign state conclusive until contrary shown; King v. Robinson, 33 Me. 114, 54 A. D. 614, denying right to contradict record of another state as to appearance by attorney; Gleason v. Dodd, 4 Met. 333, sustaining right of administrator to show in action on foreign judgment that no one authorized to appear in foreign action; Baltzell v. Nosler, 1 Iowa, 588, 63 A. D. 466, sustaining right to deny authority of attorney appearing when action brought on judgment of foreign state; Edmonds v. Montgomery, 1 Iowa, 143, holding record of judgment of another state showing appearance by attorney sufficient without giving name; Knapp v. Abell, 10 Allen, 485; Barringer v. King, 5 Gray, 9; Westcott v. Brown, 13 Ind. 83,—holding record of foreign state properly authenticated showing personal service, conclusive; Sheldon v. Kendall, 7 Cush. 217, holding judgment of another state obtained on proper service conclusive as to matters forming any defense; Pritchett v. Clark, 3 Harr. (Del.) 517, holding judgment of court of foreign state conclusive as to all matters within jurisdiction; Zepp v. Hager, 70 Ill. 223, holding parol evidence admissible to contradict record of judgment of sister state showing personal service of summons; Carleton v. Bickford, 13 Gray, 591, 74 A. D. 652, holding parol evidence admissible to contradict return of officer showing personal service in action on foreign judgment; Litowich v. Litowich, 19 Kan. 451, 27 A. R. 145, sustaining right to show invalidity of foreign judgment of divorce by proof *aliunde* record; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; Burnham v. Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; Wilcox v. Kassick, 2 Mich. 165; Bimeler v. Dawson, 5 Ill. 536, 39 A. D. 430,—holding foreign judgments only *prima facie* evidence of indebtedness; Wilson v. Jackson, 10 Mo. 329, holding judgment of foreign state *prima facie* evidence of jurisdiction of person where writ returned "executed;" Napier v. Gidiere, Speers, Eq. 215, 40 A. D. 613, holding judgment of foreign state conclusive on subject of indebtedness; Healy v. Root, 11 Pick. 389; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158,—holding record of foreign judgment *prima facie* sufficient on which to base action of debt; Noyes v. Butler, 6 Barb. 613; Bradshaw v. Heath, 13 Wend. 407,—holding judgment of divorce by foreign court not conclusive in absence of Am. Dec. Vol. III.—25.

statement of court's jurisdiction of defendant; *Brainard v. Fowler*, 119 Mass. 262, on right of judgment debtor removing to another state to impeach judgment in action thereon.

Cited in reference notes in 20 A. D. 189; 21 A. D. 180; 25 A. D. 322; 42 A. D. 201,—on effect of judgments of sister states; 62 A. D. 791, on validity of judgments of sister states; 65 A. D. 704, on right to attack foreign judgments by inquiring into jurisdiction of court and its power over parties and things in controversy.

Cited in notes in 26 A. R. 30, on effect given to judgments of other states; 103 A. S. R. 308, as to when inquiries concerning the jurisdiction of another state are open; 21 L.R.A. 857, 858, 859, on effect of judgment of foreign country or sister state obtained on unauthorized appearance of attorney.

Judgment or record as evidence.

Cited in *Sawyer v. Garcelon*, 63 Me. 25, holding original or certified copy of record competent evidence.

— Foreign judgment.

Cited in *Dobson v. Pearce*, 1 Duer, 142, 10 N. Y. Leg. Obs. 170; *Green v. Van Buskirk*, 38 How. Pr. 52,—holding foreign judgment properly authenticated, admissible in evidence; *Pelton v. Platner*, 13 Ohio, 209, 42 A. D. 197, holding judgments of foreign courts not of record inadmissible outside of state; *Mahurin v. Bickford*, 6 N. H. 567, holding judgment of justice of peace of foreign state admissible in evidence when properly authenticated.

Indivisibility of joint judgment.

Cited in *Jackson v. Hulse*, 6 Mackey, 548, holding joint judgment void as to one void as to all; *Peterson v. Middlesex & S. Traction Co.* 71 N. J. L. 296, 59 Atl. 456, holding joint judgment reversible as to all when error shown; *Wilbur v. Abbot*, 60 N. H. 40, holding joint judgment not valid when void as to one defendant; *Wies v. Aaron*, 75 Miss. 138, 65 A. S. R. 594, 21 So. 763, holding judgment on replevin bond against principal and surety, void if rendered after death of surety.

Cited in reference note in 61 A. S. R. 770, on judgment against several persons only part of whom are served.

Cited in notes in 91 A. S. R. 363, 364, 367, on entirety of judgments void as against some of the parties; 32 A. D. 604, 605, on invalidity as to all defendants of judgment void as against one.

Waiver of objection.

Cited in *State v. Richmond*, 26 N. H. 232, on waiver of objection to lack of proper service by submitting case to judgment of court without objecting at earliest opportunity.

Plea of nul tiel record.

Cited in *Bennett v. Morley*, 10 Ohio, 100, holding under plea *nul tiel record* in suit of debt on judgment of foreign state against two defendants appearing, evidence not admissible to show one not served; *Endicott v. Morgan*, 66 Me. 456, holding plea *nul tiel record* to judgment rendered by court of another state on issue to contrary, bad on demurrer; *Anderson v. Hubble*, 93 Ind. 570, 47 A. R. 394, on invalidity as to all defendants, of erroneous joint verdict, in case where the wrongs are distinct and several.

Cited in reference note in 50 A. D. 525, on right to inquire into justness of judgment on plea of *nul tiel record*.

Plea of *nil debet*.

Cited in reference notes in 54 A. D. 460, on right to plead *nil debet* to debt on foreign judgment.

Distinguished in *Risley v. Indianapolis, B. & W. R. Co.* Wilson Super. Ct. (Ind.) 572, holding *nil debet* cannot be pleaded in suit upon judgment rendered in another state.

17 AM. DEC. 368, SMITH v. DENNIE, 6 PICK. 262.**Competency of witnesses.**

Cited in *Maine Stage Co. v. Longley*, 14 Me. 444, holding bailor competent witness for bailee when not interested in event of action.

Cited in reference notes in 49 A. D. 232, 790, on release of interest to qualify witness to testify; 55 A. D. 245, on competency of interested witnesses by release of their interest; 44 A. D. 117, on competency, as witness, of assignor of chose in action or nominal party.

Passing of title on sale of property.

Cited in *Harding v. Metz*, 1 Tenn. Ch. 610, holding that title does not pass to grain delivered in instalments upon agreed payment on delivery; *Sutro v. Hoile*, 2 Neb. 186, holding that title to goods sold on credit does not pass until execution and delivery of note; *Lupin v. Marie*, 2 Paige, 169, holding sale not conditional because notes to be given; *Cole v. Berry*, 42 N. J. L. 308, 36 A. R. 511; *Luey v. Bundy*, 9 N. H. 298, 32 A. D. 359,—holding title to property delivered on condition not pass until condition met; *Furniss v. Hone*, 8 Wend. 247, holding delivery of goods bought at auction for which notes to be sent for later, not conditional; *Rinehart v. Olwine*, 5 Watts & S. 157; *National Ref. & Storage Co. v. Miller*, 7 Phila. 97, 25 Phila. Leg. Int. 228,—holding vendor's retention of bill of lading for goods sold evidence of conditional sale; *Tyler v. Freeman*, 3 Cush. 261; *Hill v. Freeman*, 3 Cush. 257,—holding that vendor's title does not pass by delivery of goods to vendor according to custom before compliance with terms of sale; *Osborn v. Gantz*, 60 N. Y. 540 (affirming 6 Jones & S. 148), sustaining vendor's right to reclaim goods sold for gold note upon vendee's refusal to give same; *Dresser Mfg. Co. v. Waterston*, 3 Met. 9, denying title of one purchasing cloth from printing company to whom sent for printing on conditional sale; *Brawner v. Lomax*, 23 Ill. 496, sustaining title of one to goods purchased from one who bought on unconditional sale; *Brundage v. Camp*, 21 Ill. 330, sustaining title of bona fide purchaser from one buying goods under agreement to give note with security; *George v. Kimball*, 24 Pick. 234, sustaining right of assignee to recover goods taken under assignment without knowledge of fraud; *Hanway v. Wallace*, 18 Ind. 377, holding vendee to have title on performance of condition without interest subject to levy; *Manton v. Gammon*, 7 Ill. App. 201, holding action for breach of contract, not assumpsit, lies for failure to give notes by certain time for goods sold; *Smith v. Smith*, 21 Pa. 367, 60 A. D. 51, holding unconditional sale of goods not avoided by insolvency of vendee; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 A. S. R. 615, 22 S. W. 813, holding worthless check given for goods sold for cash not payment so as to transfer title; *Strauss v. Hirsch*, 63 Mo. App. 95, holding under facts liquors sold for cash on delivery; *Fuller v. Bean*, 34 N. H. 290, holding it question for jury as to intention that title to goods shall pass upon delivery.

Cited in reference notes in 40 A. D. 92, on conditional sales title of goods to remain in vendor; 44 A. D. 124, on title to property sold under conditional sale.

Cited in notes in 13 L.R.A.(N.S.) 705, on rights of creditors of vendee of goods sold for cash, but delivered without payment; 120 A. S. R. 870, as to when sales and delivery do not pass title though sale is not expressly conditional; 120 A. S. R. 873, on sale and delivery passing title where condition has been waived.

Waiver of exact performance of contract.

Cited in *Moffatt v. Green*, 9 Ind. 198, holding counting of ties waived by delivery of portion without counting.

— Of sale.

Cited in *Haskins v. Warren*, 115 Mass. 514, holding unqualified delivery waiver of cash payment; *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 28 S. E. 183, holding delivery of goods sold for cash upon receipt of part, waiver of condition; *Smith v. Lynes*, 5 N. Y. 41 (reversing 3 Sandf. 203), holding condition as to cash payment waived by delivery of goods to be paid for on delivery without demanding notes; *Leatherbury v. Connor*, 54 N. J. L. 172, 33 A. S. R. 672, 23 Atl. 684, holding failure to compel payment upon delivery of goods until rights of purchasers intervene waiver; *Rice v. McLarren*, 42 Me. 157, holding delivery of boat without stipulation as to payment, waiver of cash and title passed; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630, holding delivery of goods without requiring compliance of condition as to payment, presumption of waiver; *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 359, holding waiver of breach of condition inoperative when without knowledge of breach; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244, denying seller's right to reclaim wheat sold for cash but delivered without payment; *Neal v. Boggan*, 97 Ala. 611, 11 So. 809, holding right to reclaim goods sold on agreement to pay cash, waived by seller's taking notes; *Schmidt v. Kattenhorn*, 2 Hilt. 157, holding it question for jury whether vendor intended to waive cash payment by delivery.

Cited in reference note in 33 A. S. R. 674, on waiver of vendor's rights in conditional sales.

Cited in notes in 21 A. D. 262, on delivery without payment or performance of conditions; 11 L.R.A.(N.S.) 951, on delay in attempting to regain property obtained under agreement to pay therefor on delivery, as waiver of condition.

17 AM. DEC. 372, BLAKE v. WILLIAMS, 6 PICK. 286.

What law governs.

Cited in *Heydock's Appeal*, 7 N. H. 496, holding administrator of resident decedent accountable in state for proceeds of sale of personal property in another state; *Johnson v. Hunt*, 23 Wend. 87, holding trustees in state not entitled to property of absconding debtor taken from state and given to resident of another state.

Cited in note in 3 L.R.A. 702, on contract as governed by *lex loci contractus*.

— As to transfer of property generally.

Cited in *Owen v. Miller*, 10 Ohio St. 136, 75 A. D. 502, holding personal property transferable according to law of owner's residence; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115, sustaining right of nonresident transferee of note to sue insolvent maker thereon in courts of latter's state; *Perry Mfg. Co. v. Brown*, 2 Woodb. & M. 449, Fed. Cas. No. 11,015, holding action on notes governed by law of state where same payable.

— As to insolvency.

Cited in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545; *Thum v. Pingree*, 21 Utah, 348, 61 Pac. 18,—holding receiver appointed in insolvency proceedings without jurisdiction over debtor's property in another state; *Wilson v. Matthews*, 32 Ala. 332, holding assignee for creditors under state law not entitled to recover property of assignor in another state; *Stowe v. Belfast Sav. Bank*, 92 Fed. 90, holding insolvency laws of one state powerless to invalidate assignment made in another state; *Betton v. Valentine*, 1 Curt. C. C. 168, Fed. Cas. No. 1,370, holding assignee of insolvent appointed in Massachusetts not entitled to avoid conveyance of personal property in Rhode Island; *Goodsell v. Benson*, 13 R. I. 225, holding bankruptcy proceedings without extraterritorial effect on those not parties; *Frink v. Buss*, 45 N. H. 325, sustaining assignment by creditor in state where bulk of property located, although some in another state where insolvency laws different; *Garding v. East Tennessee Land Co.* 185 Mass. 380, 70 N. E. 206, holding creditor of insolvent foreign corporation bringing action in Federal court in another state not entitled to maintain action for equitable attachment in Massachusetts; *Taylor v. Columbia Ins. Co.* 14 Allen, 353, holding remedies in favor of creditors in one state not barred by insolvency proceedings in another; *Felch v. Bugbee*, 48 Me. 9, 77 A. D. 203, holding discharge of bankrupt under laws of another state not release claim held by citizen of Maine; *May v. Breed*, 7 Cush. 15, 54 A. D. 700, holding discharge under English bankruptcy law of one residing in England from debt due citizen of Massachusetts payable in England bar to action in latter state; *United States v. Bank of United States*, 8 Rob. (La.) 262; *Dehon v. Foster*, 4 Allen, 545; *Frank v. Bobbitt*, 155 Mass. 112, 29 N. E. 209; *Frazier v. Fredericks*, 24 N. J. L. 162; *Fellows v. Heerman*, 8 Luzerne Leg. Reg. 35; *Clark v. Connecticut Peat Co.* 35 Conn. 303,—holding assignment for creditors valid in state where made valid elsewhere; *Dunlap v. Rogers*, 47 N. H. 281, 93 A. D. 433; *Dalton v. Currier*, 40 N. H. 237,—holding assignment under laws of another state not superior to subsequent attachment by resident creditor; *Noble v. Smith*, 6 R. I. 446, holding assignment for creditors superior to prior foreign attachment; *Finnell v. Burt*, 2 Handy (Ohio) 202, holding mere notice to debtor of insolvent of foreign assignment cannot prejudice claim of subsequent attaching creditor; *Kelly v. Crapo*, 45 N. Y. 86, 6 A. R. 35, holding lien of attachment on property of nonresident in state superior to claims of nonresident assignees in bankruptcy; *Burlock v. Taylor*, 16 Pick. 335; *Fall River Iron Works Co. v. Croade*, 15 Pick. 11,—on extraterritorial effect of assignments under bankruptcy laws of foreign states.

Cited in reference notes in 6 A. D. 132, on effect of discharge under foreign insolvent law; 6 A. D. 482, on effect of discharge under foreign bankruptcy law; 45 A. D. 93, on effect of foreign assignment for benefit of creditors.

Cited in notes in 1 L.R.A. 120, on foreign bankrupt and insolvent laws; 94 A. S. R. 556, on foreign proceedings in bankruptcy and in insolvency; 78 A. D. 597, on extraterritorial effect of assignments for benefit of creditors; 23 L.R.A. 43, on transfer of personal property out of state by bankruptcy transfers; 15 A. S. R. 213, on validity, when rendered, of decree of discharge as against nonresident not a party to insolvency proceedings; 17 L.R.A. 87, on protection of domestic creditors.

Situs of debt or cause of action.

Cited in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, holding situs of debt where same payable; *Harvey v. Great*

Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905, holding for purpose of attachment situs of debt wherever debtor found; *Bragg v. Gaynor*, 85 Wis. 468, 21 L.R.A. 161, 55 N. W. 919, holding situs of debts due nonresident within state for purpose of garnishment; *Tootle v. Coleman*, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41, holding right to garnish debtor not limited to situs of cause of action; *Lancashire Ins. Co. v. Corbett*, 62 Ill. App. 236, holding debts not being property of debtor without situs for purpose of garnishment; *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 19 A. S. R. 143, 8 L.R.A. 385, 23 Pac. 430, holding garnishment by nonresident creditor no defense to action against railroad company doing business in state by resident employee for wages; *Cross v. Brown*, 19 R. I. 220, 33 Atl. 147, sustaining attachment under statute of debt due nonresident; *Hibernia Nat. Bank v. Lacombe*, 21 Hun, 166, holding place where drawee refuses to pay draft place where cause of action thereon arises.

Validity of assignment for creditor.

Cited in *Newman v. Bagley*, 16 Pick. 570, holding assignment prima facie valid when debts of greater amount than value of property.

What passes under assignment for creditors.

Cited in *Saunders v. Williams*, 5 N. H. 213, holding bona fide assignment by debtor for benefit of creditors valid to pass all debts; *Smith v. Eaton*, 36 Me. 298, 58 A. D. 746, holding assignee of bankrupt entitled to property of latter upon assignment.

Attachment of property on which advances have been made.

Cited in *Gibson v. Stevens*, 3 McLean, 551, Fed. Cas. No. 5,401, upholding right of local creditor to attach property although advances have been made thereon by foreign factor.

Appearance as waiver of defects.

Cited in *Sturtevant v. Robinson*, 18 Pick. 175, holding objection that time and place not mentioned in writ taken after appearance, too late.

17 AM. DEC. 385, CUTLER v. WINSOR, 6 PICK. 335.

Rights and liability of master of boat as owner.

Cited in *Clark v. Washington Ins. Co.* 100 Mass. 509, 1 A. R. 135, holding master in charge of boat owner for time being; *First Nat. Bank v. Stewart*, 26 Mich. 83, denying owner's liability for money borrowed by master under charter party to pay men; *Rich v. Jordan*, 164 Mass. 127, 41 N. E. 56, denying owner's liability for bait furnished one in possession of boat under charter party; *Baker v. Huckins*, 5 Gray, 596, denying owner's liability for supplies furnished boat in possession of master under charter party; *Webb v. Peirce*, 1 Curt. C. C. 104, Fed. Cas. No. 17,320; *The India*, 16 Fed. 262; *McLellan v. Reed*, 35 Me. 172,—holding one hiring vessel, and not owner, liable for repairs and supplies; *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032, holding owner agreeing to equip vessel and sail same, and not charter party, entitled to salvage.

Cited in notes in 13 A. D. 87, 88, on liability of hirer of vessel for failure to deliver goods; 23 A. D. 622, on owner's nonliability for nondelivery of goods shipped on his vessel chartered to another; 37 L.R.A. 58, on whose servants, crew of chartered vessel are.

— When boat taken on shares.

Cited in *Bird v. Hall*, 73 Me. 73, holding master taking vessel on shares, owner for time being, and not partner of real owner, liable to account; *Skolfield v. Potter*, 2 Ware, 394, Fed. Cas. No. 12,925, holding owner letting boat to master

for part of earnings liable for seaman's wages; *Scarff v. Metcalf*, 107 N. Y. 211, 1 A. S. R. 807, 13 N. E. 796, holding owners of boat sailed by co-owner on shares liable for latter's neglect to furnish mate with medical aid; *Tuckerman v. Brown*, 17 Barb. 191; *Thompson v. Hamilton*, 12 Pick. 425, 23 A. D. 619; *Bonzey v. Hodgkins*, 55 Me. 98,—holding one sailing boat on shares liable for loss of freight; *Sproat v. Donnell*, 26 Me. 185, 45 A. D. 103, holding master taking vessel on shares, and not owner, liable for taking part of cargo for fuel; *Williams v. Williams*, 23 Me. 17, holding master taking vessel on shares, trustee for owner as to latter's part of profits.

When partnership exists.

Cited in notes in 19 E. R. C. 402, on what constitutes a partnership; 18 L.R.A. (N.S.) 1045, on creation of partnership liability by taking profits as compensation for use of ships.

Libel for seaman's wages.

Cited in *The Caroline Casey v. Pounder*, Fed. Cas. No. 2,421a, sustaining seaman's right to maintain libel against schooner for wages.

Validity of parol charter party.

Cited in *Fish v. Sullivan*, 40 La. Ann. 193, 3 So. 730, sustaining validity of.

Proof of partnership.

Cited in *Chapline v. Conant*, 3 W. Va. 507, 100 A. D. 766; *Parchen v. Anderson*, 5 Mont. 438, 51 A. R. 65, 5 Pac. 588,—holding sharing of profits not conclusive as to partnership; *Eastman v. Clark*, 53 N. H. 276, 16 A. R. 192, holding sharing of profits evidence on question of partnership; *Holmes v. Old Colony R. Corp.* 5 Gray, 58, holding one occupying hotel for half of income not partner of owner; *Denny v. Cabot*, 6 Met. 82, holding partnership not established by agreement to manufacture goods for part of profits of sale; *Price v. Alexander*, 2 G. Greene, 427, 52 A. D. 526; *Pierson v. Steinmyer*, 4 Rich. L. 309; *Clark v. Smith*, 52 Vt. 529; *Loomis v. Marshall*, 12 Conn. 69, 30 A. D. 596,—holding that right to portion of profits as compensation for services does not establish partnership as to parties.

17 AM. DEC. 387, AMHERST ACADEMY v. COWLS, 6 PICK. 427.

Liability for subscription.

Cited in reference notes in 60 A. S. R. 731, on validity of subscription; 7 A. D. 203, on liability of voluntary subscribers to further a common public enterprise.

Cited in notes in 6 A. D. 166, on recovery of subscriptions; 7 A. D. 56, on liability of persons subscribing money to carry on common project; 26 L.R.A. 308, on validity of note given for voluntary subscription; 3 L.R.A. 469, on effect of condition annexed to subscription for public purpose; 3 L.R.A. 797, on obligation of subscriber to corporate stock to pay for shares.

—Necessity of consideration.

Cited in *Stewart v. Hamilton College*, 2 Denio, 403 (affirmed in 1 N. Y. 581); *Stoddard v. Cleveland*, 4 How. Pr. 148,—denying recovery on promise to give voluntary subscription.

—Sufficiency of consideration.

Cited in *Warren Academy v. Starrett*, 15 Me. 443, holding note given for use of academy, good consideration for renewal thereof; *Thompson v. Page*, 1 Met. 565, holding member unincorporated religious society liable on agreement to pay on

stock, to treasurer giving temporary bond, until election of treasurer of corporation; *Ives v. Sterling*, 6 Met. 310, holding subscriber, declining to pay subscription to fund for erecting academy, and interested therein to amount subscribed, on ground of proposed change of site, liable to authorized collection committee; *Wheeler v. Toof*, 2 Mich. N. P. 44, holding maker liable on note given to complete church, to trustee advancing amount, on ground that worthy purpose was sufficient consideration; *Wesleyan Seminary v. Fisher*, 4 Mich. 515, holding maker of note to pay for subscription to endowment fund, in consideration of stock to be issued, and tuition to be furnished by female seminary, liable to seminary; *Presbyterian Bd. of Foreign Missions v. Smith*, 209 Pa. 361, 58 Atl. 689, holding acceptance of subscription to missionary society sufficient consideration.

— **Failure of consideration.**

Distinguished in *Congregational Soc. v. Goddard*, 7 N. H. 430, denying maker's liability on note given to religious society for support of evangelical minister, where part of fund was used to pay Unitarian.

— **Mutual promises as inducement.**

Cited in *Capelle v. Trinity M. E. Church*, Fed. Cas. No. 2,392, enforcing claim in bankruptcy, of church corporation against one verbally agreeing with another to pay part of debt, subsequently publicly ratified, on ground of mutual promise and also expenses incurred thereby; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123, enforcing agreement of one to pay percentage of corporation stock to be issued, to agent authorized to receive, regardless of subsequent acts of agent and others affecting value; *Hart's Estate*, 13 Phila. 226, 7 W. N. C. 164, 36 Phila. Leg. Int. 175; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412,—holding one liable on written promise to contribute to fund for theological institute, where others were thus induced to make up specified sum, and expenses incurred; *Eastern Pl. Road Co. v. Vaughan*, 20 Barb. 155; *Kennebec & P. R. Co. v. Palmer*, 34 Me. 366,—holding subscriber to stock of railway company to be organized, liable on ground that his promise was consideration for promises of others; *Church & Congregation in Second Precinct v. Stetson*, 5 Pick. 506, holding member religious society after voluntary subscription to increase ministerial fund, liable on note to authorized trustees, on ground that others were led to subscribe and minister secured; *Lathrop v. Knapp*, 27 Wis. 214, holding subscriber to agreement to purchase lands for mutual benefit liable to duly appointed receiver on ground that each promise is consideration for another.

— **Performance or assumption of liability by payee.**

Cited in *Sturges v. Colby*, 2 Flipp. 163, Fed. Cas. No. 13,566, sustaining validity of mortgage securing note given after subscription to university fund was completed, in bankruptcy proceedings, on ground of work done and expenses incurred in reliance thereupon; *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L.R.A. 636, 44 S. W. 454, holding one agreeing to contribute to erection of church at specified place liable, although location subsequently changed, where payee incurred liability; *Beatty v. Western College*, 177 Ill. 280, 69 A. S. R. 242, 42 L.R.A. 797, 803, 52 N. E. 432, holding maker of note made because of "a desire to aid" college, estopped from denying consideration, after liabilities have been incurred thereby; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427, sustaining consideration of endowment bond ordering, after death, payment to fund for endowing chair named after obligor upon assumption of duty by college; *Doherty v. Arkansas & O. R. Co.* 5 Ind. Terr. 537, 82 S. W. 899, holding subscriber liable on subscription agreement acted upon by railroad; *University of Dea*

Moines v. Livingston, 57 Iowa, 307, 42 A. R. 42, 10 N. W. 738, sustaining admissibility of evidence in action against subscriber to fund that authorized agent of religious society, relied upon subscription to make improvements; **Haskell v. Oak**, 75 Me. 519, holding implied promise of treasurer of dairy association to pay its debts sufficient consideration, in action by him, for creditors at time of subscription, against subscriber to fund; **Higert v. Indiana Asbury University**, 53 Ind. 326; **Maine Central Institute v. Haskell**, 73 Me. 140; **Troy Conference Academy v. Nelson**, 24 Vt. 189; **Ladies' Collegiate Institute v. French**, 16 Gray, 196, holding subscriber to fund for "Ladies Institute," liable on implied promise of payee to use funds properly and upon fulfilment of conditions imposed; **Williams College v. Danforth**, 12 Pick. 541, holding subscriber to fund for improving college property under certain conditions, liable upon fulfilment; **Cottage Street M. E. Church v. Kendall**, 121 Mass. 528, 23 A. R. 286, denying liability of subscriber to fund to erect church cottage in absence of evidence that subsequent erection was based upon reliance thereon; **Albert Lea College v. Brown**, 88 Minn. 524, 60 L.R.A. 870, 93 N. W. 672, holding estate of one liable on note given by him to university, maturing after death, on proof of donee's acceptance and resulting expenditure, to donor's knowledge; **Kock v. Lay**, 38 Mo. 147, holding maker liable on note given to found college, subsequently dissolved, where corporation in reliance on promise incurred expense and assumed liabilities; **School Dist. v. Sheidley**, 138 Mo. 672, 60 A. S. R. 576, 37 L.R.A. 406, 40 S. W. 656, holding maker liable on note given for erection of library when money is expended for such in reliance thereon; **Barnes v. Perine**, 12 N. Y. 18 (affirming 9 Barb. 202), holding subscriber to church rebuilding fund, liable upon completion of church, on ground of services rendered and expenses incurred at subscriber's request; **Wayne & O. Collegiate Institute v. Smith**, 36 Barb. 576, holding one liable for part of subscription to school building funds after expenses incurred as result, on ground of fulfilment of condition of promise; **Baptist Female University v. Borden**, 132 N. C. 476, 44 S. E. 47, sustaining testamentary bequest to university on proof that expenses were incurred, during testator's life, relying upon subscription given, and publicly announced in his presence; **Irwin v. Lombard University**, 56 Ohio St. 9, 60 A. S. R. 727, 36 L.R.A. 239, 46 N. E. 63, holding maker liable on note given to establish college professorship where same was credited in faith of such promise; **Hopkins v. Upshur**, 20 Tex. 89, 70 A. D. 375, holding one agreeing to donate towards erection of church, liable to builder employed by vestry relying upon donor's promise.

Distinguished in **Gittings v. Mayhew**, 6 Md. 113, denying recovery against subscriber to treasurer of building fund, being merely custodian, not named as payee in subscription, and having done no work in reliance thereon.

Revocation of subscription by death.

Cited in **Stokes's Estate**, 14 Phila. 251, 9 W. N. C. 439, 38 Phila. Leg. Int. 12, holding death of subscriber to charitable fund operated as revocation, where nothing was done pursuant thereto for several months after death.

Subscription as debt within tax law.

Cited in **King v. Carroll**, 129 Iowa, 364, 105 N. W. 705, holding subscription to endowment fund of college payable upon promisor's death, debt within meaning of tax law.

Capacity of corporation to receive donation.

Cited in **Chamberlain v. Chamberlain**, 43 N. Y. 424, holding foreign corporation authorized to receive money for support of liberal education, capable of

taking bequest according to will of donor, and investing it for benefit of a college; *Genesee College v. Dodge*, 26 N. Y. 213, holding college capable of taking subscription and giving in return scholarship in another institution of learning connected with it; *State v. Johnson*, 52 Ind. 197, sustaining agreements to give for charitable and educational purposes on conditions, in holding state of Indiana capable of receiving donations for house of refuge.

Sufficiency of consideration generally.

Cited in *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370 (dissenting opinion), on sufficiency of consideration; *Wilks v. Georgia P. R. Co.* 79 Ala. 180, enforcing agreement by land owner to give right of way over, and minerals on, land to railroad, on completion within required time, although a stipulation exempted railroad from damages for failure; *Burr v. Wilcox*, 13 Allen, 269, holding procurement by collector, at request of one interested in real property, of apportionment of tax, good consideration for promise to pay amount when ascertained; *People's Bank & T. Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179, holding agreement of father of illegitimate children to pay mother for their support in consideration of latter's promise to care for them, valid; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 A. S. R. 870, 50 N. W. 503, holding raising wages of son to retain services in company controlled by father a valid consideration, as against claims of creditors.

Cited in note 12 L.R.A. 466, on sufficiency of benefit to promisee and detriment to promisor to support promise.

— Promissory notes.

Cited in *Horn v. Fuller*, 6 N. H. 511, enforcing collection by payee of note, not stating consideration, from maker promising "agreeable to father's last will" to pay, on ground that consideration was presumed; *Smith v. Kittridge*, 21 Vt. 238, holding love and affection insufficient consideration for note given to two of several children, payable after death, by father executing on same day will dividing estate equally.

Right of action of assignee of note.

Cited in *McDonald v. Laughlin*, 74 Me. 480, sustaining right of action of assignee of note given to "treasurer" of society in name of treasurer at commencement of action, but not at time note was given.

Liability of partnership for services rendered after dissolution.

Cited in *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, holding firm liable, on agreement to pay sum for such purpose, to committee for services in defending it against infringements suits after dissolution.

Variances in pleading.

Cited in *Underwood v. Waldron*, 12 Mich. 73, denying recovery against subscriber to college fund where declaration showed subscription was for one college and proof showed it was for another.

17 AM. DEC. 397, RIPLEY v. SEVERANCE, 6 PICK. 474.

Right of trustee to offset demands.

Cited in *Boardman v. Cushing*, 12 N. H. 105, sustaining right of trustee of debtor to set off demands due himself contracted before service of trustee process; *Price v. Masterson*, 35 Ala. 483; *Shreve v. Fenno*, 49 Me. 78,—sustaining right of trustee in bill of sale void as to creditors to deduct bona fide claims.

Proof of trustee's misconduct.

Cited in *Porter v. Stevens*, 9 Cush. 530, holding affirmative proof necessary to charge trustee with goods alleged to be in his hands.

Surety as subject to garnishment.

Cited in *St. Louis v. Regenfuss*, 28 Wis. 144, holding garnishee retaining part of purchase price of land as indemnity against own liability on attachment debtor's note, not liable to garnishment.

What subject to garnishment.

Cited in note in 59 L.R.A. 369, on garnishment of unliquidated claims to surplus on deposit.

When trustee process will issue.

Cited in *Lamb v. Stone*, 11 Pick. 527, holding attachment by trustee process proper remedy for fraudulent purchase of property by absconding debtor; *Chapman v. Williams*, 13 Gray, 416, holding one to whom land is conveyed by debtor without adequate consideration, not chargeable as trustee in foreign attachment; *Bissell v. Strong*, 9 Pick. 562, holding grantee of land as security for indebtedness of less value, not chargeable for excess in foreign attachment; *Proctor v. Lane*, 62 N. H. 457, holding creditor attaching debtor's funds in trustee's possession bound to show funds subject to trustee process.

Practice on garnishment.

Cited in *Banning v. Sibley*, 3 Minn. 389, Gil. 282, on practice of considering validity of assignment for creditors when brought before court by garnishee process.

Presumption in favor of garnishee.

Cited in *Thompson v. Dyer*, 100 Me. 421, 62 Atl. 76, to point that no presumption is to be made in favor of one summoned as trustee of principal defendant.

Nature of real estate.

Cited in *Wright v. Bosworth*, 7 N. H. 590, holding real estate not money, rights, or credits within attachment statute.

Discharge of mortgage lien.

Cited in *Enright v. Amsden*, 70 Vt. 183, 40 Atl. 37, holding mortgage lien not discharged by mortgagee's purchase of goods under agreement to resell and credit proceeds; *Avery v. Hackley*, 20 Wall. 407, 22 L. ed. 385, holding lien not discharged by holder's taking void equity of redemption; *Stedman v. Vickery*, 42 Me. 132, holding valid mortgage not defeated by void bill of sale to mortgagee.

17 AM. DEC. 400, DOW v. NORRIS, 4 N. H. 16.**Deprivation of right to penalty by repeal of statute.**

Distinguished in *Wooster v. Plymouth*, 62 N. H. 193, holding right of individual to penalty incurred under statute cannot be taken away by repeal of statute, but right of state or municipality may be so taken.

Action for penalty as removable civil suit.

Cited in *Robertson v. Kettell*, 64 N. H. 430, 14 Atl. 78, as to whether action of debt for penalty is suit of civil nature removable to Federal courts.

Right of judiciary to determine validity of statute.

Cited in *Bank of St. Mary's v. State*, 12 Ga. 469; *Beall v. Beall*, 8 Ga. 210,—sustaining right of judiciary to pass upon constitutionality of statutes.

Statute unconstitutional in part.

Cited in *Dunn v. Great Falls*, 13 Mont. 58, 31 Pac. 1017, holding act authoriz-

ing municipal indebtedness in excess of constitutional limitation void only as to such excess.

Construction of charter, statute, or ordinance.

Disapproved in *Williams v. Goddard*, 8 Vt. 492, denying that charter settlement right to reserved lands for use of minister vested absolutely in first incumbent.

— Reasonable construction.

Cited in *Western U. Teleg. Co. v. State*, 82 Ark. 309, 101 S. W. 748, 12 A. & E. Ann. Cas. 82, holding court bound to adopt reasonable construction of statute.

— Construction consistent with validity.

Cited in *Mobile v. Southerland*, 47 Ala. 51, holding act and ordinance thereunder regulating harbor master and port warden's fees, a valid exercise of police power; *Camp v. Rogers*, 44 Conn. 291, construing statute making owner liable for failure to turn to right, to mean person in immediate control, to avoid constitutional objection; *People ex rel. Longenecker v. Nelson*, 133 Ill. 576, 27 N. E. 217, sustaining act to create sanitary districts and to control water power incidentally created, as embracing only one subject; *Swigart v. People*, 50 Ill. App. 181, denying that statute prohibiting book-making and pool-selling repealed previous statute prohibiting gaming; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76, holding act regulating transportation of gas and limiting pressure not attempt to limit or restrain commerce; *State ex rel. Worrell v. Peeble*, 121 Ind. 495, 22 N. E. 654, construing statute authorizing appointment of state officer by governor, as applying to appointment to fill vacancy only; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469, construing statute authorizing board of excise commissioners to permit other business in room where intoxicating liquors sold, as not conferring arbitrary power; *Swift v. Topeka*, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075, denying violation by bicycle rider using bridge roadway, of ordinance prohibiting use of sidewalk or riding across bridge; *Tabor v. Cook*, 15 Mich. 326, construing statute authorizing bill to quiet title by party not in possession, as applying only to vacant lands, since otherwise right to jury trial violated; *Sedalia ex rel. Taylor v. Smith*, 206 Mo. 346, 104 S. W. 15, holding that ordinance subject to two constructions must be given that which will sustain it; *Opinion of Justices*, 41 N. H. 553, sustaining statute providing for freedom of slaves entering state and penalty for holding, as not antagonistic to Federal fugitive slave law; *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588, upholding statute providing for injunction against unlawful use of building, notwithstanding use constitutes criminal offense; *Pickle v. Finley*, 91 Tex. 484, 44 S. W. 480, denying statute fixing stenographer's salary for indefinite time constitutes appropriation where such construction would violate Constitution permitting appropriations for two years only; *State ex rel. Calderwood v. Schomber*, 23 Wash. 573, 63 Pac. 221, construing act providing actions before justice must be commenced, in precinct of defendant's residence, to avoid conflict with constitutional venue in criminal cases; *Bridges v. Shallcross*, 6 W. Va. 562, sustaining statute providing for formation of board of public works, comprised of state officers, and for appointments thereunder as satisfying required manner of carrying out provisions.

Distinguished in *Motz v. Detroit*, 18 Mich. 515, holding city charter making

whole expense of street improvement assessable against abutting property, in disregard of principle of apportionment, unconstitutional.

Retrospective operation of statute.

Cited in *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014, upholding statute authorizing auditors to extend inquiries into returns of property for taxation for four years preceding passage; *Boyce v. Holmes*, 2 Ala. 54, denying application of statute allowing value of improvements made before enactment to tenants ejected by paramount title; *Dunbarton v. Franklin*, 19 N. H. 257, denying retrospective operation of statute validating marriages void for lack of ministerial jurisdiction and publication of intention; *Adams v. Hackett*, 27 N. H. 294, 59 A. D. 376, denying validity of repeal of statute licensing liquor sales as to sales before passage; *Loveren v. Lamprey*, 22 N. H. 434, holding statute, passing real property by will, applied to will, previously executed, of testator dying subsequent to passage.

Cited in notes in 14 A. D. 393, on validity of retrospective statutes; 41 L. ed. U. S. 96, on retroactive laws and laws impairing vested rights.

— Affecting remedy.

Cited in *Adams v. Johnson*, 6 N. H. 119, holding bar to cause of action on note, because of nonresidence, not removed by subsequent repealing statute; *Willard v. Harvey*, 24 N. H. 344, sustaining statute, prescribing twenty year limitation, as to action brought twenty-one years after cause arose, but nine years after passage; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491, upholding as to previous right of action statute authorizing reduction of insolvent saving bank's deposits, to divide loss equally among depositors; *Rairden v. Holden*, 15 Ohio St. 207, sustaining retrospective operation of act giving administrator *de bonis non* right of action on bond of administrator dying before enactment; *Mellinger v. Houston*, 68 Tex. 37, 3 S. W. 249, holding statute denying defense of statute of limitations to action for taxes, not applicable to taxes barred before enactment.

— Affecting pending action or proceeding.

Cited in *Denver S. P. & P. R. Co. v. Woodward*, 4 Colo. 162, holding repeal of act giving right of action for wrongful death, not applicable to case on appeal at time of passage; *Kennett's Petition*, 24 N. H. 139, denying application of statute providing for inquiry and hearing concerning highways, to previous petition therefor; *Pembroke v. Epsom*, 44 N. H. 113, holding action, for supplies for pauper, came within clause, of act abolishing settlements, providing no pending action should be affected; *Farr v. Chandler*, 51 N. H. 545, holding repeal of statute, allowing deduction of illegal interest from judgment, not applicable to suit commenced before passage; *Dow v. Electric Co.* 68 N. H. 59, 31 Atl. 22, holding repeal of statute requiring payment of 50 per cent excess over actual damages caused by erection of dam, not applicable to pending suits; *Stanyan v. Peterborough*, 69 N. H. 372, 46 Atl. 191, denying application to previous action, of repeal of act, requiring notice before bringing action for penalty for nonerection of guide posts; *State v. Pray*, 14 N. H. 464, holding act making party, entitled to penalty, incompetent as interested witness, applied to previous action.

Distinguished in *Rich v. Flanders*, 39 N. H. 304, sustaining application of statute allowing parties to civil actions to testify to previous actions.

17 AM. DEC. 403, BARNARD v. EDWARDS, 4 N. H. 107.**When right of dower is barred.**

Cited in *Burt v. C. W. Cook Sheep Co.* 10 Mont. 571, 27 Pac. 399; *Parker v. Obear*, 7 Met. 24; *Ridgeway v. McAlpine*, 31 Ala. 458,—holding dower not barred by statute of limitations; *Robie v. Flanders*, 33 N. H. 524, holding that statute of limitations begins to run against claim of dower from time right accrues after demand; *May v. Rumney*, 1 Mich. 1, holding no bar to action for dower in land of which husband was seized during coverture; *Chase v. Alley*, 82 Me. 234, 19 Atl. 397, holding that failure to demand dower until twenty-six years after husband's death does not bar; *Barksdale v. Garrett*, 64 Ala. 277, 38 A. R. 6, holding dower barred after twenty years from husband's death, though in statutory bar to unaliened land.

Cited in reference notes in 43 A. S. R. 348, on limitation of actions to recover dower; 93 A. S. R. 430, on running of limitations against right to dower; 29 A. D. 527, on inapplicability of statute of limitations to dower.

Cited in note in 39 A. S. R. 31, on time for assignment of dower.

Distinguished in *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125, holding statute does not run against dower while widow is in possession of lands under devise during son's minority; *Danley v. Danley*, 22 Ark. 263, holding that more than ten years having elapsed since husband's death, claim of dower is barred; *Durham v. Angier*, 20 Me. 242, holding that adverse occupation for more than twenty years during husband's lifetime does not bar dower.

17 AM. DEC. 404, TYLER v. STEVENS, 4 N. H. 116.**New trial for misconduct of jurors.**

Cited in *Boynton v. Trumbull*, 45 N. H. 408, to point that where misconduct of jurors in arriving at verdict is shown, verdict will be set aside.

Cited in reference note in 39 A. D. 180, on vacation of verdicts for irregularities on part of jury.

Testimony or affidavits as to verdict or report — Of commissioners.

Cited in *Maxfield v. Pittsfield*, 67 N. H. 104, 36 Atl. 609, holding testimony of county commissioner that he was not influenced by prejudicial statements of stranger, admissible; *Groton's Petition*, 43 N. H. 91, holding that county commissioner's affidavit as to consultations in their rooms regarding discontinuance of highway, inadmissible.

— Testimony of jurors.

Cited in *Hearn v. Boston & M. R. Co.* 67 N. H. 320, 29 Atl. 970, holding on retrial juror's testimony that former verdict was based solely on issues material to second action, inadmissible.

Distinguished in *Knight v. Epsom*, 62 N. H. 356, holding that juror's testimony admissible that verdict found by averaging sums was agreed to after deliberation and before separation.

— Affidavit of jurors on motion for new trial to impeach verdict.

Cited in *Folsom v. Brawn*, 25 N. H. 114, holding affidavits inadmissible to show impressions as to effect of verdict upon costs; *Caverno v. Jones*, 61 N. H. 623, holding that affidavit that juror understood from instructions he must agree with majority inadmissible; *Walker v. Kennison*, 34 N. H. 257, holding affidavits inadmissible to show motives, inducements, or principles upon which they joined in verdict.

Cited in note in 36 A. D. 534, on affidavits of jurors that they misapprehended instructions in support of motion for new trial.

Distinguished in *State v. Hascall*, 6 N. H. 352, holding affidavits of jurors that certain prejudicial papers were not shown to them, as alleged, permissible.

—Affidavits in support of verdict.

Distinguished in *Tenney v. Evans*, 13 N. H. 462, 40 A. D. 166, holding affidavits of jurors to exculpate themselves from improper conduct charged to impeach verdict, admissible; *State v. Howard*, 17 N. H. 171, holding affidavits to deny imputation of bias, admissible.

17 AM. DEC. 406, ADAMS v. MORRISON, 4 N. H. 166.

Judicial sales.

Cited in reference notes in 40 A. D. 620, on executor's discretion on sales under order of court; 37 A. D. 66, on effect of executor's sale in excess of authority given by court.

—When sale of entire tract justified.

Cited in *Wakefield v. Campbell*, 20 Me. 393, 37 A. D. 60, denying writ of entry where administrator sold whole tract for sum greater than authorized to raise; *Merrill v. Harris*, 26 N. H. 142, 57 A. D. 359, holding if dividing tract to equal demands will work injury, license to sell whole proper; *Elsley v. Falconer*, 56 Ark. 419, 20 S. W. 5, to point that sale of entire tract for taxes not included in complaint void even as to portion equalling amount due.

17 AM. DEC. 407, EMERSON v. MURRAY, 4 N. H. 171.

Effect of indorsements on or annexed to written instruments.

Cited in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799, holding that if application is indorsed and referred to as part of policy, false answers of soliciting agent bind insured; *Baldwin v. Jenkins*, 23 Miss. 206, holding agreement for lien on premises, indorsed on absolute deed, acknowledged and recorded therewith, part thereof; *Missouri P. R. Co. v. Levy*, 17 Mo. App. 501, holding that indorsement on back of promissory note affects contract where both instruments are considered as one; *Key v. Cross*, 23 Miss. 598, holding that memorandum limiting liability indorsed on promissory note when made, designed as integral part thereof, becomes so; *Belknap v. Wendell*, 21 N. H. 175, holding that goods are described in mortgage where on separate paper attached to mortgage after words "following goods;" *Roberts v. Chenango County Mut. Ins. Co.* 3 Hill, 501, holding that papers purporting to be conditions of insurance annexed to and delivered with policy, binds insured; *Olcott v. Tioga R. Co.* 27 N. Y. 546, 84 A. D. 298, to point that seal of service of notice sufficiently authenticates certificate beneath on same page; *Beaman v. Russell*, 20 Vt. 205, 49 A. D. 775; *Gillett v. Sweat*, 6 Ill. 475,—to point that when and by whom alterations on note were made are matters of fact for jury.

17 AM. DEC. 408, HAMILTON v. ELLIOT, 4 N. H. 181.

Estoppel by disclaimer.

Cited in *Leavitt v. Wallace*, 12 N. H. 489, holding that disclaimer in real action estops setting up any title, in subsequent action by grantee, unless acquired subsequently; *Parker v. Brown*, 15 N. H. 176, to point that recovery of damages for breach of covenant of seisin will estop grantee claiming land as against grantor.

Cited in reference note in 24 A. D. 498, on estoppel by conduct.

Right to amend disclaimer.

Cited in *Wells v. Jackson Iron Co.* 50 N. H. 85, holding that in writ of entry disclaimer as to part may at any time before judgment be amended.

17 AM. DEC. 410, FARRAR v. FARRAR, 4 N. H. 191.**Effect of cancelation, destruction, or redelivery of written instrument.**

Cited in *Decker v. Decker*, 64 Neb. 239, 89 N. W. 795, holding that redelivery and destruction of unrecorded deed with parol defeasance reverts title as against grantee's heirs; *Mussey v. Holt*, 24 N. H. 248, 55 A. D. 234, holding that surrender and cancelation of deed reverts title in grantor and transfers grantee's rights in lease; *Dukes v. Spangler*, 35 Ohio St. 119, holding that destruction by agreement of deed to wife will not *per se* prevent wife claiming against grantor's heirs; *Albrecht v. Albrecht*, 121 Iowa, 521, 96 N. W. 1087, holding that mutual assent that absolute deed deposited with stranger be destroyed and trust deed substituted, estops grantee; *Slaughter v. Bernards*, 97 Wis. 184, 72 N. W. 977, holding that under statute recording instrument stating that certain conveyances are by consent canceled, does not revert title; *Winfrey v. Gallatin*, 72 Mo. App. 191, holding that destruction of assignment of patent by mutual agreement reverts title in assignor; *Clamorgan v. Lane*, 9 Mo. 446, on right of grantee to afterwards set up deed delivered up and canceled; *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding grantee's title not divested where grantor for safety took back unrecorded deed lodged with third person; *Barrett v. Barron*, 13 N. H. 150, holding that grantee's redelivery of deed, and bond of third party having easement, does not cancel bond; *Johnson v. Elkins*, 1 App. D. C. 430, holding that surrender of unrecorded deed for cancelation divests grantee's legal title and reverts same in grantor; *Wiley v. Christ*, 4 Watts, 196, holding that if grantee after redelivering of deed marry grantor thus possessing himself with deed, title is not reverted; *Dodge v. Dodge*, 33 N. H. 487, holding grantee estopped from claiming title after redelivery of deed for cancelation; *Parker v. Kane*, 4 Wis. 1, 65 A. D. 283, holding that grantee cannot give parol evidence of title under deed voluntarily redelivered for cancelation; *Whisenant v. Gordon*, 101 Ala. 250, 13 So. 914, on right of grantee to maintain ejectment if he has redelivered deed to grantor for destruction; *Potter v. Adams*, 125 Mo. 118, 46 A. S. R. 478, 28 S. W. 490, holding that destruction of deed to effect reconveyance to grantee's wife does not divest title as against grantee's creditors.

Cited in reference notes in 59 A. D. 331, on effect of destruction of conveyance with consent of grantee to divest his title; 65 A. D. 292, on effect of cancelation or destruction of deed to revert title in grantor.

Cited in note in 18 L.R.A.(N.S.) 1172, on effect of destruction or cancelation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

Disapproved in *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262, holding that under statute voluntary destruction of unrecorded deed does not divest legal title.

— Effect of unrecorded cancelation on judgment.

Cited in *King v. Crocheron*, 14 Ala. 822, holding that if cancelation indorsement be unrecorded judgment against grantee is lien on land, though grantor reconvey to another.

— Right to prove intent to redeliver.

Cited in *Bank of Newbury v. Eastman*, 44 N. H. 431, holding that grantee

may prove unrecorded deed redelivered to have another deed substituted, third party's rights not intervening.

Effect of tender back or agreement to cancel.

Cited in *Chase v. Hinckley*, 74 Me. 181, holding mere tender back of written assignment of mortgage insufficient to entitle cancelation of consideration therefore; *Morse v. Child*, 7 N. H. 581; *Morse v. Child*, 6 N. H. 521,—holding that mere agreement to cancel deed, without actual cancelation, does not effect reconveyance; *Hilton v. Lothrop*, 46 Me. 297, holding that mortgagor may redeem if defeasance bond is not redelivered and canceled as verbally agreed.

17 AM. DEC. 412, SPENCER v. BLAISDELL, 4 N. H. 198.

What subject to levy.

Cited in *First Nat. Bank v. Hanchett*, 126 Ill. 409, 16 N. E. 907, holding that money of execution debtor in another's possession may be levied on; *N. H. I. F. Co. v. Platt*, 5 N. H. 193, holding that a note cannot be seized nor sold upon an execution; *Goll v. Hinton*, 8 Abb. Pr. 120, to point that whatever may be sold under execution may be attached; *Thomas v. McDonald*, 102 Iowa, 564, 71 N. W. 572, to point that money of the judgment defendant received by garnishee must be retained until disposition of garnishment proceedings.

Cited in reference notes in 28 A. D. 268, on property subject to attachment or execution; 33 A. D. 595, on bank bills as subject of attachment; 30 A. D. 168; 46 A. D. 293,—on liability of bank bills to attachment.

Cited in note in 52 A. D. 452, on right to take bank bills in execution.

17 AM. DEC. 414, GRAFTON v. KENT, 4 N. H. 221.

Parol evidence of suretyship.

Cited in *M'Gee v. Prouty*, 9 Met. 547, 43 A. D. 409; *Pollard v. Stanton*, 5 Ala. 451,—holding in action between joint makers of promissory note, parol evidence admissible to show one was security; *Smith v. Freyler*, 4 Mont. 489, 47 A. R. 358, 1 Pac. 214, holding that suretyship and payee's knowledge thereof may be proved by parol; *Davis v. Barrington*, 30 N. H. 517, holding relation of obligors of bond being known to obligees, parol evidence admissible to show suretyship; *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954; *Hoffman v. Habighorst*, 38 Or. 261, 53 L.R.A. 908, 63 Pac. 610,—holding parol evidence of suretyship admissible as against holder with knowledge of facts; *Hubbard v. Gurney*, 64 N. Y. 457, holding under Code parol evidence admissible to prove suretyship to enable defense of discharge by extension granted; *Gillett v. Taylor*, 14 Utah, 190, 60 A. S. R. 890, 46 Pac. 1099; *Harmon v. Hale*, 1 Wash. Terr. 423, 34 A. R. 816; *Smith v. Doak*, 3 Tex. 215,—holding in suit between payee and makers, parol evidence of suretyship known to payee admissible; *Paul v. Rider*, 58 N. H. 119, holding in action for contribution, parol evidence admissible to show cosuretyship; *Weare v. Sawyer*, 44 N. H. 198, holding parol evidence inadmissible to show limited liability, where liability is absolute on its face; *Bank of St. Marys v. Mumford*, 6 Ga. 44, holding in action against joint and several provisions, parol evidence admissible to show suretyship, not apparent; *Bruce v. Lord*, 1 Hilt. 247 (dissenting opinion), on right of acceptor of draft to discharge himself by parol evidence; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095, holding to point that joint and several maker of note may show as against payee that he was only a surety; *Young v. Schon*, 53 W. Va. 127, 97 Am. Dec. Vol. III.—26.

A. S. R. 970, 62 L.R.A. 499, 44 S. E. 136, to point that holder of non-negotiable instrument may show, by parol, liability of indorsers.

Cited in reference notes in 59 A. S. R. 788, as to when apparent principal may show himself to be a surety; 43 A. D. 408, on right of apparent principal to show by parol that he is surety; 41 A. D. 717, as to when party to note may prove himself surety by parol.

Cited in notes in 59 A. S. R. 243, as to when apparent principal may show himself to be surety; 20 L.R.A. 712, on parol evidence to show who is principal and who surety on note not under seal; 42 A. R. 395, on showing agreement that accommodation indorsers were to be cosureties.

Distinguished in *Campbell v. Tate*, 7 Lans. 370, holding parol evidence that one of two joint makers signed as surety, inadmissible; *Heath v. Derry Bank*, 44 N. H. 174; *Derry Bank v. Baldwin*, 41 N. H. 434,—holding that joint and several signers of promissory note cannot, as against payee, show suretyship.

Disapproved in *Garrett v. Ferguson*, 9 Mo. 125, holding parol evidence admissible to prove who is principal and who surety on note.

Who are sureties.

Cited in *Heydock v. Duncan*, 43 N. H. 95, holding that two joint obligors on bond may be considered as sureties for third, though apparently principals; *Whitehouse v. Hanson*, 42 N. H. 9, to point that surety is not principal to another surety unless shown that latter became surety at his request.

Discharge of surety.

Cited in *Cross v. Rowe*, 22 N. H. 77, holding surety on note payable to bank not discharged by indorsement to another after notice not to discount; *Port v. Robbins*, 35 Iowa, 208, holding surety on note incorporating prior note discharged by subsequent surrender of security given for prior note; *Pickering v. Marsh*, 7 N. H. 192, holding that if surety releases principal, apparently sureties, he releases known accommodation maker, though apparently principal; *Smith v. Clopton*, 48 Miss. 66, holding that failure to prosecute action against principal, after notice from surety, discharges latter.

—By extension of time to principal.

Cited in *Christner v. Brown*, 16 Iowa, 130, holding that extension of time without surety's consent, discharges him from liability; *American and General Mfg. Co. v. Marquam*; *Massey v. Fisher*, 62 Fed. 958; *Riley v. Gregg*, 16 Wis. 667,—holding known surety discharged by extension granted without his knowledge; *Wheat v. Kendall*, 6 N. H. 504, holding that extension of time after holder obtained knowledge of suretyship discharges surety, if without notice; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 A. D. 673, holding that extension of time without knowledge of known surety, discharges him, though prior extension consented to; *Neel v. Harding*, 2 Met. (Ky.) 247, holding that extension of time to one joint maker does not release one not known as surety; *Howard v. Fletcher*, 59 N. H. 151, holding discharge because of extension of time not available, unavailable where note made and payable; *Davenport v. King*, 63 Ind. 64, holding allegation of suretyship and discharge by extension of time to principal insufficient where it is not apparent and not alleged that holder had notice.

17 AM. DEC. 419, MORSE v. SHATTUCK, 4 N. H. 229.

Parol evidence to vary writing.

Cited in *McGehee v. Rump*, 37 Ala. 651, holding parol evidence admissible to show that bill of sale was an exchange; *Bever v. North*, 107 Ind. 544, 8 N. E.

576, holding parol evidence inadmissible to show grantee contracted subject to another's interest in the land; *Jacobs v. Miller*, 50 Mich. 119, 15 N. W. 42, holding that grantee's name and interest conveyed cannot be contradicted by parol evidence; *Hickman v. Hickman*, 55 Mo. App. 303, holding proof that grantors were to remain in possession, occupancy, and enjoyment of property absolutely conveyed, inadmissible; *Henderson v. Henderson*, 13 Mo. 151, holding parol evidence by grantor to show resulting trust in his conveyance to son, inadmissible; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. 1113, holding parol evidence inadmissible to show that grantee understood he was not purchasing share of heir, if alive; *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572, holding parol evidence admissible to show that consideration expressed was for more land than was conveyed.

Cited in reference note in 90 A. D. 271, on admissibility of parol evidence to show that grantee is trustee for grantor.

—As to consideration generally.

Cited in *Eckles v. Carter*, 26 Ala. 563, holding that consideration expressed in money may be shown to have been a slave; *Hall v. Hall*, 8 N. H. 129, holding proof of verbal agreement to pay all received over certain sum on resale, admissible; *Leach v. Shelby*, 58 Miss. 681, holding that where consideration is assailed, proof of another valuable consideration than one expressed is admissible; *Belden v. Seymour*, 8 Conn. 304, 21 A. D. 661, holding that in action on covenant of seisin, grantor may prove, by parol payment of greater consideration than expressed; *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863; *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498; *Rhine v. Ellen*, 36 Cal. 362,—holding that as between grantor and grantee, grantee may prove that real consideration is not expressed; *Vaugine v. Taylor*, 18 Ark. 65, holding that parol proof, clear and conclusive, is admissible to controvert expressed, and show true, consideration; *Goodlett v. Hansell*, 66 Ala. 151, holding that in absence of fraud, grantor's heirs cannot dispute consideration recited; *Bingham v. Weiderwax*, 1 N. Y. 509, holding that in action on covenant of seisin, true consideration and that part only was paid may be shown; *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103, holding parol evidence admissible to show that consideration expressed as money was iron of stipulated quantity and price; *Harwood v. Harwood*, 22 Vt. 507, holding parol evidence admissible, that consideration expressed in deed included payment of debt due from grantee; *Harrison v. Castner*, 11 Ohio St. 339, holding that where deed is offered as evidence of parol agreement as to other land, grantee may contradict consideration; *Pomeroy v. Bailey*, 43 N. H. 118, holding that where consideration is money and "other good causes and considerations," consideration of blood may be proved; *Quimby v. Stebbins*, 55 N. H. 420, holding parol evidence admissible to show that as part consideration grantor was to occupy part of property; *Kimball v. Fenner*, 12 N. H. 248, to point that where grantor conveys to another land in his creditor's possession, valuable consideration must be proven; *Goward v. Waters*, 98 Mass. 596, to point that proof of services and expenditures is admissible in action on written agreement therefor.

Cited in reference note in 54 A. D. 503, on right to explain, control, etc., consideration in deed by parol.

Cited in notes in 20 L.R.A. 107, on parol evidence as to consideration of deed in action for breach of covenant; 99 A. D. 74, on proof of real consideration by parol action for breach of covenant of seisin.

—To contradict acknowledgment of consideration.

Cited in *Burleigh v. Coffin*, 22 N. H. 118, 53 A. D. 236, to point that receipt

of payment acknowledged in, cannot be contradicted for purpose of defeating conveyance; *Rundlett v. Hodgman*, 16 N. H. 239, to point that even total want of consideration cannot be shown to avoid altogether deed expressed to be on consideration of money; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847, on conclusiveness as to creditors of recital of valuable consideration; *Kimball v. Walker*, 30 Ill. 482, holding parol evidence admissible to show consideration has not in fact been paid; *Horn v. Thompson*, 31 N. H. 562, holding that mortgagor cannot show want of consideration for assignment of mortgage by mortgagee; *Harwell v. Fitts*, 20 Ga. 723, holding that vendor may deny having received purchase money, though receipt thereof acknowledged in bill of sale; *Peck v. Vandenberg*, 30 Cal. 11, holding parol evidence admissible to show that deed from mother to daughter was gift though money consideration expressed; *Grout v. Townsend*, 2 Denio, 336, holding that married woman cannot, without showing fraud, contradict acknowledgment of consideration to avoid conveyance; *Whiting v. Gould*, 2 Wis. 552, holding parol proof of absence of valuable consideration recited in deed improper, without proof of mistake or fraud; *Farrington v. Barr*, 36 N. H. 86, holding that receipt of consideration admitted in deed cannot be contradicted to raise resulting trust in grantor; *Barns v. Learned*, 5 N. H. 264; *Nutting v. Herbert*, 35 N. H. 120,—holding parol evidence admissible to show no consideration for land included in deed by mistake; *White v. Hunter*, 23 N. H. 128, holding that heir of grantor cannot prove immoral consideration to avoid deed; *Adams v. Hull*, 2 Denio, 306 (dissenting opinion), on right to show by parol that note was not given as consideration but as collateral security; *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170 (dissenting opinion), on right of court of law to inquire into consideration to invalidate deed; *Prescott v. Hayes*, 43 N. H. 593, on creditor's right to impeach consideration expressed in mortgage to avoid same.

Distinguished in *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. 894, holding parol evidence as to consideration that defeats and destroys deed, inadmissible.

—To show payment of consideration by another.

Cited in *Pritchard v. Brown*, 4 N. H. 397, 17 A. D. 431, holding that parol evidence admissible to show that consideration money expressed was paid by third person.

Necessity of consideration.

Cited in *Home F. Ins. Co. v. Collins*, 61 Neb. 198, 85 N. W. 54, on title passing without consideration; *Jewett v. Alton*, 7 N. H. 253, to point that, though note given as consideration is void, action for purchase price lies.

Measure of damages for breach of covenant.

Cited in *Willson v. Willson*, 25 N. H. 229, 57 A. D. 320, holding that measure of damages is price paid; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171, holding that measure is such portion of purchase money and interest as value of part bears to whole measured by purchase price; *Morrison v. Underwood*, 20 N. H. 369, holding that in action on covenant of seizin sum at which the part encumbered was valued at when purchased may be shown.

17 AM. DEC. 421, HARRIS v. RAND, 4 N. H. 259.

Right of carrier to freight.

Cited in *Weston v. Minot*, 3 Woodb. & M. 437, Fed. Cas. No. 17,453, holding agreed freight for entire capacity recoverable though vessel is not filled, if through heavy freight usual draft is reached; *Reina v. Cross*, 6 Cal. 29, holding

that freight paid in advance may be recovered back, is vessel is lost and voyage not accomplished.

Cited in reference note in 41 A. D. 389, as to when carrier may recover *pro rata* freightage.

Cited in note in 60 A. D. 154, on freight *pro rate itineris*.

Duty and liability of carrier.

Cited in *Swetland v. Boston & A. R. Corp.* 102 Mass. 276, holding that if part of train must be detached, conductor is not bound to forward part containing perishable goods.

Cited in reference note in 39 A. D. 118, on delivery by common carrier as termination of liability.

Cited in notes in 5 E. R. C. 281, on duty of carrier to proceed by usual route; 1 E. R. C. 233, on act of God as excusing loss of goods by carrier; in 11 L.R.A. 615, on what constitutes an act of God exempting a carrier from liability.

17 AM. DEC. 423, ROBY v. WEST, 4 N. H. 285.

Rights where statute imposing penalty is violated.

Cited in *Leach v. Kimball*, 34 N. H. 568, holding that statute imposing penalty of chattel mortgage is executed without mentioning prior mortgage, does not void mortgage; *Moses v. Julian*, 45 N. H. 52, 84 A. D. 114, holding will written by probate judge, in violation of law, and executed under his direction, not void; *Brckett v. Hoyt*, 29 N. H. 264, holding sale of pressed hay, not branded as required, unaccompanied by offer for sale, legal; *Gage v. Whittier*, 17 N. H. 312, holding that though statute prohibits mortgagor selling chattel without mortgagee's written assent, delivery and payment passes title; *Pray v. Burbank*, 10 N. H. 377, holding that value of wood sold without being measured by public wood measurer cannot be recovered; *Cook v. Fernandez*, 11 Fla. 100, holding that physician who has not filed certificate cannot secure court's aid for exemption from military duty; *Williams v. Tappan*, 23 N. H. 385, to point that to avoid contract for shingles because not surveyed, proof of illegal offer for sale, necessary.

Cited in notes in 12 L.R.A.(N.S.) 587, on implied legislative intention from penalty; 25 A. R. 676, on validity of contract not expressly declared void, nor prohibited, but founded on act forbidden under penalty.

Rights where acts are contrary to public policy.

Cited in *Welsh v. Cutler*, 44 N. H. 561, holding that loser cannot recover back money lost at play; *White v. Hunter*, 23 N. H. 128, holding that grantor or heir cannot, to recover back property deeded, set up immoral consideration; *May v. May*, 33 Ala. 203, holding that equity at grantor's instance will not declare absolute deed, given to defraud creditors, to be mortgage; *Dawkins v. Gill*, 10 Ala. 206, holding agreement to pay one for attending as witness, amount depending on success of action, unenforceable; *Edgerly v. Hale*, 71 N. H. 138, 51 Atl. 679, holding that sheriff's agreement that no fees shall be received for serving writs unless action successful, is void; *Pendexter v. Carleton*, 16 N. H. 482, holding that receipt, fraudulently given in full, to enable false disclosure to be made creditors may be contradicted by parties thereto; *Hinds v. Chamberlain*, 6 N. H. 225, holding promissory note given in consideration of receiving bond indemnifying against public prosecution for alleged offense, unenforceable; *Phalen v. Clark*, 19 Conn. 421, 50 A. D. 253 (dissenting opinion), on right of lottery ticket dealer to recover back price paid on ticket obtained through fraud.

Rights where act is illegal.

Cited in *Wooten v. Miller*, 7 Smedes & M. 380, holding that nonresident principal cannot recover proceeds of sale of slave unlawfully introduced and sold in state by agent; *Gregg v. Wyman*, 4 Cush. 322, holding that owner cannot recover for injuries to horse let on Sunday for purpose other than necessity or charity; *Saltmarsh v. Tuthill*, 13 Ala. 390, holding note indorsed on Sunday void, though indorsee without knowledge, if taken in substitution for usurious note; *Hynds v. Hays*, 25 Ind. 31, holding that where consideration of bill of exchange was partly illegal paper recovery for legal consideration only, is permissible; *Greer v. Payne*, 4 Kan. App. 153, 46 Pac. 190, holding that equity will not aid member of illegal trade association to retain membership, if expelled; *Monahan v. Monahan*, 77 Vt. 133, 70 L.R.A. 935, 59 Atl. 169, holding that mortgage taken in son's name to avoid taxation may be recovered by father if withheld; *Swope v. Jefferson F. Ins. Co.* 3 Phila. Leg. Int. 308, holding mortgage executed in consideration of agreement to compound felony void and unenforceable; *Ovitt v. Smith*, 68 Vt. 35, 35 L.R.A. 223, 33 Atl. 769, holding marriage by petitionee in divorce proceedings, in violation of law, void.

Cited in reference notes in 27 A. D. 267, on action on illegal contract; 40 A. D. 117, on enforceability of illegal contracts; 26 A. D. 532, on interference by courts with executed illegal contract.

Cited in notes in 37 A. R. 398, on acts which may not be ratified by state; 7 L.R.A. 602, on authorization of lotteries and regulation by statute; 8 A. D. 692, on actions on illegal contracts; 12 L.R.A.(N.S.) 578, 582, on validity of contracts in violation of law; 12 L.R.A.(N.S.) 584, on validity of contracts impliedly prohibited by statute; 12 L.R.A.(N.S.) 592, on relation between illegality and contract in business which it is a misdemeanor to transact; 12 L.R.A.(N.S.) 622, on effect of forced disclosure of illegality of contract in business which it is a misdemeanor to transact.

Violation of liquor law.

Cited in *Bancher v. Mansel*, 47 Me. 58, holding that promisee cannot enforce note for liquor purchased in place where sale was legal, for resale in place where it would be illegal; *Doe v. Burnham*, 31 N. H. 426, holding bona fide purchaser before maturity may enforce note given for spirituous liquors sold without license; *Lewis v. Welch*, 14 N. H. 294; *Bancroft v. Dumas*, 21 Vt. 456; *Dolson v. Hope*, 7 Kan. 161,—holding that recovery cannot be had for liquors sold without license; *Hill v. Spear*, 50 N. H. 253, 9 A. R. 205, holding contract for sale of liquors, valid where made, enforceable though vendor knew illegal resale intended; *Ruemmeli v. Cravens*, 13 Okla. 342, 74 Pac. 908, holding that if agent secures liquor license in his name, principal cannot maintain action for proceeds unaccounted for; *State v. Rand*, 51 N. H. 361, 12 A. R. 127, holding that purchaser of liquor, illegally sold, cannot be excused from testifying as to purchase; *Coburn v. Odell*, 30 N. H. 540, holding note given for board and spirituous liquors sold illegally, unenforceable if amount for liquors is uncertain; *Loranger v. Jardine*, 56 Mich. 518, 23 N. W. 203, holding that price of liquor sold after purchaser's wife notified dealer not to sell husband cannot be recovered; *Marienthal v. Shafer*, 6 Iowa, 223, holding that one selling intoxicating liquors to another for illegal purposes cannot maintain replevin against vendee's attaching creditors; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469 (dissenting opinion), on constitutionality of local option act.

Distinguished in *Priest v. Pinkham*, 18 N. H. 520, holding that owner may recover intoxicating liquors, attached as agent's while in his possession, though purchased for illegal sale.

— Illegality of act as defense.

Cited in *State v. Patterson*, 66 Kan. 447, 71 Pac. 860, holding no defense, in action against city treasurer for embezzlement, that money was collected from illegal business; *Gilliam v. Brown*, 43 Miss. 641, holding illegality of executed contract no defense to action by principal to recover proceeds from agent; *Floyd v. Patterson*, 72 Tex. 202, 13 A. S. R. 787, 10 S. W. 526, holding that agent receiving money growing out of illegal contract may be compelled to pay it to principal.

Cited in reference note in 99 A. D. 66, on defense against recovery of money collected on ground that it was collected on unlawful contract or for illegal purpose.

Distinguished in *State v. Dimick*, 12 N. H. 194, 37 A. D. 197, to point that minor having remained in military service, receiving pay and rations, ratified illegal enlistment.

Enforcement of contract void in part.

Cited in *Prost v. More*, 40 Cal. 347, holding entire contract void in part, is entirely void and cannot be enforced.

Cited in note in 4 L.R.A. 167, on divisibility of contracts partly valid and partly invalid.

Retroactive effect of statute.

Cited in *Rockport v. Walden*, 54 N. H. 167, 20 A. R. 131, holding application of statute annulling statute of limitations, to vested defense, unconstitutional; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 A. R. 491, holding act of 1874 authorizing reduction of deposit accounts of insolvent banks constitutional though retroactive; *Pickering v. Pickering*, 19 N. H. 389, holding that statute allowing several replications does not apply to suits commenced before its passage; *Kennett's Petition*, 24 N. H. 139, holding statute allowing highway commissioners to assess adjoining towns for new highway not operative on pending petitions; *Willard v. Harvey*, 24 N. H. 344, holding that new statute limiting action for debt applies to case where part of time has expired; *Rich v. Flanders*, 39 N. H. 304, holding that statute removing disqualification of interest, enables parties to action to testify, though cause accrued prior; *Rich v. Flanders*, 39 N. H. 304 (dissenting opinion), on right to give statute removing disqualification retroactive effect; *Opinion of the Justices*, 41 N. H. 553, to point that act of 1857 "to secure freedom and right of citizenship," etc., is constitutional.

Cited in note in 14 A. D. 393, on validity of retrospective statutes.

Effect of repeal of statute.

Cited in *Anding v. Levy*, 57 Miss. 51, 34 A. R. 435, holding that repeal of trader's privilege tax act does not enable enforcement of contracts entered into before repeal; *Robinson v. Barrows*, 48 Me. 186, holding that repeal of statute prohibiting action for value of intoxicating liquors does not permit recovery for prior sales; *Denning v. Yount*, 62 Kan. 217, 50 L.R.A. 103, 61 Pac. 803, holding that repeal of real estate agent's occupation tax does not enable recovery of commissions for prior sales; *Pacific Guano Co. v. Dawkins*, 57 Ala. 115, holding that repeal of statute requiring personal inspection of goods by inspector will not make invalid inspection valid; *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 473, 10 N. W. 609, holding that repeal of statute prohibiting higher rates than prescribed does not prevent enforcement of penalty incurred before repeal.

Cited in reference note in 34 A. D. 493, on effect of repeal of statute.

Cited in note in 12 L.R.A. (N.S.) 591, on effect of repeal of prohibitory statute on legality of contract made in violation thereof.

Right of action where parties are in pari delicto.

Cited in reference notes in 35 A. D. 140, on right of action where parties are *in pari delicto*; 46 A. D. 654, on right of parties *in pari delicto* with reference to illegal contract to maintain action requiring its support.

Cited in note in 3 A. S. R. 742, on right of one to avoid his contract upon ground of his own fraud.

17 AM. DEC. 428, BARKER v. CLARK, 4 N. H. 380.**Right to damages for obstructing easement.**

Cited in *De Rochemont v. Boston & M. R. Co.* 64 N. H. 500, 15 Atl. 131, holding that grantor warranting against encumbrance cannot maintain action against grantee for obstructing way across premises conveyed; *Clark v. Boston C. & M. R. Co.* 24 N. H. 114, holding owner's private way over his land not easement for which he can have damages if obstructed; *Rosser v. Bunn*, 66 Ala. 89, on right of landowner to interdict use of road across his property.

Creation of easement as appurtenance.

Cited in *Spaulding v. Abbot*, 55 N. H. 423, 7 Legal Gaz. 300, holding that word "appurtenances" in deed will not convey easement not legally appurtenant to land; *Watson v. Bartlett*, 62 N. H. 447, holding that conveyance of "mill privilege" includes easement of flowage rights without words describing it in deed.

Cited in reference note in 100 A. D. 117, on right of way as appurtenant to land.

Grant of easement.

Cited in reference note in 30 A. D. 278, on presumption of grant of right of way.

Cited in note in 57 A. D. 766, on implied grant of easement in way.

What is a highway.

Cited in note in 26 L. ed. U. S. 1099, on what constitutes a public highway or street.

Highway by user.

Cited in *Walker v. Manchester*, 58 N. H. 438, on length of time necessary to establishment of highway by user; *Campton's Petition*, 41 N. H. 197, holding twenty years' uninterrupted use of highway competent evidence of its legal establishment; *Hanson v. Taylor*, 23 Wis. 547, holding that continuous and uninterrupted use of land as highway during time limited by statute creates prescriptive right in public; *Cahill v. Layton*, 57 Wis. 600, 46 A. R. 46, 16 N. W. 1, holding that way affording entrance to rear of buildings maintained by proprietors thereof is not a public highway; *State v. Nudd*, 23 N. H. 327, holding use of alleged way mostly in fall and winter when gathering seaweed and driftwood insufficient; *Starr v. People*, 17 Colo. 458, 30 Pac. 64, holding that use for long time by owner's permission, always subject to his control, does make road public highway.

Cited in reference notes in 44 A. D. 42, on presumption of grant of highway from uninterrupted use; 33 A. D. 714, on establishment of street or way by dedication or uninterrupted use.

Cited in notes in 57 A. S. R. 746, on highways by user; 23 A. D. 669, on establishment of highway by long use; 12 E. R. C. 522, on sufficiency of use to establish road.

Highways by dedication.

Cited in note in 57 A. S. R. 751, on highways by dedication.

Acceptance of highway by public.

Cited in *State v. Atherton*, 16 N. H. 203, holding acceptance by minority of selectmen of dedicated road, insufficient to bind town; *Manderschid v. Dubuque*, 29 Iowa, 73, 4 A. R. 196, holding acceptance sufficiently shown by public use of road dedicated as highway and repair work done thereon.

Interruption in use of highway.

Cited in note in 57 A. S. R. 764, on interruptions of use of highway.

Evidence of dedication.

Cited in *Willey v. Portsmouth*, 35 N. H. 303, holding record of laying out of highway, evidence of same; *City Cemetery Asso. v. Meninger*, 14 Kan. 312, holding that use of way to cemetery for several years with consent of owner is evidence of dedication; *State v. New-Boston*, 11 N. H. 407, holding public travel of turnpike after charter repealed not evidence of dedication or acceptance as public highway.

Admissibility of declarations as part of *res gestæ*.

Cited in *Simonds v. Clapp*, 16 N. H. 222, holding claimant's acts and declarations admissible in action for reward offered against defense of performance for another; *Morrill v. Foster*, 32 N. H. 358, holding hearsay evidence of declarations of transaction entirely past, slightly connected with immaterial fact, inadmissible.

17 AM. DEC. 431, PRITCHARD v. BROWN, 4 N. H. 397.**Parol evidence of resulting trust.**

Cited in *Connor v. Follansbee*, 59 N. H. 124, holding parol evidence of payment of consideration by other than grantee, competent to show resulting trust; *Merrill v. Gould*, 16 N. H. 347, holding proof of consent and design admissible, to show title in one was for benefit of another; *Livermore v. Aldrich*, 5 Cush. 431, holding parol evidence admissible to show third person paid consideration in deed to establish resulting trust; *Kimball v. Walker*, 30 Ill. 482, holding parol evidence admissible to show expressed consideration in deed was not paid, but not to show resulting trust; *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 29 N. H. 129,—holding that consideration admitted in deed cannot be contradicted to raise resulting trust in grantor; *Eaton v. George*, 40 N. H. 258, on right of one advancing purchase money, taking void mortgage thus avoiding deed, to claim resulting trust.

Cited in reference notes in 36 A. D. 182, on establishing trust by parol; 43 A. D. 624, on creation of trusts of personalty by parol; 55 A. D. 755, as to when trust in land may be created or established by parol under statute of frauds.

— When resulting trust established.

Cited in *Packard v. Putnam*, 57 N. H. 43, holding that if land is to be conveyed to wife through trustee, trust results in wife if trustee retains title; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713, holding that in order to raise resulting trust in one advancing money, payment must be when purchase made; *Hopkinson v. Dumas*, 42 N. H. 296, holding that where sureties pay proportion of consideration note for property purchased in principal's name, trust results; *Bean v. Bean*, 33 N. H. 279, holding that property purchased by father in daughter's name, on his decease, becomes resulting trust in favor of estate; *Dow v. Jewell*, 21 N. H. 470, holding that where part of purchase money is furnished in consideration of wood for life, no trust results; *Odiorne v. Lyford*, 9 N. H. 502, 32 A. D. 387, holding that where one joint purchaser of land takes title, there is resulting trust in

other; *Page v. Page*, 8 N. H. 187, holding that purchaser from trustee with assent, and at *cestui que trust's* request, does not become trustee; *Hunter v. Marlboro*, 2 Woodb. & M. 168, Fed. Cas. No. 6,908, on what takes a resulting trust out of operation of statute of frauds.

Cited in reference note in 27 A. D. 313, as to when resulting trust arises.

Rights of *cestui que trust*.

Cited in *Kimball v. Blaisdell*, 5 N. H. 533, 22 A. D. 476, holding that tenant of one having legal title cannot, by execution, defeat rights of unknown *cestui que trust*; *Burbank v. Rockington Mut. F. Ins. Co.* 24 N. H. 550, 57 A. D. 300, holding that one having equitable interest in property may insure same; *George v. Fisk*, 32 N. H. 32, holding that one in possession of property under a bond may recover for injuries to his possession; *Pembroke v. Allenstown*, 21 N. H. 107, to point that interest of *cestui que trust* is such ownership of realty as gives pauper a settlement.

Statute of uses.

Cited in note in 16 L.R.A.(N.S.) 1155, on statute of uses in the United States.

Property subject to levy.

Cited in *Russell v. Dyer*, 40 N. H. 173, on mode of sale of land under execution and of the right in equity to redeem same.

Cited in reference notes in 24 A. D. 436; 26 A. D. 231,—on property subject to execution.

Cited in note in 28 L.R.A. 171, on position of judgment creditors as to partnership real estate.

—Equity of redemption.

Cited in *Kittredge v. Bellows*, 4 N. H. 424, holding that prior to statute of 1822 mortgagor's right to redeem could be sold under execution; *Wendell v. New Hampshire Bank*, 9 N. H. 404, holding extent upon land, subject to mortgage, invalid since statute of 1822; *Carrasco v. Mason*, 72 N. H. 158, 54 Atl. 1101, holding that judgment creditor levying execution upon debtor's mortgaged realty acquires his interest therein; *Burnham v. Aiken*, 6 N. H. 306, to point that extent on lands of joint debtors is void, if appraisalment does not enable separate redemption.

—Interest of *cestui que trust*.

Cited in *Hutchins v. Heywood*, 50 N. H. 491, holding that the estate of *cestui que trust* may be taken by writ of entry; *Upham v. Varney*, 15 N. H. 462, holding that life interest of one under devise may be levied upon and sold under execution; *Jarvis v. Brooks*, 27 N. H. 37, 59 A. D. 359, holding that partnership creditors may levy upon partnership property held in name of one partner; *Edgerly v. Sanborn*, 6 N. H. 397, holding that principal's creditors may have execution against his interest in land purchased under sales agreement from trustee; *Hall v. Congdon*, 56 N. H. 279, holding that one who advances purchase price of property has interest therein that may be seized on execution.

Cited in reference notes in 34 A. D. 667, on right to take interest of *cestui que trust* on execution; 55 A. D. 250, as to whether interest of *cestui que trust* in lands is subject to execution.

Cited in note in 97 A. D. 308, on interest of beneficiary under resulting trust being subject to execution.

Disapproved in *Corey v. Greene*, 51 Me. 114, holding that interest of *cestui que trust* in land cannot be taken in execution.

Rights of purchaser at execution sale against *cestui que trust*.

Cited in *Lyford v. Thurston*, 16 N. H. 399, holding purchaser at execution against *cestui que trust* not defeated by voluntary conveyance to one ignorant of trust; *Lyons v. Urgalones*, 189 Mass. 424, 75 N. E. 950, holding that execution purchaser of judgment debtor's property standing in another's name may maintain writ of entry.

Notice of interest from possession.

Cited in *Haddock v. Wilmarth*, 5 N. H. 181, 20 A. D. 570, holding that grantee cannot defeat equitable title of third person in open adverse possession; *Helms v. O'Bannon*, 26 Ga. 132, holding that possession is notice, to subsequent purchaser, of prior sale to one occupying premises; *Marston v. Osgood*, 69 N. H. 96, 38 Atl. 378, holding that levying creditor takes property subject to equitable rights of one in open possession; *Pinney v. Fellows*, 15 Vt. 525, holding that open and exclusive possession of *cestui que trust* affects trustee's attaching creditor with notice of her interest; *Pell v. McElroy*, 36 Cal. 268, holding vendor's continued possession after sale sufficient notice of interest to subsequent purchaser to entitle enforcement of vendor's lien; *Dougherty v. Western & A. R. Co.* 53 Ga. 304, holding purchaser of land bounded by railroad, presumed to know extent of land claimed by them; *Patten v. Moore*, 32 N. H. 382, holding constructive possession of land not notice of mortgage on timber as to purchaser upon faith of sale to another; *Ferrin v. Errol*, 59 N. H. 234, holding that purchaser cannot defeat rights of one in possession and occupation of land; *Mullins v. Wimberly*, 50 Tex. 457, holding purchaser chargeable with notice of mistake in description in his deed, by another's possession thereof; *Daubenspeck v. Platt*, 22 Cal. 330, holding possession and actual occupation by another than grantor constructive notice of rights therein; *Lestrade v. Barth*, 19 Cal. 600, holding that open and exclusive possession with valuable improvements, though deed defective, defeats title of subsequent purchaser.

Cited in reference notes in 25 A. D. 676, on possession as notice; 31 A. S. R. 476, on possession of realty as notice of title; 28 A. D. 51, as to when possession is notice of occupant's title; 20 A. D. 573, on possession as notice of adverse claim to land.

Cited in notes in 21 A. D. 315, on possession as notice; 21 A. D. 641, on notice of interest from possession; 13 L.R.A.(N.S.) 52, on possession of land as notice of title; 63 A. S. R. 470, on what constitutes notice of a trust; 19 A. S. R. 267, on notice of trust from possession; 13 L.R.A.(N.S.) 121, on possession of land by *cestui que trust* as notice of title; 11 E. R. C. 548, on possession as evidence of seisin in fee.

Effect of notice of prior rights.

Cited in *Wright v. Bates*, 13 Vt. 341, holding that purchaser with notice of parol defeasance cannot defeat redemption rights; *Warren v. Ireland*, 29 Me. 62, holding that one levying on judgment creditors' interest in land with notice of assignment cannot defeat assignee's rights.

Parol evidence to vary written agreement.

Cited in *Runnells v. Bosquet N. I. & S. Co.* 60 N. H. 38, holding parol evidence admissible to show fraudulent character of written assignment of wages; *McGehee v. Rump*, 37 Ala. 651, holding parol evidence admissible to show contract purporting to be sale was in fact an exchange; *Webster v. Hodgkins*, 25 N. H. 128, holding parol evidence admissible where writings do not contain entire contract; *Edgerly v. Emerson*, 23 N. H. 555, 55 A. D. 207, holding that surety may show

that a discharge written upon execution should have been an assignment; *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572, holding parol evidence admissible to show that consideration was for a lot, which, by mistake or fraud, was not conveyed; *Morrison v. Underwood*, 20 N. H. 369, on right in action on covenant of seisin to show what part from which plaintiff was evicted was valued at when purchased.

Cited in note in 11 E. R. C. 232, on parol evidence to explain or vary terms of deeds.

— As to consideration generally.

Cited in *Quimby v. Stebbins*, 55 N. H. 420, holding parol evidence admissible that as part consideration of deed grantor was to occupy portion of premises; *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103, holding that fact that consideration expressed in money was paid in iron may be shown by parol; *Eckles v. Carter*, 26 Ala. 563, holding that consideration in bill of sale expressed in money may be shown to be a slave; *Vaugine v. Taylor*, 18 Ark. 65, holding that consideration in deed expressed in money may be controverted by conclusive evidence and true consideration shown; *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498, holding parol evidence admissible to show true consideration paid on deed; *Pomeroy v. Bailey*, 43 N. H. 118, holding that "other good causes and consideration" in deed may be shown to be blood and affection; *Harrison v. Castner*, 11 Ohio St. 339, holding that where deed is offered as evidence of parol agreement to exchange lands, consideration may be contradicted.

Cited in notes in 3 A. D. 307, on parol evidence to vary consideration; 20 L.R.A. 109, on parol evidence as to consideration for deed to establish trust in third person; 14 E. R. C. 752, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed.

— To contradict acknowledgment of consideration.

Cited in *Burleigh v. Coffin*, 22 N. H. 118, 53 A. D. 236, to point that receipt of payment of consideration acknowledged in deed cannot be contradicted to defeat conveyance; *Horn v. Thompson*, 31 N. H. 562, holding that mortgagor cannot show want of consideration for mortgagee's assignment thereof; *Harwell v. Fitts*, 20 Ga. 723, holding that payment of consideration money acknowledged in deed may be contradicted; *Taggart v. Stanberry*, 2 McLean, 543, Fed. Cas. No. 13,724, holding in action for purchase money, parol evidence that consideration acknowledged was not paid admissible; *Hall v. Hall*, 8 N. H. 129, holding that though deed acknowledge payment of consideration, verbal promise to pay whatever received over certain sum on resale admissible; *Prescott v. Hayes*, 43 N. H. 593, holding that as to creditors of grantor payment of consideration acknowledged in deed must be proved.

Cited in reference note in 29 A. D. 730, on conclusiveness of acknowledgment of receipt of consideration in deed.

— To show payment of consideration by another.

Cited in *Hall v. Young*, 37 N. H. 134, holding that ownership of money paid as consideration for property may be shown by parol; *Lahey v. Broderick*, 72 N. H. 180, 55 Atl. 354, holding that parol evidence admissible to show purchase price was paid by another than one taking title.

Effect of recital of consideration.

Cited in note in 68 L.R.A. 925, on recital of money consideration in deed as importing ownership of purchase money.

Rights under defective instrument.

Cited in *Stone v. Ashley*, 13 N. H. 38, holding that since act of 1829 defectively attested deed will not pass land by way of bargain and sale; *Forsaith v. Clark*, 21 N. H. 400, on right to consider deed void that lacks words of attestation before witnesses' signatures.

Conveyance of interest in timber.

Cited in *Kingsley v. Holbrook*, 45 N. H. 313, 86 A. D. 173, on what is necessary to convey interest in timber.

17 AM. DEC. 437, SABIN v. HARKNESS, 5 N. H. 415.**Rights and liabilities of owners of cemetery lots.**

Cited in *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 A. S. R. 897, 40 Atl. 871, holding that one acquiring title to cemetery lot does not acquire right to remove body therefrom; *Anderson v. Anderson*, 132 Iowa, 744, 9 L.R.A. (N.S.) 217, 110 N. W. 335, holding fee owner of cemetery lot liable in damages for removal of bodies without heir's consent; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 A. S. R. 141, 33 S. E. 853, holding that heirs at law of person to whose memory gravestone was erected may recover damages for its removal; *Joy v. Fesler*, 67 N. H. 257, 29 Atl. 448, holding that monument provided by will to be erected "in family burying ground" should be erected on burial lot.

17 AM. DEC. 438, HUNT v. HUNT, 4 N. H. 434.**Instruments held valid as will.**

Cited in *Greer's Estate*, 21 Montg. Co. L. Rep. 26, holding signed writing directing another to pay certain sum out of writer's estate testamentary; *Kohl's Estate*, 28 Pa. Co. Ct. 552, 19 Montg. Co. L. Rep. 182, holding indorsement on note directing disposition of proceeds after holder's death, testamentary and revoked by subsequent will; *Baer's Estate*, 19 Lanc. L. Rev. 126, 11 Pa. Dist. R. 471, holding that letter mentioning another letter directing disposition of writer's property cannot be probated without previous letter; *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400, 35 W. N. C. 264, holding paper found in suicide's room giving to one to whom directed certain property, a will; *Frew v. Clarke*, 80 Pa. 170, 3 W. N. C. 497, 33 Phila. Leg. Int. 92, holding sealed writing directing certain sum to be paid at writer's death, testamentary; *Anderson v. Pryor*, 10 Smedes & M. 620, holding letter of volunteer while Army is in foreign country, expressing intention as to his property, a will; *Heaston v. Krieg*, 167 Ind. 101, 119 A. S. R. 475, 77 N. E. 805, holding that contract containing devise or bequest may be probated as will if properly executed; *Marston v. Marston*, 17 N. H. 503, 43 A. D. 611, holding that a valid will may be revoked as to personalty by writing not executed with required formalities; *Eldred v. Warner*, 1 Ariz. 176, 25 Pac. 800 (dissenting opinion), on right to construe as will signed agreement by partners that survivor shall have property.

Cited in reference note in 71 A. D. 509, on what is necessary to constitute a holographic will.

Cited in notes in 92 A. D. 384; 89 A. S. R. 494, on testamentary writing in form of promissory note.

Distinguished in *Kinnebrew v. Kinnebrew*, 35 Ala. 628, holding grant in deed of gifts of money payable from the grantor's estate at his decease, valid as will; *Burlington University v. Barrett*, 22 Iowa, 60, 92 A. D. 376, on rule of construction to determine whether instrument is contract or will

17 AM. DEC. 439, HUTCHINS v. SPRAGUE, 4 N. H. 469.**Right of creditor to charge debtor's transferee as trustee.**

Cited in *Bishop v. Catlin*, 28 Vt. 71, holding assignee of void assignment not liable as trustee for amount debtor is actually indebted to him; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, holding that attachment of stock between obtaining new certificates and notice to office, voids transfer unnecessarily delayed; *Norris v. Jones*, 93 Va. 176, 24 S. E. 911, holding bona fide donee, not liable if she has repaid to donor beyond value of gift; *Weeks v. Hill*, 38 N. H. 199, holding town chargeable as trustee by bona fide creditor at time money was received under illegal contract; *Price v. Masterson*, 35 Ala. 483, on liability of trustee as garnishee.

Cited in reference note in 50 A. D. 804, on conveyances to hinder, delay, or defraud creditors.

— Vendee of realty.

Cited in *Oriental Bank v. Haskins*, 3 Met. 332, 37 A. D. 140, holding that vendee making full payment for land fraudulently conveyed before attachment not liable; *Albee v. Webster*, 16 N. H. 362, holding though part of consideration be fraudulent, if there be further full and adequate consideration, conveyance valid; *Henderson v. Hunton*, 26 Gratt. 926, holding that conveyance, will not be set aside if, before notice, bona fide grantee pays grantor's debts to full value; *Biocchi v. Casey-Swasey Co.* 91 Tex. 259, 66 A. S. R. 875, 42 S. W. 963, to point that conveyance by one having title to one entitled cannot be attacked as lacking consideration.

Criticized in *Boardman v. Cushing*, 12 N. H. 105, holding that bona fide vendee may retain for all demands due from debtor contracted before process served.

Disapproved in *Caldwell v. Walker*, 76 Miss. 879, 71 A. S. R. 545, 25 So. 929, holding that remaining in possession and paying grantor's debts beyond property's value will not validate fraudulent conveyance.

— Vendee of personalty.

Cited in *Robinson v. Mitchell*, 62 N. H. 529, holding vendee in fraudulent sale, not chargeable if, before service of process, he pays full value; *Bailey v. Ross*, 20 N. H. 302, holding that if one redelivers according to secret trust he is not liable in process subsequently commenced; *Mandigo v. Healey*, 69 N. H. 94, 45 Atl. 318, holding that debtor's fraudulent transfer of goods does not void title of bona fide vendee of fraudulent vendee; *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 566, holding that debtor's remaining in possession of machinery will not void bona fide sale for sufficient consideration; *Corning v. Records*, 69 N. H. 390, 76 A. S. R. 178, 46 Atl. 462, holding sale of chattels in custody of lessee valid without actual delivery or notice to lessee.

— Mortgagee.

Cited in *Crowninshield v. Kittridge*, 7 Met. 520, holding that if mortgagee apply proceeds of fraudulent mortgage to debt, secured without creditor's knowledge, he is discharged; *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1, holding that if, prior to intervening rights of creditors, fictitious element in debt secured is corrected mortgagee is protected; *Enright v. Amaden*, 70 Vt. 183, 40 Atl. 37; holding fraudulent mortgagee not liable if, before insolvency proceedings, he apply mortgagee proceeds to bona fide debts; *Longfellow v. Barnard*, 58 Neb. 612, 76 A. S. R. 117, 79 N. W. 255, holding assignment of fraudulent mortgage to secure mortgagor's creditor valid without consideration, and assignor protected; *Getchell v. Chase*, 37 N. H. 106, holding grantor of land by quitclaim deed receiving horse

and mortgage back in payment in good faith not liable to creditors of grantee though title subsequently turns out invalid; *Pierce v. Le Monier*, 172 Mass. 508, 53 N. E. 125, holding it not necessary to show transaction leading to mortgage purged of fraud, to entitle mortgagor to redeem.

17 AM. DEC. 444, MILLS v. STARK, 4 N. H. 512.

Animals escaping onto land of another. — Right to impound.

Cited in *Osgood v. Green*, 33 N. H. 318, holding that where cattle, in another's inclosure, do no damage they cannot be legally impounded; *Dillard v. Webb*, 55 Ala. 468, to point that statute authorizing impounding of cattle taken damage feasant is constitutional.

— Liability for injuries by.

Cited in *Hartford v. Brady*, 114 Mass. 466, 19 A. R. 377, holding owner not liable if cattle properly driven along highway escape upon unfenced land; *Tewksbury v. Bucklin*, 7 N. H. 518, holding owner of oxen pastured with consent on another's land liable if they stray onto third party's land; *Blaisdell v. Stone*, 60 N. H. 507, holding that bailment of cattle does not relieve owner from liability if they escape from bailee's pasture.

Cited in notes in 49 A. D. 249, on common-law rule as to liability for trespasses of animals; 49 A. D. 253, on liability for trespass by animals as affected by duty to maintain fences; 22 L.R.A. 59, on liability for injury by trespassing stock entering from highway; 12 L.R.A. (N.S.) 912, on liability for trespass on unfenced land by live stock being driven along the highway.

— Liability for injuries to.

Cited in *Towns v. Cheshire R. Co.* 21 N. H. 363, holding railroad company not liable where horse killed escaped into highway not adjoining owner's land and thence onto railroad; *Morse v. Boston & L. R. Co.* 66 N. H. 148, 28 Atl. 286, holding railroad not liable for killing cattle straying onto railroad across land of another than cattle owner; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. 101, 88 A. D. 491, holding railroad not liable where animal strayed from properly inclosed pasture onto highway thence onto track at highway intersection.

Rights in highways.

Cited in *Baker v. Shephard*, 24 N. H. 208, holding that public acquires no right to use trees along highway to build or repair same; *Blake v. Rich*, 34 N. H. 282, holding that fee owner may maintain trespass against one appropriating timber on land taken for railroad purposes; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 A. D. 177, holding that town may maintain damage action against railroad appropriating and destroying highway.

Cited in note in 1 L.R.A. 215, on title to land taken for railroad or public highway.

Duty as to fence.

Cited in reference notes in 71 A. D. 727, on duty as to fencing against cattle on highway; 20 A. D. 683, on duty to fence against cattle rightfully on highway only; 34 A. D. 80, on 'duty to fence against cattle in highway.

Cited in note in 19 E. R. C. 25, on duty to maintain fence.

17 AM. DEC. 446, GEORGE v. HARRIS, 4 N. H. 533.

Nature, validity, and enforcement of subscription.

Cited in *Ives v. Sterling*, 6 Met. 310, holding subscription enforceable though subscriber gave notice that he would not pay if certain site were selected;

Peoples Bank & T. Co. v. Weidinger, 73 N. J. L. 433, 64 Atl. 179, to point that father's agreement with mother to pay certain sum if she support illegitimate children, unenforceable if he die before accepted; *Danbury Cornet Band v. Bean*, 54 N. H. 524, to point that agreement between members of cornet band that any member leaving band, leaves his interest, enforceable; *Congregational Soc. v. Goddard*, 7 N. H. 430, holding subscription for support of minister of certain religious sentiments unenforceable if one expressing different sentiments is engaged; *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123, holding agreement to subscribe to stock of corporation enforceable though subscriber refuse to participate in organization; *White Mountains R. Co. v. Eastman*, 34 N. H. 124, holding subscription enforceable though charter permit shares of delinquent subscribers to be sold.

Cited in reference notes in 102 A. S. R. 153, on validity and effect of subscriptions for public buildings; 38 A. D. 282, on action on subscription to contribute to a common undertaking.

Cited in notes in 22 L.R.A. 81, as to whether subscription contract is joint or several; 4 L.R.A. (N.S.) 592, on contract as to location of public buildings; 3 L.R.A. 469, on effect of condition annexed to subscription for public purpose.

Distinguished in *Grande Lodge I. O. of G. T. v. Farnham*, 70 Cal. 158, 11 Pac. 592, holding mere promise to subscribe, if not accepted, revoked by promisor's death, and heirs not liable.

— Sufficiency of consideration for.

Cited in *Osborn v Crosby*, 63 N. H. 583, 3 Atl. 429, holding promise to subscribe enforceable if, on faith thereof, money is expended; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412, holding that where charitable organization has incurred expenses on faith of voluntary subscription, subscription is enforceable; *Methodist Episcopal Church v. Garvey*, 53 Ill. 401, 5 A. R. 51, holding subscription enforceable where trustees, on faith of subscription list, borrow money to erect church; *State v. Johnson*, 52 Ind. 197, holding agreement to pay certain sum if state locate public institution in certain place, lawful and enforceable; *Pillsbury v. Pillsbury*, 20 N. H. 90, holding that subscribers who proceed and accomplish undertaking may recover subscription of party refusing to pay; *Kimmins v. Wilson*, 8 W. Va. 584, holding subscription and liability thereon sufficient consideration to enable enforcement of note therefor; *Wheeler v. Toof*, 2 Mich. N. P. 44, holding subscriber's note, in lieu of subscription, to one advancing money toward church indebtedness, based on sufficient consideration; *Troy Conference Academy v. Nelson*, 24 Vt. 189, holding application of fund to purposes for which raised sufficient consideration to enforce subscription thereto; *Armann v. Buel*, 40 Neb. 803, 59 N. W. 515; *Congregational Soc. v. Perry*, 6 N. H. 164, 25 A. D. 455; *Moore v. Chesley*, 17 N. H. 151; *Higert v. Indiana Asbury University*, 53 Ind. 326,—holding where several agree to subscribe toward erection of college building mutual promises sufficient consideration for each promise; *Lathrop v. Knapp*, 27 Wis. 214, holding mutual promises of subscribers, and payment by some, sufficient consideration to enable receivers to enforce subscription; *Methodist Orphans' Home Asso. v. Sharp*, 6 Mo. App. 150, holding mere fact that others were led to subscribe, not sufficient consideration for gratuitous subscription; *Underwood v. Waldron*, 12 Mich. 73, holding subscription toward erection of building at place to which college could not lawfully remove, invalid.

Cited in notes in 3 L.R.A. 762, on sufficiency of consideration for promise;

3 L.R.A. 468, on consideration for subscription to common object; 12 L.R.A. 463, on mutual promises as consideration for each other.

— Who may enforce.

Cited in *Curry v. Rogers*, 21 N. H. 247, holding that building committee, not subscribers to building fund, cannot enforce subscriptions thereto; *George v. Benjamin*, 100 Wis. 622, 69 A. S. R. 963, 76 N. W. 619, on right of members of voluntary land association to enforce subscriptions; *Hopkins v. Upshur*, 20 Tex. 89, 70 A. D. 375, holding subscription toward church building fund valid contract, and enforceable by contractor to whom vestry assigned same.

Parol evidence as to subscription.

Cited in *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491, holding parol agreements inconsistent with written subscription inadmissible.

17 AM. DEC. 449, *STATE v. POTTS*, 9 N. J. L. 26.

Secondary evidence of forged instrument.

Cited in *Cross v. People*, 192 Ill. 291, 61 N. E. 400, holding that setting out forged note in indictment *in hæc verba* does not preclude admission of copy; *Mead v. State*, 53 N. J. L. 601, 23 Atl. 264, holding that failure to allege forged instrument as lost does not prevent offering secondary evidence to sustain indictment; *Armitage v. State*, 13 Ind. 441, holding that contents of forged notes in prisoner's possession cannot be proved by parol without notice to produce.

Sufficiency of description in indictment.

Cited in *United States v. Howell*, 64 Fed. 110, holding description as "United States notes" of certain denomination sufficient where prisoner has counterfeit notes; *Dana v. State*, 2 Ohio St. 91, holding words "of the purport and effect following" insufficient allegation that instrument set out is exact copy; *State v. Callahan*, 124 Ind. 364, 24 N. E. 732, holding if whereabouts of forged instrument are unknown to grand jury, setting out substance, stating reason, sufficient.

Cited in reference notes in 22 A. D. 776; 60 A. S. R. 22; 61 A. S. R. 840; 36 A. S. R. 817; 71 A. S. R. 913,—on sufficiency of indictment for forgery; 65 A. D. 206, on necessity that indictment for forgery should describe instrument; 4 A. S. R. 765, on necessity of setting out copy of instrument in indictment for forgery; 96 A. D. 164, on necessity of setting out in indictment the forged instrument or description thereof.

Varianc between forged name in indictment and in instrument.

Cited in *Turpin v. State*, 19 Ohio St. 540, holding where forged name is uncertain and can be read as in indictment, submission to jury not error.

17 AM. DEC. 455, *HOSKINS v. PAUL*, 9 N. J. L. 110.

Right of distraint for rent.

Cited in *Brown v. Howell*, 66 N. J. L. 25, 48 Atl. 1020, holding sale irregular, though goods may be distrained after tenant's death and before administrator is appointed; *Re Bowne*, 12 Nat. Bankr. Reg. 529, Fed. Cas. No. 1,741, to point that if tenant's goods remain on premises after assignment in bankruptcy landlord is entitled to past-due rent from proceeds.

Cited in reference notes in 53 A. S. R. 303, on distress for rent; 30 A. D. 364, on exemptions from distress; 38 A. D. 576, on exemptions from seizure under distress.

Cited in note in 9 E. R. C. 676, on what articles may be distrained for rent.

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Distinguished in *Bischoff v. Trenholm*, 36 S. C. 75, 15 S. E. 346, holding property on demised premises, in assignee's possession, not distrainable for rent past due before assignment; *Hamilton v. Hamilton*, 25 N. J. L. 544, holding that if sheriff leave goods levied on in debtor's possession, landlord cannot distrain them for rent; *Allen v. Agnew*, 24 N. J. L. 443, holding where tenant and stranger own jointly goods on demised premises, distraint of tenant's interest, only, permissible.

Limited in *Woodside v. Adams*, 40 N. J. L. 417, holding chattel mortgage on goods of tenant superior to subsequent distress for rent.

Disapproved in *Bean v. Edge*, 84 N. Y. 510, holding that furniture on premises sold before warrant issues, cannot be distrained.

17 AM. DEC. 462, WOODWARD v. WOODWARD, 9 N. J. L. 115.

What subject to attachment.

Cited in *Shinn v. Zimmerman*, 23 N. J. L. 150, 55 A. D. 260, holding that creditors of judgment creditors cannot attach money due on judgment, in hands of judgment debtor; *Osborne v. Edwards*, 11 N. J. Eq. 73, holding husband's equitable interest in proceeds of partition sale of wife's land not subject to attachment; *Shewell v. Keen*, 1 Miles (Pa.) 186, holding that unless executor has assented to legacy or legatee has furnished refunding bond, legacy cannot be attached.

Cited in reference note in 73 A. S. R. 380, on liability of legacy for legatee's debts.

Cited in notes in 30 A. D. 268, on attachability of personal legacy; 23 L.R.A. 645, on interest of heir in ancestor's lands as subject to attachment or levy on execution; 47 L.R.A. 357, on application to executor and administrator of statutes as to attachment of absent, concealed, and absconding debtors.

17 AM. DEC. 464, JOHNSON v. MARTINUS, 9 N. J. L. 144.

Parol evidence as to indorsement of promissory note.

Cited in *Taylor v. French*, 2 Lea, 257, 31 A. R. 609, holding as between immediate parties, parol evidence admissible to show blank indorser's agreement as to liability; *Harrison v. McKim*, 18 Iowa, 485, holding in action by indorsee against indorser, parol evidence admissible that note was indorsed without recourse; *McGuire v. Allen*, 108 Mo. 403, 18 S. W. 282 (dissenting opinion), on right to explain blank indorsement by parol; *Meyer v. Beardsley*, 30 N. J. L. 236, to point that if drawee of bill write upon it "accepted," parol evidence to vary is inadmissible.

Cited in reference notes in 41 A. D. 390; 42 A. D. 87,—on parol evidence affecting indorsement; 43 A. D. 289, on parol evidence to vary effect of indorsement.

Cited in notes in 9 A. D. 384; 13 L.R.A. 649,—on parol evidence as between immediate parties to promissory note; 17 L.R.A. (N.S.) 840, on right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only.

Disapproved in *Johnson v. Ramsey*, 43 N. J. L. 279, 39 A. R. 580, holding that accommodation indorser in action by his indorsee cannot set up agreement limiting liability; *Northern Nat. Bank v. Hoopes*, 98 Fed. 935, holding contemporaneous parol agreement inadmissible to vary liability of blank indorser; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647, holding evidence of contemporaneous

parol agreement of indorsement without recourse, inadmissible in action against indorser; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 A. R. 256, holding that there is no distinction between blank indorsements and indorsements in full as to admissibility of evidence.

— Before indorsement by payee.

Cited in *Watkins v. Kirkpatrick*, 26 N. J. L. 84, holding that where party other than payee first indorses note, payee may, show character of his indorsement.

17 AM. DEC. 468, WEED v. VAN HOUTEN, 9 N. J. L. 189.

Demand on note payable at particular place.

Cited in *Jackson v. Packer*, 13 Conn. 342, to point that, where bill is payable at either of two banks, notice to acceptor as to bank where demand would be made, is unnecessary.

Cited in reference notes in 25 A. D. 340, on note payable at particular place; 28 A. D. 335, on note payable at particular time and place; 24 A. D. 455, on necessity of demand on note payable at particular place; 26 A. D. 317, on necessity for presentment of note payable at a particular place; 43 A. D. 256, on necessity for demand on bill or note payable at particular time and place, to hold maker or acceptor; 39 A. D. 114, on necessity for demand on note or bill payable at particular bank to charge maker or acceptor.

Necessity of averment and proof of presentment of negotiable paper.

Cited in *Sims v. National Commercial Bank*, 73 Ala. 248, holding that defense of nonpresentation of note need not be averred in action to enforce vendor's lien; *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *Montgomery v. Tutt*, 11 Cal. 307; *Adams v. Hackensack Improv. Commission*, 44 N. J. L. 638, 43 A. R. 406; *Edwards v. Hasbrook*, 2 Tex. 578; *Sumner v. Ford*, 3 Ark. 389,—holding it unnecessary to aver or prove presentment at place where note is payable in action against maker; *Dougherty v. Western Bank*, 13 Ga. 287, holding it unnecessary to aver or prove presentation in action on bank note payable generally; *Armistead v. Armistead*, 10 Leigh, 512, holding it error to sustain demurrer to nonaverment of presentation.

Cited in note in 8 A. D. 404, on necessity of averring and proving demand in action on bill payable in particular place.

17 AM. DEC. 472, PATTERSON v. TUCKER, 9 N. J. L. 322.

Proof of attested instruments.

Cited in notes in 35 L.R.A. 323, on necessity of calling witnesses to prove attested instruments; 98 A. D. 623, on right of witness to testify from memoranda as to matters of which he has no recollection.

17 AM. DEC. 479, SHARP v. TEESE, 9 N. J. L. 352.

Effect of illegal acts—Acts in violation of public policy.

Cited in *Montclair Military Academy v. Jersey Street R. Co.* 65 N. J. L. 328, holding agreement to sell landowner bonds if he consent to railroad's occupying street, not invalid; *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding secret agreement by purchasers from executrix selling land to pay debts, price inadequate, to reconvey, voidable; *Smith v. Applegate*, 23 N. J. L. 352, holding promissory note given to caveator in consideration of his withdrawing opposition to public road, void; *Redick v. Woolworth*, 17 Neb. 260, 52 A. R.

410, 22 N. W. 693, upholding agreement, to furnish claims against bankrupt, if other do professional work and divide fees; *McGehee v. Lindsay*, 6 Ala. 16, holding contractor's agreement that commissioner shall have interest in public work let, unenforceable.

Cited in reference notes in 59 A. D. 208, on validity of preference to certain creditors for not opposing debtor's discharge; 53 A. D. 88, on validity of promise of bankrupt to pay creditor if he would withdraw opposition to bankrupt's discharge; 41 A. D. 505, on invalidity of note given creditor in consideration of his joining in assignment for benefit of creditors, or in withdrawal of opposition to debtor's discharge.

— Acts in violation of public statute.

Cited in *Holt v. Bancroft*, 30 Ala. 193, holding deed of trust to secure one creditor, given by firm contemplating bankruptcy, void; *Feldman v. Gamble*, 26 N. J. Eq. 494, holding mortgage given by debtor, compounding with creditors, to secure to one greater sum than others receive, void; *Church v. Muir*, 33 N. J. L. 318, holding note given for property transferred to maker to defraud payee's creditors, unenforceable by payee against maker; *Saltmarsh v. Tuthill*, 13 Ala. 390, holding note indorsed on Sunday void, where holder innocent thereof, if taken in substitution of usurious note; *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264, holding that equity will not enforce parol agreement to reconvey land conveyed to enable opposition to street opening; *Drexler v. Tyrrell*, 15 Nev. 114, holding mortgage executed at mortgagee's request so as to evade tax, void, though tax be afterward paid; *State, Gregory, Prosecutor, v. Jersey City*, 34 N. J. L. 390, holding proceedings of board of aldermen relating to purchasing land in which two aldermen are interested, illegal.

Cited in reference notes in 53 A. D. 770, on validity of contract founded on act prohibited by statute; 42 A. D. 230, on unenforceability of contracts against the spirit of the law or which are forbidden under a penalty.

Cited in note in 51 A. D. 343, on validity of contract originating in transaction forbidden by statute under penalty.

17 AM. DEC. 483, STATE v. JONES, 9 N. J. L. 357.

Essentials of forgery.

Cited in notes in 22 A. D. 776, on forgery; 22 A. D. 314, on accomplishment of fraud as essential to forgery; 19 A. D. 480, on necessity of actual perpetration of fraud to support prosecution for forgery.

Right to amend caption to indictment.

Cited in *State v. Society for Establishing Useful Manufactures*, 42 N. J. L. 504, holding that caption may be amended to show true date indictment presented; *Com. v. Stone*, 3 Gray, 453, holding that caption showing indictment found prior to date offense charged, may be shown as returned later.

Cited in reference note in 54 A. D. 151, on amendment of caption of indictment.

Sufficiency of allegations in indictment.

Cited in *Randall v. State*, 53 N. J. L. 485, 22 Atl. 45, holding "United States gold certificate" sufficiently described as "United States treasury note;" *Buck v. State*, 61 N. J. L. 525, 39 Atl. 919, holding averment of place where offense committed, necessary where different towns of same county have different liquor laws.

Sufficiency of caption to indictment.

Cited in *State v. Parks*, 61 N. J. L. 438, 39 Atl. 1023, holding that caption

need not contain name of person indicted; *State v. Mowry*, 21 R. I. 376, 43 Atl. 871, holding clerical error in caption in date of finding indictment, not fatal; *Berrian v. State*, 22 N. J. L. 9, holding that caption need not state that grand jury were summoned, nor by what authority; *Wall v. State*, 23 Ind. 150, holding indictment valid if record shows fact though caption does not state indictment returned by grand jury.

Cited in reference notes in 54 A. D. 151, on requisites of caption of indictment; 34 A. D. 121, on what caption of indictment should show; 46 A. D. 138, on effect of defect in caption of indictment.

Jurisdiction where new county formed.

Cited in *Nelson v. State*, 1 Tex. App. 41; *Pope v. State*, 124 Ga. 801, 110 A. S. R. 197, 53 S. E. 384, 4 A. & E. Ann. Cas. 551,—holding that courts of original county cannot try pending case, where offense was committed in territory embraced in new county; *People v. Stokes*, 103 Cal. 193, 42 A. S. R. 102, 37 Pac. 207, holding that newly created county has jurisdiction of prisoner charged with offense prior to its creation upon territory therein; *Com. v. Gay*, 153 Mass. 211, 26 N. E. 571, holding that when town is transferred to new judicial district, court of that district has jurisdiction of offenses committed prior thereto.

Cited in reference note in 42 A. S. R. 108, on criminal prosecutions after division of county.

Effect of defective information.

Cited in *State v. Hasledahl*, 3 N. D. 36, 53 N. W. 430, holding that where indictment is quashed because information is defective, new information may be filed without preliminary examination; *State v. Brennan*, 2 S. D. 384, 50 N. W. 825, holding omission from caption, of name of court in which information is to be filed, not ground for setting it aside.

17 AM. DEC. 496, WILLARD v. STONE, 7 COW. 22.

Validity of infant's contracts.

Cited in reference notes in 36 A. D. 297, on validity of infants' contracts; 23 A. D. 529; 26 A. D. 254; 30 A. D. 82,—as to when contracts of infants are void, voidable, or binding.

Cited in notes in 21 A. D. 86, on validity and ratification of infants' contracts; 18 A. S. R. 628, on apprenticeship of infants.

—Promise of marriage.

Cited in *Rush v. Wick*, 31 Ohio St. 521, 27 A. R. 523, holding that infancy may be pleaded in bar of action for breach of marriage promise; *Feibel v. Obersky*, 13 Abb. Pr. S. S. 402n; *McConkey v. Barnes*, 42 Ill. App. 511,—holding infant not liable on executory contract to marry; *Stromberg v. Rubenstein*, 19 Misc. 647, 44 N. Y. Supp. 405; *Hoitt v. Moulton*, 21 N. H. 586,—holding promise of marriage between minor and adult, binding on latter only.

Cited in notes in 63 A. D. 534, on validity of infant's contract of marriage; 15 A. D. 476, on voidability of infant's contract to marry.

—Deeds and notes.

Cited in *Cummings v. Powell*, 8 Tex. 80, holding infant's deed of conveyance voidable but not void; *Conn v. Coburn*, 7 N. H. 368, 26 A. D. 746; *Jefford v. Ringgold*, 6 Ala. 544,—holding promissory note made by infant not void but voidable, and validated by ratification after majority.

Who may take advantage of infancy.

Cited in note in 18 A. S. R. 696, on who may take advantage of infancy.

Infant's liability for tort.

Cited in note in 57 L.R.A. 684, on liability of infant for torts arising from contract.

Action for breach of promise.

Cited in reference note in 44 A. D. 444, on action for breach of promise of marriage and damages therefor.

Defenses to action for breach of promise.

Cited in notes in 40 A. S. R. 174, on infancy as defense to breach of promise suit; 63 A. D. 543, on plaintiff's unchastity as defense to action for breach of promise to marry; 40 A. S. R. 173, on plaintiff's unchastity unknown at time of engagement as defense to breach of promise suit.

Admissibility of evidence of character in mitigation of damages.

Cited in *Ford v. Jones*, 62 Barb. 484, holding specific lewd and immoral acts, admissible to disparage plaintiff's character in action for assault; *Bennett v. Smith*, 21 Barb. 439, holding evidence of husband's drunkenness and immorality, in mitigation of damages for enticing wife away; *Robison v. Rupert*, 23 Pa. 523, holding evidence of plaintiff's conduct admissible in mitigation of damages resulting from forcible suppression of annoyance.

— In breach of promise actions.

Cited in *Palmer v. Andrews*, 7 Wend. 142, holding evidence of plaintiff's unchastity admissible in mitigation of damages; *Van Storch v. Griffin*, 71 Pa. 240, 1 Luzerne Legal Reg. 610, 29 Phila. Leg. Int. 349, holding evidence as to plaintiff's general bad character for chastity, admissible in mitigation of damages; *Butler v. Eschleman*, 18 Ill. 44, holding that damages are mitigated upon slight facts and circumstances of misconduct; *Johnson v. Jenkins*, 24 N. Y. 252 (dissenting opinion), as to what may be shown in mitigation of damages; *Button v. McCauley*, 1 Abb. App. Dec. 282, 5 Abb. Pr. N. S. 29 (reversing 38 Barb. 413), holding evidence of intoxication admissible in mitigation of damages.

Cited in reference notes in 44 A. D. 179, on evidence of plaintiff's character in action for breach of promise; 1 A. D. 105, on evidence as to previous character in breach of promise suit.

Cited in note in 26 A. D. 678, on evidence of plaintiff's want of chastity or immoral conduct in mitigation of damages for breach of promise of marriage.

How promise of marriage established.

Cited in *Hotchkiss v. Hodge*, 38 Barb. 117, holding that promise of marriage may be implied from long-bestowed attentions, apparently honorable.

Cited in reference notes in 36 A. D. 347, on proving express promise in action for breach of promise to marry; 44 A. D. 179, on necessity and proof of tender and refusal of performance of promise of marriage.

Cited in notes in 63 A. D. 541, on breach of promise of marriage and evidence thereof; 26 A. D. 678, on necessity of proving offer to marry on part of plaintiff in action for breach of promise.

What constitutes breach of promise to marry.

Cited in *Kelly v. Renfro*, 9 Ala. 325, 44 A. D. 441, holding that refusal to perform contract of marriage may be inferred from acts or declarations; *Coil v. Wallace*, 24 N. J. L. 291, holding formal request for marriage and refusal unnecessary when defendant's conduct shows unequivocal intention not to perform; *Cole v. Holliday*, 4 Mo. App. 94, holding that tender of marriage and refusal must be alleged and proved in action for breach; *Anderson v. Kirby*, 125 Ga. 62, 114 A. S. R. 185, 54 S. E. 197, 5 A. & E. Ann. Cas. 103, holding that

woman may treat renunciation of promise of marriage as breach and bring action before time for performance arrives; *Hubbard v. Bonesteel*, 16 Barb. 360, holding that breach of promise by refusal to marry may be shown by circumstantial evidence.

17 AM. DEC. 498, FULLER v. WILLIAMS, 7 COW. 53.

Necessity and sufficiency of tender and demand for conveyance.

Cited in *Lawrence v. Simons*, 4 Barb. 354, holding that party who has performed, or offered to, cannot recover advances without showing defendant's failure or inability to perform; *Smith v. Henry*, 7 Ark. 207, 44 A. D. 540, holding that vendor must tender conveyance and demand price before suing for purchase money; *Jerome v. Scudder*, 2 Robt. 169, holding tender of deed unavailing while mortgages on premises undischarged; *Smith v. Henry*, 7 Ark. 207, 44 A. D. 540, holding that duty of preparing and tendering deed devolves upon vendor; *Hoyt v. Hall*, 3 Bosw. 42, holding tender and demand of bill of sale necessary before bringing action to recover partial payment.

Cited in reference note in 26 A. D. 625, as to whether vendor or vendee shall prepare deed.

Cited in notes in 37 A. S. R. 29, on necessity for tender of deed; 31 A. D. 278, on necessity of performance or tender of performance on part of vendor.

Distinguished in *Ritchie v. Bennett*, 35 App. Div. 68, 54 N. Y. Supp. 379, holding demand upon heirs unnecessary to recovery for services rendered upon intestate's verbal agreement to convey.

— By vendee.

Cited in *Camp v. Morse*, 5 Denio, 161, holding offer of payment, with demand for execution of conveyance, good answer to vendor's action; *Gray v. Dougherty*, 25 Cal. 266, holding that vendee must demand deed before suing to recover damages for breach of covenant to convey; *Fairbanks v. Dow*, 6 N. H. 266, holding that action will not lie for failure to convey until security for purchase money tendered and deed demanded; *Raudabaugh v. Hart*, 61 Ohio St. 73, 76 A. S. R. 361, 55 N. E. 214, holding that in an action on contract to convey complainant must aver performance or offer to perform; *Cooper v. Brown*, 2 McLean, 495, Fed. Cas. No. 3,191, holding demand for deed unnecessary where vendor prevented from enforcing specific performance by his own laches; *Northrup v. Mead*, 121 App. Div. 385, 106 N. Y. Supp. 150, holding vendor's heirs not put in default in absence of demand by vendee for conveyance.

Cited in reference note in 44 A. D. 536, on necessity of party entitled to deed demanding same.

Cited in note in 16 A. D. 428, on vendee's duty as to demanding deed.

Reasonable time to perform contract.

Cited in *Morris v. Sliter*, 1 Denio, 59, holding that in contract for conveyance after payment vendor has a reasonable time to perform after payment; *Barber v. Cary*, 11 Barb. 549, holding that plaintiff upon foreclosure sale should have reasonable time in which to execute necessary papers and pay over surplus.

17 AM. DEC. 502, JACKSON v. SHEPARD, 7 COW. 88.

Evidence of compliance with statutory requirements.

Cited in *Laraby v. Reid*, 3 G. Greene, 419, holding evidence of noncompliance with statutory requirements admissible to rebut rentals in tax deed.

— Deeds as.

Cited in *Leggett v. Rogers*, 9 Barb. 406, holding comptroller's deed not even prima facie evidence that statutory prerequisites have been complied with; *Porter v. Wells*, 6 Kan. 448, holding sheriff's deed executed in foreign state, not evidence of a valid sale.

— Recitals in deeds as.

Cited in *Jackson ex dem. Webb v. Roberts*, 11 Wend. 422, holding recital of power of sale in sheriff's deed, not conclusive evidence thereof; *Jackson ex dem. Watson v. Esty*, 7 Wend. 148, holding recitals in deed not sufficient evidence of performance of prerequisite acts; *Varick v. Tallman*, 2 Barb. 113, holding that recitals in comptroller's deed do not dispense with necessity of proof of compliance with statutory requirements; *Hill v. Draper*, 10 Barb. 454, holding recitals in surveyor general's deed not prima facie evidence that preliminary steps were taken; *Pike v. Chicago, M. & St. P. R. Co.* 40 Wis. 483, holding publication of notice of sale not sufficiently proved by recitals in sheriff's deed.

Cited in reference notes in 42 A. D. 484; 76 A. D. 406; 81 A. D. 427; 125 A. S. R. 965,—on recitals in deeds as evidence; 19 A. S. R. 143, on prima facie evidence from recitals in tax deeds; 35 A. S. R. 321, on presumptions of regularity from recitals in tax deed; 15 A. S. R. 508; 31 A. S. R. 233,—on effect of recitals in tax deed; 27 A. D. 395, on effect of misrecitals in tax deed; 23 A. S. R. 377, as to what recitals in tax deeds must show in order to pass title.

Cited in notes in 21 A. D. 404, on recitals in sheriff's deed; 17 A. D. 507, on recitals in tax deed as evidence; 4 A. S. R. 189, as to when tax deed is not prima facie evidence of title; 76 A. D. 532, on legislature's power to make tax deeds and assessment conclusive evidence of regularity of prior essential proceedings.

Distinguished in *Phillips v. Schiffer*, 64 Barb. 548, 7 Lans. 347, 14 Abb. Pr. N. S. 101, conceding recitals in sheriff's deed not sufficient proof of issuance of execution.

— Court orders and proceedings as.

Cited in *Munro v. Merchant*, 26 Barb. 383, holding recitals in proceedings of partition commissioners, not legal proof of appointment of such commissioners; *Harrington v. People*, 6 Barb. 607, holding court order not conclusive evidence of regularity of proceedings for laying out highway.

Distinguished in *Farrington v. King*, 1 Bradf. 182, holding surrogate presumed to have made order of sale upon sufficient evidence of facts necessary to be ascertained.

Necessity of compliance with statutory requirements.

Cited in *Phillips v. Doe*, 13 Smedes & M. 31, holding that lessee must preserve evidence of trustee's compliance with statutory prerequisites to leasing school lands; *Sherwood v. Reade*, 7 Hill, 431, holding that in sales under United States deposit fund mortgages statutory authority must be strictly pursued; *Atkins v. Kinnan*, 20 Wend. 241, 32 A. D. 534, holding void surrogate's order to sell decedent's real estate because not drawn in statutory form; *Corwin v. Merritt*, 3 Barb. 341, holding sale of decedent's estate to pay debts void where all preliminary statutory steps not taken; *Bloom v. Burdick*, 1 Hill, 130, 37 A. D. 299, holding infants for whom no guardian appointed, not concluded by sale for payment of decedent's debts; *Curtis v. Leavit*, 15 N. Y. 9 (dissenting opinion), as to rule that statutory power must be strictly pursued in prescribed mode and form; *Scott v. Babcock*, 3 G. Greene, 133, holding tax deed not admissible in evidence without proof of compliance with statutory requirements.

Distinguished in *Minor v. Natchez*, 4 Smedes & M. 602, 43 A. D. 488, holding title of vendee at execution sale not vitiated by marshal's departure from statutory mode of advertising; *Brown v. Wilbur*, 8 Wend. 357, holding loan officer's deed valid, though sale after default in payment of mortgage not advertised. — In tax sales.

Cited in *Stevens v. Palmer*, 10 Bosw. 60, holding it necessary to show compliance with statutory prerequisites to establish title under tax sale; *Bush v. Davison*, 16 Wend. 550, holding comptroller's deed void unless all statutory requirements fully complied with; *Sharp v. Speir*, 4 Hill, 76; *Striker v. Kelly*, 7 Hill, 9; *Brown v. Wright*, 17 Vt. 97, 42 A. D. 481; *Hadley v. Tankersley*, 8 Tex. 12,—holding party claiming title under tax deed obliged to allege and prove performance of prerequisites; *Potts v. Cooley*, 51 Wis. 353, 8 N. W. 153, holding issuance of tax deed prohibited except upon notice by one stating that he is owner of certificate; *St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 321, Gil. 225, holding collection of tax unenforceable until statutory requirements of publication or personal demand have been observed; *Stewart v. Pergusson*, 133 N. C. 276, 45 S. E. 585; *Fox v. Stafford*, 90 N. C. 296,—holding that vendee under tax deed must show compliance with statutory prerequisites; *Gavin v. Shuman*, 23 Ind. 32; *Carnahan v. Sieber Cattle Co.* 34 Colo. 257, 82 Pac. 592,—holding that at common law no presumption obtains of performance of conditions precedent to issuance of tax deed; *Graves v. Bruen*, 11 Ill. 431, holding that at common law party claiming under statutory proceedings must show compliance with requisitions of statute; *Varick v. Tallman*, 2 Barb. 113, holding that presumption in favor of official acts of public officers cannot dispense with proof of compliance with statutory requirements; *Sibley v. Smith*, 2 Mich. 486, holding common-law rule requiring vendee to show compliance with statutory provisions, abrogated by statute; *D'Antignac v. Augusta*, 31 Ga. 700; *Reeds v. Morton*, 9 Mo. 878; *Cahoon v. Coe*, 57 N. H. 556; *Neber v. Hatch*, 10 Abb. N. C. 431; *Brown v. Goodwin*, 75 N. Y. 409, 56 How. Pr. 301 (affirming 1 Abb. N. C. 452); *Hubbell v. Weldon*, Hill & D. Supp. 139; *Scales v. Alvis*, 12 Ala. 617, 46 A. D. 269,—holding that all statutory requirements must be complied with before land can be sold for taxes; *Johnson v. Hahn*, 4 Neb. 139, holding sale void where county treasurer failed to first exhaust personal property, as required by statute.

Annotation cited in *Shell v. Duncan*, 31 S. C. 547, 5 L.R.A. 821, 10 S. E. 330, holding good title established by tax deed until noncompliance with statutory requirements shown.

Cited in reference notes in 36 A. D. 103, on tax sales; 42 A. D. 484, on necessity of strict compliance with statute as to tax sale; 30 A. D. 656, on necessity of purchaser of land sold for taxes showing strict compliance with requisites for exercise of the power; 66 A. D. 534, on necessity of showing compliance with every substantial requirement of law by one claiming title under collector's sale for taxes.

Distinguished in *Oakley v. Van Horn*, 21 Wend. 305, sustaining validity of collector's tax levy where return silent as to proof of demand.

17 AM. DEC. 514, JACKSON v. CHURCHILL, 7 COW. 287.

Provisions in lieu of dower generally.

Cited in reference notes in 31 A. D. 237, on devise in lieu of dower; 28 A. D. 459, on testamentary provision as bar to dower; 81 A. D. 215, as to when dower is not barred by devise

Cited in notes in 51 A. D. 579, as to when dower is barred by provision in will; 26 A. D. 503, on election between benefits conferred by will and share in community property; 12 L.R.A. 227, on method by which widow may elect to take under the will.

Effect of acceptance of provision in lieu of dower.

Cited in *Re Frazer*, 92 N. Y. 239, holding acceptance of testamentary provision, no bar to dower where terms of will not repugnant thereto; *Kennedy v. Mills*, 13 Wend. 553, holding that acceptance of testamentary provision given in lieu of dower bars dower right; *Avant v. Robertson*, 2 McMull. L. 215, holding acceptance of statutory provision, legal bar to claim for dower; *Davison v. Davison*, 15 N. J. L. 235, holding widow who understandingly elected to take provision in lieu of dower, not entitled to dower; *Adams v. Adams*, 39 Ala. 274, holding election to accept testamentary provision not apparently intended as addition to dower bars dower at law.

Necessity of election between dower and provisions in lieu thereof.

Cited in *Bond v. McNiff*, 6 Jones & S. 83, holding devisee of use and occupation until youngest child reaches majority, also entitled to dower; *Brown v. Brown*, 55 N. H. 106, holding widow to whom \$400 bequeathed also entitled to dower; *Tobias v. Ketchum*, 32 N. Y. 319, holding election unnecessary where will not repugnant to dower and testamentary provision not expressly declared in lieu thereof; *Durfee's Petition*, 14 R. I. 47, holding widow entitled to dower where husband devised his interest only to others; *Hilliard v. Binford*, 10 Ala. 977, holding widow entitled at common law to dower and legacy not manifestly intended in lieu thereof; *Durfee's Petition*, 14 R. I. 47, holding that widow must elect between dower and estate devised to her equally with others; *Corriell v. Ham*, 2 Iowa, 552, holding widow to whom entire estate devised entitled to dower in lands previously sold on execution against husband; *Bailey v. Boyce*, 4 Strobbh. Eq. 84 (dissenting opinion), as to necessity of election between testamentary provision and dower.

Cited in reference note in 43 A. D. 757, as to when election as to dower is not necessary.

Cited in notes in 12 L.R.A. 230, as to when widow is put to her election between her rights under the will and under the law; 3 L.R.A. 498, as to when widow is put to election between provision in will and dower; 3 L.R.A. 499, as to when widow is not put to election between provision in will and dower; 92 A. S. R. 702, on effect of particular testamentary provisions on widow's duty to elect between benefits of will and right to dower or in community property.

When ejectment lies for dower.

Cited in *Ellicott v. Mosier*, 11 Barb. 574, holding that ejectment to recover dower will lie against tenant with interest less than freehold, before dower assigned or admeasured.

17 AM. DEC. 517, JACKSON v. HARSEN, 7 COW. 323.

Continuance of relation of landlord and tenant.

Cited in *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357, holding relation of landlord and tenant once established, presumed to attach to all holding under tenant; *Springs v. Schenck*, 99 N. C. 551, 6 A. S. R. 552, 6 S. E. 405, holding that party who enters by tenant's permission, sufferance, or consent owes allegiance to original lessor; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682; *Lee v. Payne*, 4 Mich. 106,—holding that assignee of lease stands in relation of tenant

of original lessor; *Newman v. Mackin*, 13 Smedes & M. 383, holding that third party to whom tenant abandoned possession stands in same relation to original lessor; *Thompson v. Clark*, 7 Pa. 62, holding that purchaser from tenant stands in relation of tenant to original lessor; *Evertson v. Sutton*, 5 Wend. 281, 21 A. D. 217, holding conventional relation of landlord and tenant not created by holding over after time for surrender under executory contract.

Cited in reference note in 15 A. S. R. 719, on relation between landlord and subtenant.

Grantor retaining possession as tenant.

Cited in *Brooks v. Hyde*, 37 Cal. 366, holding grantor remaining in possession becomes tenant at will of grantee.

Cited in reference note in 39 A. D. 73, on party entering under tenant or by his permission standing in like situation.

Cited in notes in 15 A. D. 460, on purchaser from tenant taking land as tenant of grantor's lessor; 45 A. D. 456, on position of assignee of lessee.

What is a lease.

Cited in *Branch v. Doane*, 17 Conn. 402; *Strong v. Skinner*, 4 Barb. 546; *Voorhees v. Presbyterian Church*, 5 How. Pr. 58, 8 Barb. 135; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744,—holding lease a contract for possession and profits of lands and tenements, for compensation.

Cited in reference notes in 40 A. D. 612, defining a "lease;" 29 A. D. 488, on nature of lease; 24 A. S. R. 574, on essential elements of lease.

Tenant's right to question landlord's title.

Cited in *Jackson ex dem. Witherell v. Jones*, 9 Cow. 182, holding tenant estopped to deny landlord's title; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154, holding claimant to title who leases from another, estopped to deny landlord's title; *Vance v. Johnson*, 10 Humph. 214, sustaining tenant's right to attorn where relation of landlord and tenant created by operation of law; *Byrne v. Beeson*, 1 Dougl. (Mich.) 179, holding that tenant cannot attorn to third party without landlord's consent, during continuance of lease or tenancy; *Doe ex dem. Kennedy v. Reynolds*, 27 Ala. 364, holding landlord's possession not affected or destroyed by tenant's attornment to stranger; *Norwood v. Kirby*, 70 Ala. 397, holding that tenant who entered under lease cannot assert subsequently acquired adverse title against landlord, without first surrendering possession; *De Lancey v. Ganong*, 9 N. Y. 9, holding that tenant cannot establish commencement of good adverse possession by denying the tenancy; *Lane v. Osment*, 9 Yerg. 86, holding that party claiming under tenant cannot contest landlord's title within period prescribed by statute of limitations.

Cited in notes in 89 A. S. R. 108, on persons estopped to deny landlord's title; 89 A. S. R. 70, on estoppel of tenant to deny landlord's title by creation of relation; 53 L.R.A. 945, on power of tenant to initiate an adverse possession during term for years; 53 L.R.A. 951, on initiation of adverse possession by successors of tenant.

Adverse possession against reversioners, etc.

Cited in reference notes in 76 A. S. R. 160, on adverse possession against reversioner; 9 A. S. R. 806, on life tenant's right to set up adverse possession against remainderman or reversioner.

Cited in note in 19 L.R.A. 839, 852, on adverse possession against remaindermen and owners of future estates.

How adverse possession established.

Cited in *Sands v. Hughes*, 53 N. Y. 287, holding that adverse possession may be originated during running of assessment lease; *Saunders v. Hanes*, 44 N. Y. 353, holding adverse possession established where reversioner permits limitation to expire while life tenant's representative holds, claiming title; *Pattison v. Dryer*, 98 Mich. 564, 57 N. W. 814, holding that husband vested with estate in marital right held adversely from time of wife's death; *Mann v. Mann*, 141 Cal. 326, 74 Pac. 995, holding prescriptive title established where life tenant's grantee held adversely for statutory period after life estate terminated; *Christie v. Gage*, 71 N. Y. 189, holding that life tenant's grantee in fee may claim in hostility to reversioners or remaindermen; *Barrett v. Stradl*, 73 Wis. 385, 9 A. S. R. 795, 41 N. W. 439, holding that possession of life tenant's grantee in fee becomes adverse upon life tenant's death.

17 AM. DEC. 521, JACKSON v. McCHESNEY, 7 COW. 360.**Admissibility of admissions by former owner.**

Cited in *Hines v. Soule*, 14 Vt. 99, holding admissions against title by debtor, made before attachment, not evidence against sheriff who executed writ.

Effect of acknowledgment of consideration.

Cited in *Turner v. Howard*, 10 App. Div. 555, 42 N. Y. Supp. 335; *Doody v. Hollwedel*, 22 App. Div. 456, 48 N. Y. Supp. 93,—holding recital of valuable consideration prima facie evidence of payment thereof, even as against strangers to deed; *Bayliss v. Williams*, 6 Coldw. 440, holding recital of receipt of consideration, evidence thereof as against grantor; *Todd v. Eighmie*, 4 App. Div. 9, 38 N. Y. Supp. 304, holding recital of consideration, prima facie proof of payment by grantee of valuable consideration; *Hendy v. Smith*, 49 Hun, 510, 2 N. Y. Supp. 535, holding acknowledgment of receipt of one dollar, sufficient to show grantee was purchaser for valuable consideration; *Peck v. Mallams*, 10 N. Y. 509, holding recital in deed of receipt of consideration, not sufficient evidence of bona fide purchase, against prior mortgagee; *Wood v. McClughan*, 4 Thomp. & C. 420, holding deed presumptive evidence of payment of consideration named therein, in absence of proof; *Dooper v. Noelke*, 5 Daly, 413, holding acknowledgment of receipt of consideration in deed, uncontradicted, sufficient evidence of its payment; *Wood v. Chapin*, 13 N. Y. 509, 67 A. D. 62; *Page v. Waring*, 76 N. Y. 463,—holding acknowledgment of receipt of consideration in deed, sufficient prima facie evidence thereof under recording act; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847, holding recital of receipt of consideration, not evidence against grantor's creditor, who alleges fraudulent conveyance; *Weideman v. Zielinska*, 102 App. Div. 163, 92 N. Y. Supp. 493, holding recital of consideration in assignment of mortgage, uncontradicted, sufficient to establish bona fide purchase; *Meeker v. Wright*, 76 N. Y. 262, 7 Abb. N. C. 299, assuming value of lands not less than sum stated in deed; *Ring v. Steele*, 4 Abb. App. Dec. 68, on acknowledgment of payment of consideration as sufficient evidence of purchase for value.

Cited in notes in 17 A. D. 524, on acknowledgment of receipt of consideration in deed; 29 L.R.A. 740, on receipts in deeds as evidence of payment as against third parties.

Distinguished in *Bolton v. Jacks*, 6 Robt. 166, holding acknowledgment of receipt of consideration in deed, uncontradicted, not sufficient to prove purchase for valuable consideration.

Denied in *Shotwell v. Harrison*, 22 Mich. 410, holding recital of receipt of

valuable consideration, no evidence against grantee in prior unrecorded deed; *Galland v. Jackman*, 26 Cal. 79, 85 A. D. 172, holding recital of receipt of valuable consideration, evidence only against parties claiming under grantor by subsequent conveyance.

Parol evidence as to consideration.

Cited in notes in 23 A. D. 368, on parol evidence to explain acknowledgment of receipt of consideration in deed; 20 L.R.A. 111, on parol evidence as to consideration for deed in action by creditor to set it aside.

What constitutes bona fide purchaser.

Cited in *Balliett v. Seeley*, 34 Fed. 300, holding that assignee of judgment against himself and another for fraudulent transfer may enforce it; *Gratz v. Land & River Improv. Co.* 40 L.R.A. 393, 27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381, holding junior purchaser whose deed first recorded, presumptively bona fide purchaser for value without notice; *Truluck v. Peeples*, 3 Ga. 446, holding purchaser with notice from party without notice, protected; *Varick v. Briggs*, 6 Paige, 323, holding purchaser with notice, from prior bona fide purchaser without notice, protected; *Sweet v. Green*, 1 Paige, 473, 19 A. D. 442, holding bona fide purchaser's grantee with notice, protected; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521; *Craft v. Russell*, 67 Ala. 9,—holding payment of price without notice of complainant's claim, necessary to sustain defense as bona fide purchaser; *Burns v. Hobbs*, 29 Me. 273, holding that bona fide purchaser without notice of fraudulent conveyance may avail himself thereof in defense.

Cited in reference notes in 24 A. D. 235; 25 A. D. 532; 41 A. D. 268,—on who are bona fide holders; 42 A. D. 627; 4 A. S. R. 417,—on necessity of payment of consideration before notice to constitute one a bona fide purchaser; 25 A. D. 108, on necessity of payment in full before notice to constitute one a bona fide purchaser.

Necessity of alleging and proving bona fides.

Cited in *Seymour v. McKinstry*, 106 N. Y. 230, 14 N. E. 94, 11 N. Y. S. R. 760, holding defendant seeking relief as innocent purchaser must deny notice and prove it, though not charged; *Cotton Improv. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486, holding that assignee of mortgage cannot enforce it without showing assignment in good faith for value; *Colby v. Parker*, 34 Neb. 510, 52 N. W. 693, holding indorsee of negotiable instrument before due must show payment of consideration without notice.

Cited in reference note in 3 A. S. R. 168, on what bona fide purchaser must show to sustain his claim.

Rights of bona fide purchaser.

Cited in reference note in 45 A. D. 371, on right of purchaser without notice of encumbrance to sell to one having notice.

Cited in notes in 25 A. D. 614, on right of bona fide purchaser from fraudulent purchaser; 23 A. D. 614, on protection of bona fide purchaser from fraudulent purchaser at sheriff's sale.

Effect of failure to record instrument.

Cited in *Dusenbury v. Hulbert*, 59 N. Y. 541, holding lien of purchase-money mortgage, superior to that of subordinate mortgage first recorded.

Cited in reference notes in 82 A. S. R. 399, on necessity of recording deeds and mortgages; 116 A. S. R. 705, on validity of unrecorded mortgage against subsequent purchasers and encumbrancers without notice.

Cited in notes in 31 A. D. 283, on validity of unrecorded instruments as between

the parties; 23 A. D. 185, on validity as to subsequent creditors with notice of unrecorded marriage settlement.

17 AM. DEC. 525, PIXLEY v. WINCHELL, 7 COW. 366.

Appearance as waiver.

Cited in reference note in 32 A. D. 318, as to when appearance of defendant will be set aside.

— Of irregularities generally.

Cited in *Roberts v. Willard*, 1 Code Rep. 100, holding irregularities in commencement of action, waived by appearance; *The Monte A*, 12 Fed. 331, holding that at common law and in admiralty general appearance, in actions *in personam*, cures irregularities in service, or want thereof; *Ballowhey v. Cadot*, 3 Abb. Pr. N. S. 123, holding omission of Christian names of plaintiffs in affidavit for order of arrest, waived by general appearance; *Coppernoll v. Ketcham*, 56 Barb. 111, holding irregularity in notice of appeal, waived by appearance generally, noticing cause and moving trial; *Bissell v. New York C. & H. R. R. Co.* 67 Barb. 385, holding irregularity in summons in action to recover statutory penalty, waived by serving notice of appearance; *Hubbell v. Dana*, 9 How. Pr. 424, holding irregularity of commencing suit against receiver without court's leave, waived by serving general notice of appearance; *Ilseley v. Harris*, 10 Wis. 95, holding irregularity on face of order for arrest, waived by putting in bail to action; *Webb v. Mott*, 6 How. Pr. 439; *Keyser v. Pollock*, 20 Utah, 371, 59 Pac. 87,—holding objection to regularity of summons waived by general appearance; *Dix v. Palmer*, 5 How. Pr. 233, holding irregularity in summons waived by serving general notice of appearance; *Converse v. Warren*, 4 Iowa, 158, holding objection to defective service not waived by appearing and pleading after timely objection overruled; *Easton v. Altum*, 2 Ill. 250, holding that want of seal to summons cannot be taken advantage of after an appearance; *Gardner v. Teller*, 2 How. Pr. 241, holding irregularity in declaration waived by serving notice of retainer generally; *State ex rel. Curtis v. McCullough*, 3 Nev. 202, holding irregularity of return date on writ of mandamus, waived by appearance and request for adjournment; *Graham v. Circuit Judge*, 108 Mich. 425, 66 N. W. 348, holding objection to sufficiency of affidavit to hold to bail, waived by general appearance; *Pardee v. Smith*, 27 Mich. 33, holding imperfection in showing for civil warrant waived by joining issue and proceeding to trial; *Stewart v. Hill*, 1 Mich. 265, holding objection to regularity or sufficiency of affidavit upon which warrant issued, waived by appearance and giving bail; *Col. Ins. Co. v. Force*, 8 How. Pr. 353, holding objection to legality of arrest not waived by request for time to answer.

Cited in reference notes in 78 A. D. 369, on appearance as waiver of irregularities in process; 43 A. D. 125; 48 A. D. 348,—on appearance of defendant as irrevocable waiver of defects in service of process; 35 A. S. R. 85, on waiver of defects in process by appearing.

Distinguished in *Barber v. Hubbard*, 3 Code Rep. 169, holding that motion to discharge order of arrest may be made at any time before justification of bail.

— Of lack of jurisdiction.

Cited in *Pauling v. Hudson Mfg. Co.* 2 E. D. Smith, 318; *Paulding v. Hudson Mfg. Co.* 3 N. Y. Code Rep. 223,—holding objection to justice's jurisdiction waived where foreign corporation appeared and answered.

— Of right to jury trial.

Cited in *Mooney v. Hudson River R. Co.* 3 Daly, 105, holding right of trial without jury not waived by appearing and trying case before jury, at judge's unauthorized direction.

— Of exemption from arrest.

Cited in *Petrie v. Fitzgerald*, 1 Daly, 401, holding privilege of exemption from arrest waived by giving bail and notice of justification of sureties.

Conclusiveness of foreign judgment.

Annotation cited in *Moch v. Virginia F. & M. Ins. Co.* 4 Hughes, 61, 10 Fed. 696, holding parties bound in home court when foreign court of general jurisdiction has passed upon its jurisdiction.

17 AM. DEC. 525, EX PARTE WILLCOCKS, 7 COW. 402.

Necessity of majority vote.

Cited in *State ex rel. Mason v. Paterson*, 35 N. J. L. 190, holding appointment of city treasurer by less than majority of aldermen, unlawful and void; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15 (affirming 6 App. Div. 277, 40 N. Y. Supp. 535), holding vote of majority of members of common council, required for official act; *Moore v. St. Thomas*, 4 Abb. N. C. 51, holding invalid bond and mortgage executed by authority of less than majority of legal number of vestrymen.

Cited in note in 7 E. R. C. 600, on necessity that corporate business be transacted by number of directors specified in governing instrument.

What constitutes a majority vote.

Cited in *People ex rel. Hawes v. Walker*, 23 Barb. 304, 2 Abb. Pr. 421, holding majority of all sufficient where statute requires appointment by jury commissioners, supervisors, and certain judges; *St. Aemilianus Orphan Asylum v. Milwaukee County*, 107 Wis. 80, 82 N. W. 704, holding majority vote of quorum, majority vote of board of supervisors; *People v. Harrington*, 63 Cal. 257, sustaining validity of action by majority of quorum of board of supervisors; *State, Schermerhorn, Prosecutor, v. Jersey City*, 53 N. J. L. 112, 20 Atl. 829, holding that enactment requiring agreement of three fourths of all aldermen means three fourths of entire body; *Field v. Field*, 9 Wend. 394, holding majority of those appearing at regular monthly meeting of friends, competent to transact business; *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321, 12 Sup. Ct. Rep. 507, sustaining validity of act of House of Representatives passed by majority of quorum present; *Beall v. State*, 9 Ga. 367, holding three out of five commissioners competent to act and make assessment; *State ex rel. Granvold v. Porter*, 11 N. D. 309, 91 N. W. 944, holding majority of those present at political convention, competent to transact business.

— In corporate matters.

Cited in *Buell v. Buckingham*, 16 Iowa, 284, holding that a majority of a quorum of directors may bind corporation; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 A. D. 203, holding that majority of board may bind corporation where by-laws give directors power to act; *Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co.* 40 Colo. 1, 102 A. S. R. 1024, 90 Pac. 81, holding majority of quorum, being also majority of directors, authorized to do anything entire board could do; *Round Lake Asso. v. Kellogg*, 47 N. Y. S. R. 668, 20 N. Y. Supp. 261, holding majority of those present at regular meeting of corporation composed of indefinite number competent to transact business; *Hosack v.*

College of Physicians & Surgeons, 5 Wend. 547, holding invalid certificates of indebtedness issued under resolution passed by less than quorum of trustees.

Distinguished in *Wallace v. Walsh*, 125 N. Y. 26, 11 L.R.A. 166, 25 N. E. 1076, 3 Silv. Ct. App. 212, sustaining validity of annual report signed by majority of trustees, though certificate of reduction in number not filed.

When majority may act.

Cited in reference notes in 43 A. D. 465, on powers of majority of corporate directors; 73 A. D. 723, as to when majority of corporators may exercise power conferred on their body by by-laws.

Cited in note in 24 A. D. 115, as to when majority may execute power delegated to several.

What constitutes a quorum.

Cited in Opinions rendered to Governor, 12 Fla. 651, holding quorum of Senate for legislative purposes, majority of entire number of which Senate may be composed; *Walker v. Rogan*, 1 Wis. 597, holding majority of justices of supreme court constitute quorum for transaction of business; *Oakley v. Aspinwall*, 3 N. Y. 547 (dissenting opinion), as to whether court of appeals can be held by less than eight judges; *Morrill v. Little Falls Mfg. Co.* 53 Minn. 371, 21 L.R.A. 174, 55 N. W. 547, holding majority of those present at stockholders' meeting constitutes quorum when constitution and by-laws silent; *Fisher v. Harrisburg Gas Co.* 1 Pearson (Pa.) 118, holding majority of board of directors, necessary to form quorum competent to transact business.

Cited in notes in 6 L.R.A. 309, on what constitutes a quorum; 21 L.R.A. 175, on what constitutes a quorum for a meeting of stockholders where number is indefinite.

Who entitled to notice of or to vote at corporate meeting.

Cited in *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274, holding pledgee of stock not owner entitled to notice of meetings of corporation.

— Who entitled to vote.

Cited in *Re Long Island R. Co.* 19 Wend. 37, 32 A. D. 429, holding right to vote determined by transfer book alone; *Re Mohawk & H. R. R. Co.* 19 Wend. 135, holding shares could be voted only by party in whose name they stood on transfer books, though "cashier" added thereto; *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806, holding that corporation cannot refuse to recognize validity of transfer made in violation of pooling agreement; *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 56 A. S. R. 119, 35 L.R.A. 309, 47 Pac. 582, holding dummy holders of stock, with no real interest therein, not bona fide stockholders entitled to vote; *Re St. Lawrence S. B. Co.* 44 N. J. L. 529; *State ex rel. Guerrero v. Pettineli*, 10 Nev. 141; *New York & N. H. R. Co. v. Schuyler*, 38 Barb. 534; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 A. R. 594; *State ex rel. White v. Ferris*, 42 Conn. 560,—holding party in whose name stock stands upon corporation's books, entitled to vote thereon; *Strong v. Smith*, 15 Hun, 222, holding that in contests arising out of disputed elections court will go behind transfer books; *Re North Shore Staten Island Ferry Co.* 63 Barb. 556, holding that personal representation of deceased trustee may vote stock held by him in that capacity; *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 A. R. 377, holding right to vote on shares held for benefit of corporation, suspended while so held; *McHenry v. Jewett*, 26 Hun, 453, holding that pledgee cannot vote upon stock without express or implied assent of pledgee; *Re Argus Printing Co.* 1 N. D. 434, 26 A. S. R. 639, 12 L.R.A. 781, 48 N. W.

347, holding pledgee of stock in whose name it stands on corporate records, entitled to vote; *State ex rel. Reed v. Smith*, 15 Or. 98, 15 Pac. 386, holding pledgee of stock entitled to vote it, where pledgee unlawfully caused transfer to be registered; *Re Barker*, 6 Wend. 509, holding party entitled to vote upon shares standing in his name in his own right, though hypothecated to full value.

Cited in reference notes in 34 A. S. R. 644, on who entitled to vote corporate stock; 26 A. S. R. 658, on qualifications necessary to vote stock; 26 A. S. R. 658, on right of pledgee to vote stock.

Cited in notes in 121 A. S. R. 196, on right of pledgee of stock to vote at corporate elections; 29 L.R.A. 849, on right to vote by proxy in private corporations.

Rights of pledgee generally.

Cited in reference note in 42 A. D. 93, on pawnee's right to sell or dispose of pledge.

Setting aside corporate election for improper voting.

Cited in *Downing v. Potts*, 23 N. J. L. 66, holding corporation election must be set aside where legal votes rejected and illegal votes received sufficient to change result.

Adoption of corporate by-laws.

Cited in notes in 43 A. S. R. 153, on limitations on power of private corporations to enact by-laws; 85 A. D. 618, on what by-laws private corporation aggregate may adopt.

Officers de facto.

Cited in *People v. Albany & S. R. Co.* 7 Abb. Pr. N. S. 265, 38 How. Pr. 237, 55 Barb. 344, 1 Lans. 308, holding doctrine of officers *de facto* inapplicable to direct proceeding to try title to office.

Distinguished in *People v. Cook*, 14 Barb. 259, holding appointment of election inspector by less number of persons than authorized by statute, sufficient until questioned in direct proceeding.

Necessity of broker keeping identical stock purchased.

Cited in note in 75 A. D. 318, on necessity of stockbroker keeping identical stock purchased.

17 AM. DEC. 529, STONE v. WOOD, 7 COW. 453.

Contracts made by agent.

Cited in *Evans v. Wells*, 22 Wend. 324 (dissenting opinion), on necessity of deed, executed by attorney, being made in name of principal.

Cited in notes in 17 A. D. 226, on effect of executors' covenants in their conveyances; 13 A. D. 563, on effect of corporate agent's indorsement or acceptance of negotiable instrument.

— Principal's liability under.

Cited in *Detroit v. Jackson*, 1 Dougl. (Mich.) 106, holding agreement signed by one, "mayor of city," binding on principals described in instrument; *Baker v. Mechanic F. Ins. Co.* 3 Wend. 94, 20 A. D. 664, holding company not liable on note by which one, as president, promises to pay money; *Hanford v. McNair*, 9 Wend. 54, holding covenant will not lie against principal on sealed contract, executed by agent without authority under seal; *Booth v. Farmers' & M. Nat. Bank*, 4 Lans. 301, holding bank not bound by act of president executing satisfaction of judgment, as president, without corporate seal; *Peck v. Gardner*, 9 Hun, 704,

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holding principal not liable on contract executed by one as agent for another; *De Witt v. Walton*, 9 N. Y. 571, holding principal not liable on note signed by one, "agent for the churchman;" *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277, holding deed executed by president and directors without corporate seal, not corporate deed; *North v. Henneberry*, 44 Wis. 306, holding deed executed by agent described therein as attorney for principal, not deed of principal; *Kiersted v. Orange & A. R. Co.* 69 N. Y. 343, 25 A. R. 199, 55 How. Pr. 51 (reversing 3 *Thomp. & C.* 662; 1 *Hun*, 151), holding principal not liable under lease executed by agent individually, wherein agency is recited; *Decker v. Judson*, 16 N. Y. 439, holding surety signing bond bound thereby, although name is not in body of bond.

Cited in reference notes in 29 A. D. 66, as to when principal is bound by sealed contract or deed of agent; 63 A. S. R. 892, on liability of undisclosed principal on contract by agent.

Cited in note in 23 A. D. 486, on non-liability of principal on contracts in agent's name.

— Principal's rights under.

Cited in *Spencer v. Field*, 10 *Wend.* 87, holding principal cannot sue for breach of covenant in contract executed by one as "Com'r of School Fund;" *Townsend v. Corning*, 23 *Wend.* 435, holding survivors of principal cannot sue on sealed contract executed by agent personally; *Nicoll v. Burke*, 13 *Jones & S.* 75, holding principal may sue on lease signed by lessee only, wherein agents are described as landlords; *Hays v. Moody*, 2 N. Y. Supp. 385, holding principal may sue as lessor's assignee, where agent executes lease as lessor; *Sencerbox v. McGrade*, 6 *Minn.* 484, *Gill*, 334, holding principal cannot recover under agreement entered into with agent; *Wheeler v. Walden*, 17 *Neb.* 122, 22 N. W. 346, holding principal may recover for rent under lease executed by agent, wherein principal is named; *McColgan v. Katz*, 29 *Misc.* 136, 60 N. Y. Supp. 291, holding principal cannot sue on lease executed by agent described therein as agent for principal.

Distinguished in *Van Alstyne v. Van Alstyne*, 10 *Barb.* 383, holding principal may sue on covenants in lease, where it does not appear to whom covenant is made.

— Agent's liability under.

Cited in *Guyon v. Lewis*, 7 *Wend.* 26, holding agent personally signing contract, containing covenants to be performed by one as agent for another, liable; *Whitford v. Laidler*, 25 *Hun*, 136, holding board of managers personally signing and sealing lease, liable thereon; *Merchants' Nat. Bank v. Clark*, 64 *Hun*, 175, 19 N. Y. Supp. 136, holding president and treasurer of company signing note as treasurer and president, personally liable thereon; *Smith v. Teets*, 1 N. Y. City Ct. Rep. 457, holding agent employing broker to find purchaser, without principal's authority, liable to broker; *Avern v. Beckom*, 11 *Ga.* 1, holding administrator warranting property sold for estate to be sound, personally liable; *Sperry v. Fanning*, 80 *Ill.* 371, holding guardian personally liable on contract signed one, "guardian of estate of ward;" *Fogg v. Virgin*, 19 *Me.* 352, 36 A. D. 757, holding trustees of company signing promissory note individually, personally liable; *Simonds v. Heard*, 23 *Pick.* 120, 34 A. D. 41, holding town committee agreeing as "said committee" to pay certain sum for work, personally liable; *Holland v. Stewart*, 2 *Mich. N. P.* 39, holding agent purchasing without principal's authority, personally liable; *Rollins v. Phelps*, 5 *Minn.* 463, *Gil.* 373, holding agents signing contract as agents, although described therein as agents, personally liable; *Lapsley v. McKinstry*, 38 *Mo.* 245, holding government agent per-

sonally liable for livery account, where government is not bound; *Bryson v. Lucas*, 84 N. C. 680, 37 A. R. 634, holding agent personally liable on bond signed "L. [seal] for C., president of" company; *Sydnor v. Hurd*, 8 Tex. 98, holding agent liable on instrument executed individually without disclosing agency; *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677, holding petition by property owners, signed by agents, under authority, not petition of owners; *Plumb v. Milk*, 19 Barb. 74, holding agent not liable on contract made as agent with another for services; *Hood v. Hallenbeck*, 7 Hun. 362, holding trustees signing note as trustees for church, not personally liable thereon; *Roberts v. Burton*, 14 Vt. 195, holding agents contracting as agents of association and signing individual names as agents of association, not liable; *Mathews v. O'Shea*, 45 Neb. 299, 63 N. W. 820, on liability of agent to party paying agent money for principal; *Lay v. Austin*, 25 Fla. 933, 7 So. 143 (dissenting opinion), on personal liability of president and secretary executing assignment for company with individual names.

Cited in reference notes in 24 A. D. 66, as to when agent is personally bound; 44 A. D. 335, on liability of agent on his contracts; 36 A. S. R. 899, on liability of agent contracting in his own name; 46 A. S. R. 151; 79 A. S. R. 225,—on personal liability of agent signing contract in his own name; 35 A. S. R. 880, on liability of one assuming to act as agent; 50 A. D. 793; 21 A. S. R. 601,—on liability of agent on unauthorized contract; 26 A. D. 524, on personal liability of agent on sealed contracts.

Cited in notes in 2 L.R.A. 812, on personal liability of agent; 2 A. R. 333, as to when agent is personally liable on contract signed by him; 2 A. D. 514, on personal liability of agent signing by addition of descriptive title merely; 22 A. S. R. 510, as to whether agent failing to bind principal binds himself.

Distinguished in *Whitford v. Laidler*, 94 N. Y. 145, 46 A. R. 131, holding officers of corporation not personally liable on executing lease individually, where corporation ratifies it.

— Agent's rights under.

Cited in *Allen v. Pegram*, 16 Iowa, 163, holding president may recover under deed conveying property of bank, signed individually, without corporate seal.

— When words mere description of agent.

Cited in *White v. Miles*, 11 How. Pr. 36, holding receiver suing as "A. D. receiver of Bank" cannot recover as receiver without alleging appointment.

Distinguished in *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, holding bank liable to another bank for discounting bill of exchange payable to "S. B. S., Cas.," indorsed in same form.

17 AM. DEC. 532, *AINSLIE v. WILSON*, 7 COW. 662.

Effect of taking security on original debt.

Cited in *Stamper v. Johnson*, 3 Tex. 1, holding creditor receiving deed as security for debt may sue on debt.

Cited in reference notes in 24 A. D. 640, as to when note given by debtor or third person operates as payment; 76 A. S. R. 566, on mortgage by indorser as payment of note; 27 A. D. 192, as to when note given by debtor or third person operates as payment; 27 A. D. 641, on presumption of payment arising from taking of note.

Cited in notes in 19 A. D. 535; 20 A. D. 462,—on payment by note.

Distinguished in *Lewis v. Lozee*, 3 Wend. 79, holding negotiable note given to landlord after distress, to relinquish same, not payment of rent.

Maker's liability on note.

Cited in *Corey v. White*, 3 Barb. 12, holding maker of note liable, although indorser has taken assignment of judgment thereon from holder.

When assumpsit lies.

Cited in *Frazer v. Carpenter*, 2 McLean, 235, Fed. Cas. No. 5,069, holding holder of note may sue remote indorsers thereon under common money counts.

Cited in reference notes in 26 A. D. 682; 28 A. D. 288; 37 A. D. 56,—as to when assumpsit lies for money had and received; 53 A. D. 127, on rights of indorsees against prior indorsers and maker.

Cited in notes in 38 A. D. 44, as to when assumpsit lies for money paid; 52 A. D. 754, on count for money had and received lying for money only; 61 A. D. 506, on recovery by sureties paying in property; 4 L.R.A. 369, on rights and remedies of owner of stolen property; 52 A. D. 757, on admissibility of note, bill, etc., under count for money had and received.

Money equivalent.

Cited in *Redfield v. Haight*, 27 Conn. 31, holding consideration of contract of sale may be given assumed value in money as consideration; *Carter v. Cox*, 44 Miss. 148, on bank notes as money; *Van Ostrand v. Reed*, 1 Wend. 424, 19 A. D. 529, on giving of note as equivalent to payment of money; *Whitehead v. Peck*, 1 Ga. 140 (dissenting opinion), on payment in property being considered as payment in money.

Distinguished in *Artcher v. McDuffie*, 5 Barb. 147, on bond and mortgage being regarded as money.

—As sustaining action for money had and received.

Cited in *Stewart v. Conner*, 9 Ala. 803, holding paying debt to executor by discharging executor's private debt will sustain action for money had and received; *Kneeland v. Fuller*, 51 Me. 518, holding same as to receipt of cattle; *Bullard v. Hascall*, 25 Mich. 132, holding same as to receipt of draft; *Wilson v. George*, 10 N. H. 445, holding same as to promise to pay certain sum in wheelwright work; *Mathewson v. Eureka Powder Works*, 44 N. H. 289, holding same as to receipt of goods; *Seavey v. Dana*, 61 N. H. 339, holding same as to receipt of note; *Marine Bank v. Rushmore*, 28 Ill. 463, holding same as to receipt of bank notes; *Helvey v. Huntington County*, 6 Blackf. 317, holding same as to receipt of county orders; *Gordon v. Camp*, 2 Fla. 422, holding same as to receipt of certain amount in Florida money; *Huckabee v. May*, 14 Ala. 263, holding same as to receipt of land and slaves; *Barrett v. Koella*, 5 Biss. 40, Fed. Cas. No. 1,048, holding same as to receipt of notes in part payment; *Gregory v. Mack*, 3 Hill, 380, holding same as to receipt of house and lot at stipulated price; *Clark v. Fairchild*, 22 Wend. 576, holding general *indebitatus assumpsit* for price of property, sustained where part was payable in services; *Gilchrist v. Cunningham*, 8 Wend. 641, on property received as money supporting action for money had and received; *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103, on right of action for money had and received where iron was received as money; *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 A. D. 394, on proof of plaintiff's title and defendant's possession sustaining action for money had and received; *Allen v. Brown*, 44 N. Y. 228, on recovering value of notes in action for money had and received.

Distinguished in *Pratt v. Trunick*, 2 Pittsb. 289, 9 Pittsb. L. J. N. S. 65, holding failure to deliver truck under contract to exchange for patent right will not sustain action for money had and received; *Beals v. See*, 10 Pa. 56, 49 A. D. 573, holding money had and received will not lie for value of goods to be paid for in merchandise.

— **As sustaining action for money paid.**

Cited in *Lord v. Staples*, 23 N. H. 448, holding discharge of debt with land will sustain action for money paid; *Grosholts v. Stifel*, 4 Phila. 16, 17 Phila. Leg. Int. 28, holding same as to payment in goods; *Rodman v. Hedden*, 10 Wend. 498, holding surety paying principal's debt in part by note may sue for money paid; *Hulett v. Soullard*, 26 Vt. 295, holding surety paying principal's debt through levy on equity of redemption may sue for money paid; *Bonney v. Seely*, 2 Wend. 481, holding surety paying principal's debt in land may sue for money paid; *Hoyt v. Hoyt*, 16 N. J. L. 138, on discharge of debt by note sustaining action for money paid.

17 AM. DEC. 538, AYMAR v. BEERS, 7 COW. 705.

Question of law.

Cited in *Lane v. Bank of West Tennessee*, 9 Heisk, 419, holding sufficiency of notice of protest, question of law, where facts are undisputed.

— **Reasonable time as.**

Cited in *Dyas v. Hanson*, 14 Mo. App. 363, holding reasonable time in presenting sight draft question for court after facts are determined; *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210, 77 N. E. 1020, holding reasonable time in presenting demand note, bearing interest, question of law; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281, holding reasonableness of time in which bank's customer should object to error in account, question of law; *Austin v. Ricker*, 61 N. H. 97, holding reasonable time within which consignor must object to consignee's account, question of fact for referee; *Elting v. Brinkerhoff*, 2 Hall, 459,—on reasonable time for presenting inland bill of exchange being question of law; *Lierheimer v. Minnesota Mut. L. Ins. Co.* 122 Mo. App. 374, 99 S. W. 525, on reasonable time within which to rescind insurance policy being question of law; *Carmelich v. Mins*, 88 Ala. 335, 6 So. 913, on question of reasonable time in returning unaccepted policy being one of law.

Cited in reference notes in 54 A. S. R. 100, on reasonable time as question of law; 28 A. D. 381, as to when reasonable time is a question of law; 72 A. D. 539, as to when reasonable time is question of law and when of fact; 33 A. D. 111, on due diligence as question of fact; 27 A. D. 197, on reasonable diligence as question of law; 30 A. D. 360, on question of reasonable diligence as mixed question of law and fact; 66 A. D. 477, on due diligence in presentment, etc., of negotiable instruments as question of law.

Cited in note in 17 A. D. 547, on application to negotiable instruments of rule as to reasonable time being a question of law.

Transfer of overdue note.

Cited in note in 5 L.R.A. 534, on transfer of overdue note.

Necessity of presentment and notice.

Cited in reference notes in 43 A. D. 170, on necessity for presentment of draft for acceptance; 33 A. D. 111, on what excuses notice of nonpayment; 52 A. D. 641, on demand not discharged by discharge in insolvency.

Due diligence in presenting negotiable instruments.

Cited in *Gough v. Staats*, 13 Wend. 549, holding indorser discharged by lack of due diligence in presenting check, although not prejudiced by delay; *Edmisten v. Henry Herpolsheimer Co.* 66 Neb. 94, 59 L.R.A. 934, 92 N. W. 138 (dissenting opinion), on due diligence in presenting check.

Cited in reference note in 66 A. D. 477, on necessity of reasonable demand and notice to charge indorser.

— What constitutes.

Cited in *Middletown Bank v. Morris*, 28 Barb. 616, holding reasonable diligence used in presenting check, where time taken did not exceed time required in presenting by mail; *Mohawk Bank v. Broderick*, 10 Wend. 304, holding presenting check twenty days after receipt, unreasonable delay discharging indorser; *Smith v. Janes*, 20 Wend. 192, 32 A. D. 527, holding lapse of five days before presentation of check, not laches discharging indorser; *Vantrot v. McCulloch*, 2 Hilt. 272, holding retaining bill of exchange ten days before presentment is unreasonable delay; *Ransom v. Wheeler*, 12 Abb. Pr. 139, holding drafts must be presented on days respectively designated in each, to charge drawer thereon; *Emerson v. Crocker*, 5 N. H. 159, holding promissory notes payable on demand remaining unpaid for ten months, dishonored.

Cited in reference note in 83 A. D. 762, on what is a "reasonable time" in law of negotiable instruments.

Distinguished in *Wilson v. Senior*, 14 Wis. 380, holding negotiable note payable on day certain must be presented for payment on said day.

17 AM. DEC. 549, GORHAM v. GALE, 7 COW. 739.

Notice to produce.

Cited in *Jack v. Rowland*, 98 Ill. App. 352; *Bates v. Ridgeway*, 48 Ala. 611,—holding notice to produce writing at trial, insufficient without proof that same is near at hand; *Grinn v. Hamel*, 2 Hilt. 434, holding notice to produce written instrument, given during trial insufficient although same is in court; *Story v. Patten*, 3 Wend. 486, on insufficiency of notice given at trial to produce execution; *Bowen v. National Bank*, 11 Hun, 226, on insufficiency of verbal notice to produce given at trial.

Cited in reference notes in 61 A. D. 299, on service of notice to produce paper at trial; 44 A. D. 707, on necessity and sufficiency of notice to produce papers in possession of adverse party.

Cited in note in 21 L. ed. U. S. 644, on effect of notice to produce evidence.

Power of attorney in suit.

Cited in *Monson v. Hawley*, 30 Conn. 51, 79 A. D. 233, holding attorney retained to collect claim empowered to release debtor's property from attachment; *Pipe v. Emerson*, 5 N. H. 393, 22 A. D. 468, holding attorney empowered to waive by agreement, right to appeal from decision of court; *People v. New York*, 11 Abb. Pr. 66, holding attorney not empowered to stipulate not to appeal or apply for new trial; *Peck v. City Nat. Bank*, 51 Mich. 353, 47 A. R. 577, 16 N. W. 681, holding attorney empowered to prevent sheriff from advertising and selling lands levied upon; *Walratt v. Maynard*, 3 Barb. 584, holding attorney employed to defend suit removed by certiorari, unauthorized to bring suit against obligors on bond given; *Jenney v. Delesdernier*, 20 Me. 183, holding that attorney may relieve sheriff from obligation to retain personal property by approving of receipt taken therefor; *Jones v. Williamson*, 5 Coldw. 371, holding attorney under general warrant, before judgment, may assent to decree in chancery; *Steward v. Biddlecum*, 2 N. Y. 103, holding attorney empowered to institute proceedings under nonimprisonment act, on debtor's refusal to assign property; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. Supp. 692, holding attorney empowered to stipulate that decision of court shall be final; *Cox v. New York C. & H. R. R. Co.* 63 N. Y. 414, holding de-

defendant's attorney empowered to stipulate that cause of action should survive death of plaintiff; *Ex parte Shumway*, 4 Denio, 258, holding attorney not empowered to make affidavit of amount due on judgment; *Lusk v. Hastings*, 1 Hill, 656, holding attorney empowered to receive service of papers in cause any time before judgment is actually perfected; *Hale v. Lawrence*, 22 N. J. L. 72, on power of attorneys to agree in reference to putting in new plea after judgment on demurrer; *Lovell v. Orser*, 1 Bosw. 349, on power of attorney after judgment to consent to defendant's leaving jurisdiction of sheriff; *Clark v. Richards*, 3 E. D. Smith, 89 (dissenting opinion), on communication between attorney and client, made after judgment and before execution, being privileged.

— To settle or compromise suit.

Cited in *Whittington v. Ross*, 8 Ill. App. 234, holding state's attorney not empowered to compromise judgments recovered upon forfeited recognizances; *Derwort v. Loomer*, 21 Conn. 245, holding attorney employed to prosecute suit, not empowered to settle suit and discharge defendant.

— To receive payment.

Cited in *Conner v. Watson*, 29 N. Y. Civ. Pro. Rep. 153, 59 N. Y. Supp. 213, holding attorney empowered to receive money coming to client from suit; *Nolan v. Jackson*, 16 Ill. 272, holding attorney for administrator employed to obtain authority to sell real estate, not empowered to receive purchase money; *Conner v. Watson*, 27 Misc. 444, 59 N. Y. Supp. 213, holding attorney of record empowered to receive payment of client's mortgage debt on partitioned premises; *Lewis v. Woodruff*, 15 How. Pr. 539, holding attorney not empowered to receive liquor in satisfaction of judgment.

— As to executions and their collection.

Cited in *Kimball v. Perry*, 15 Vt. 414, holding attorney empowered to direct sheriff as to manner of executing execution; *Willard v. Goodrich*, 31 Vt. 597, upholding authority of attorney to direct sheriff as to time and manner of enforcing an execution; *Clark v. Randall*, 9 Wis. 135, 76 A. D. 252; *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194,—holding attorney employed to collect debt for foreign client empowered to execute bond of indemnity to sheriff; *Corning v. Southland*, 3 Hill, 552, holding attorney empowered to authorize deputy sheriff to hold execution over return day; *Walters v. Sykes*, 22 Wend. 566, holding attorney empowered to instruct sheriff to indorse execution as received on subsequent day; *Hyde v. Rogers*, 59 Wis. 154, 17 N. W. 127, holding judgment creditor may direct sheriff to countermand levy on debtor's property and seize property of joint debtor; *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 395, on attorney's power to direct sheriff as to holding execution.

Cited in note in 76 A. D. 264, on attorney's powers over judgments and executions.

Plaintiff's control over execution sale.

Cited in reference note in 44 A. S. R. 752, on plaintiff's right to direct and control execution sale.

Duties, rights, and liability of sheriff.

Cited in reference notes in 34 A. D. 204, on discretion of sheriff in execution sales; 56 A. D. 435, on effect of sheriff's executing deed on sale by deputy.

Cited in note in 19 A. D. 588, on power of sheriff or his deputy to execute a deed on execution.

— Liability for own acts.

Cited in *Armstrong v. Garrow*, 6 Cow. 465, holding sheriff liable for money had

and received, on taking note and discharging defendant from execution; *Wehle v. Conner*, 69 N. Y. 546, on liability of sheriff for attaching judgment debts, after levying upon property, by virtue of executions against plaintiff.

Distinguished in *Acker v. Ledyard*, 8 Barb. 514, holding sheriff not discharged from liability to landlord for rent collected, by paying same into court in another action.

— **Liability for acts of deputy.**

Cited in *Moulton v. Norton*, 5 Barb. 286, holding sheriff not liable for act of deputy in serving distress warrants; *Dyer v. Tilton*, 71 Me. 413, holding sheriff not liable for act of deputy in "fixing up" execution on instruction from creditor; *Smith v. Smith*, 60 N. Y. 161, holding sheriff not liable for failure to collect execution handed to deputy with instructions not to levy until directed; *New Hampshire Sav. Bank v. Varnum*, 1 Met. 34, holding sheriff liable for default of deputy in not applying money received to satisfaction of executions; *Gilbert v. Sharp*, 2 Lans. 412, on ratification by principal of agent's unauthorized act relating back to sustain action unauthorized when commenced.

Cited in reference notes in 20 A. D. 223; 33 A. D. 224,—on sheriff's liability for his deputy's torts; 41 A. D. 296, on liability of sheriff for misconduct of deputy; 41 A. D. 683, on sheriff's liability for deputy's acts and defaults.

Distinguished in *Walden v. Davison*, 15 Wend. 575, holding sheriff liable for money collected on voidable execution, where plaintiff left execution thereof to deputy; *Sheldon v. Paine*, 10 N. Y. 398, 7 N. Y. 453, holding sheriff liable for goods sold by deputy on credit without security, where deputy disregards creditor's instructions; *Ross v. Campbell*, 19 Hun, 615, holding sheriff liable for money received by deputy on execution held after sixty days; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157, holding United States marshal exercising due care in selecting not liable for misconduct of special deputy.

— **While acting under instructions from attorney in suit.**

Cited in *Robinson v. Brennan*, 11 Hun, 368, holding sheriff not liable to assignee of judgment for returning execution thereon *nulla bona*, on instructions from assignor's attorney; *Stevens v. Colby*, 46 N. H. 163, holding sheriff not liable for defect in return made by deputy, under directions from attorney; *Kimball v. Perry*, 15 Vt. 414, holding sheriff not liable for deputy's failure to return execution, where credit was given on direction of attorney; *Rogers v. The Marshal* (United States use of *Rogers v. Conklin*), 1 Wall. 644, 17 L. ed. 714, on deputy's following instructions from attorney exonerating marshal.

Liability of sureties on sheriff's bond.

Cited in *Crawford v. Howard*, 9 Ga. 314, holding sureties on sheriff's bond liable for acts of deputy.

Power of deputy sheriff to execute instrument.

Cited in *McGee v. Eastis*, 3 Stew. (Ala.) 307, holding deed executed by deputy sheriff, valid; *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645, holding deputy sheriff may execute and acknowledge, in name of sheriff, certificate of sale; *People ex rel. McAllister v. Lynch*, 68 N. Y. 473, on power of deputy sheriff to execute deed and receive redemption after expiration of sheriff's term of office.

Retroactive ratification.

Cited in *Seeley v. Morgan*, 17 Jones & S. 346, on validity of giving force to retroactive effect of ratification.

Terre-tenant as necessary party to scire facias.

Cited in *Smith v. Winston*, 2 How. (Miss.) 601, holding terre-tenant should be made party to scire facias to revive judgment constituting lien on land.

17 AM. DEC. 555, TURNER v. CHILD, 12 N. C. (1 DEV. L.) 133.**Executors de son tort, who are.**

Cited in *Outlaw v. Farmer*, 71 N. C. 31, holding that agents appointed by next of kin to settle decedent's estate are not executors *de son tort*.

Cited in reference notes in 17 A. D. 743; 22 A. D. 719; 23 A. D. 376,—on who liable as executor *de son tort*; 45 A. D. 778, as to how executor *de son tort* is constituted and liability of; 65 A. D. 140, as to when intermeddling with goods will convert one into executor *de son tort*.

Cited in notes in 85 A. D. 424; 98 A. S. R. 195,—on what constitutes one an executor *de son tort*; 85 A. D. 425, on what acts will not constitute person executor *de son tort*; 98 A. S. R. 197, on acts done by one as agent of another as constituting one an executor *de son tort*; 17 A. D. 561, 562, on one intermeddling with decedent's estate under colorable right as executor *de son tort*; 98 A. S. R. 196, on acts of charity or kindness as constituting one an executor *de son tort*.

Distinguished in *O'Reilly v. Hendricks*, 2 Smedes & M. 388,—holding surety authorized to sell decedent's property to indemnify himself, not made thereby executor *de son tort*; *Bailey v. Miller*, 27 N. C. (5 Ired. L.) 444, 44 A. D. 47, holding grandfather liable as executor *de son tort* to creditor of deceased father who had fraudulently conveyed to infant son, where grandfather took possession for benefit of infant; *M'Morine v. Storey*, 20 N. C. (4 Dev. & B. L.) 189, 34 A. D. 374, holding executor of fraudulent assignee taking possession of goods, liable to creditor of deceased assignor as executor *de son tort*.

Liability of executors de son tort.

Cited in reference notes in 20 A. D. 462, on executor *de son tort*; 57 A. D. 154, on liability of executor *de son tort*.

Cited in note in 55 A. D. 439, on power, title, and liability of executor *de son tort*.

Province of jury.

Cited in reference notes in 48 A. S. R. 620, on jury as judge of truth of uncontradicted evidence; 11 A. S. R. 829; 64 A. S. R. 214,—on weight of evidence and credibility of witnesses as questions for jury.

17 AM. DEC. 562, STATE v. BROWN, 12 N. C. (1 DEV. L.) 137.**Sufficiency of description of property in indictment.**

Cited in *State v. Credle*, 91 N. C. 640, holding "certain cattle beast" sufficient description of injured animal in indictment; *Hagerman, Prosecutor. v. State*, 54 N. J. L. 104, 23 Atl. 357, holding "certain house mouldings, inside doors, corner blocks," etc., sufficient description of property in indictment; *State v. Moore*, 129 N. C. 494, 55 L.R.A. 96, 39 S. E. 626, holding indictment for larceny sufficient, although it fails to charge quantity and separate value of each article; *People v. Jackson*, 8 Barb. 637, holding indictment for stealing ten promissory notes, called bank notes, for payment of divers sums of money, sufficient; *State v. Patrick*, 79 N. C. 655, 28 A. R. 340, holding indictment for stealing "one pound of meat," etc., fatally defective.

Cited in reference notes in 23 A. D. 128; 34 A. D. 461,—on certainty required

in indictment; 60 A. D. 440, as to certainty with which indictment should describe stolen property.

17 AM. DEC. 563, STATE v. ORRELL, 12 N. C. (1 DEV. L.) 139.

Sufficiency of indictment.

Cited in reference notes in 34 A. D. 121, on what caption of indictment should show; 82 A. S. R. 808, on necessity of showing time of offense in indictment; 56 A. D. 418, on alleging day certain in indictment.

Cited in note in 3 A. S. R. 280, on sufficiency of charging part of indictment.

— For homicide.

Cited in *State v. Haney*, 67 N. C. 467, holding charge in indictment that "of said mortal wound deceased did languish, and then and there die," sufficient; *State v. Pate*, 121 N. C. 659, 28 S. E. 354, holding indictment charging killing on certain date, not fatally defective where evidence showed deceased was wounded that day but died later; *State v. Huff*, 11 Nev. 17, on defectiveness of indictment for murder which fails to show death occurred within year and day.

Cited in reference notes in 65 A. D. 505, on sufficiency of indictment for murder; 65 A. D. 505, on necessity of stating time of death in indictment for murder.

Cited in notes in 3 L.R.A.(N.S.) 1022, on charge of time of death in indictment for homicide; 3 L.R.A.(N.S.) 1020, on charge of time of act causing death in indictment for homicide; 3 L.R.A.(N.S.) 1028, on charge of place of death in indictment for homicide.

Variance between indictment and proof.

Cited in reference notes in 4 A. S. R. 264, on variance as to time in indictment; 56 A. D. 418, on confining proof to day named in indictment.

Cited in note in 3 L.R.A.(N.S.) 1024, on correspondence between allegation and proof of time of death in prosecution for homicide.

Time of death in homicide case.

Cited in *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579, on rule in murder cases as to death of party within year and day after receiving wound.

17 AM. DEC. 565, BUFFERLOW v. NEWSOM, 12 N. C. (1 DEV. L.) 208.

Estoppel as to title to land.

Cited in *Grandy v. Bailey*, 35 N. C. (13 Ired. L.) 221, holding widow in possession estopped to deny title derived under husband's deed; *Doe ex dem. Gorham v. Brenon*, 13 N. C. (2 Dev. L.) 174, holding widow continuing in possession bound by sheriff's deed to another, under execution against husband; *Norwood v. Marrow*, 20 N. C. (4 Dev. & B. L.) 442, holding party claiming under husband, estopped from denying husband's title, to defeat wife's dower; *Wilson v. James*, 79 N. C. 349, holding slave entering into possession as tenant of another, estopped from denying other's title; *Brewster v. Striker*, 1 E. D. Smith, 321, holding heirs in possession estopped from showing legal estate in executors.

Cited in reference note in 39 A. D. 334, on tenant's right to dispute landlord's title during tenancy.

Cited in note in 49 A. D. 386, on estoppel as to heirs of a grantor.

Adverse possession of highway.

Cited in note in 26 L.R.A. 452, on acquiring of title to highway by prescription.

Possession of widow—As continuance of husband's possession.

Cited in *Love v. McLure*, 99 N. C. 290, 6 S. E. 247, holding vendor of land to husband who has paid price cannot recover possession from widow; *Den ex dem. Williams v. Bennett*, 26 N. C. (4 Ired. L.) 122, holding lessor of mortgagee may eject widow of mortgagor continuing in possession.

—As possession of heirs.

Cited in *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777, holding possession of widow under homestead inures to benefit of heirs.

17 AM. DEC. 567, JONES v. HUGGINS, 12 N. C. (1 DEV. L.) 223.**Evidence as to handwriting.**

Cited in reference notes in 28 A. D. 324; 35 A. D. 732,—on evidence as to handwriting; 22 A. D. 776, on competency of witness whose name has been forged.

Cited in note in 63 L.R.A. 984, on competency of witnesses to ancient hand-writings.

Survey as evidence.

Cited in reference notes in 39 A. D. 686, on ancient survey as evidence; 44 A. D. 135, on admissibility in evidence of survey of land.

Private map as evidence.

Cited in *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. 152; *Dobson v. Whisenant*, 101 N. C. 645, 8 S. E. 126,—holding private map inadmissible as evidence *per se*; *Riddle v. Germanton*, 117 N. C. 387, 23 S. E. 332, on admissibility of town map as evidence.

Declarations of party as evidence.

Cited in *Dancy v. Sugg*, 19 N. C. (2 Dev. & B. L.) 515, holding declaration of party as to boundary line, not evidence for person claiming under party; *Chaney v. State*, 31 Ala. 342, holding declarations of prisoner inadmissible as evidence for himself; *Snoddy v. Kreutch*, 3 Head, 301, holding mere claim of ownership insufficient to establish title.

17 AM. DEC. 569, PEARSON v. NESBIT, 12 N. C. (1 DEV. L.) 315.**Same person acting in different capacities.**

Cited in *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173, 22 A. S. R. 868, 11 S. E. 1049, holding negotiated promissory note made payable to maker for purpose of raising money thereon, valid; *Justices v. Armstrong*, 14 N. C. (3 Dev. L.) 284; *Justices v. Bonner*, 14 N. C. (3 Dev. L.) 289,—holding bond in which an obligor is an obligee, void; *Eason v. Billups*, 65 N. C. 216, holding order referring matters in controversy, without consent of parties, to attorney of one, error.

Cited in reference note in 42 A. D. 406, on right of same person to be both obligor and obligee in same undertaking or both plaintiff and defendant in the same action.

—As plaintiff and defendant.

Cited in *McElhanon v. McElhanon*, 63 Ill. 457, holding assignee in bankruptcy cannot bring action against himself and surety on bond; *Sweetland v. Porter*, 43 W. Va. 189, 27 S. E. 352, sustaining demurrer to declaration wherein one of plaintiffs is one of defendants; *Newsom v. Newsom*, 26 N. C. (4 Ired. L.) 381, holding judgment obtained by portion of children against administrator, void

where estate was left to all; *State v. Bean*, 44 N. C. (Busbee, L.) 318, holding surety on official bond cannot, as relator sue co surety for default of principal; *Bem v. Shoemaker*, 7 S. D. 510, 64 N. W. 544, on administrator suing himself on undertaking on appeal; *Monmouth Invest. Co. v. Means*, 80 C. C. A. 527, 151 Fed. 159, on executor suing coexecutor for benefit of estate.

Cited in reference notes in 34 A. D. 257, on same party as plaintiff and defendant; 55 A. D. 143, on right to be both plaintiff and defendant in the same cause.

Necessity of parties to have adjudication.

Cited in *Skinner v. Moore*, 19 N. C. (2 Dev. & B. L.) 138, 30 A. D. 155, on necessity of parties to have adjudication.

Setting aside improper judgment or decree, proper remedy.

Cited in *Larkins v. Bullard*, 88 N. C. 35, holding irregular judgment taken against infant defendants may be set aside eight years later; *England v. Garner*, 84 N. C. 212, holding new action commenced by summons, proper remedy to test validity of final decree; *Arrowood v. Greenwood*, 50 N. C. (5 Jones, L.) 414, holding writ of error proper remedy where suit was dismissed for want of a prosecution bond, although a sufficient bond had been filed.

17 AM. DEC. 571, STATE v. YOUNGER, 12 N. C. (1 DEV. L.) 357.

Criminality of conspiracy.

Cited in *State v. Wilson*, 121 N. C. 650, 28 S. E. 416, holding conspiracy to procure sexual intercourse with woman through sham marriage, indictable offense; *State v. Howard*, 129 N. C. 584, 40 S. E. 71, holding conspiracy with intent to defraud, indictable; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840, on gist of action being conspiracy in criminal prosecution for conspiring.

Cited in reference notes in 21 A. D. 154; 40 A. D. 531,—as to what constitutes conspiracy; 27 A. D. 376; 41 A. D. 84,—on indictable acts of conspiracy.

Cited in note in 51 A. D. 83, 88, on nature of conspiracy.

Indictment for conspiracy.

Cited in *United States v. Dennee*, 3 Woods, 47, Fed. Cas. No. 14,948, holding indictment for conspiring to do unlawful act, good, without averring means of effecting same; *State v. Brady*, 107 N. C. 822, 12 S. E. 325, holding same as to conspiring to cheat and defraud; *State v. Van Pelt*, 136 N. C. 633, 68 L.R.A. 760, 49 S. E. 177, 1 A. & E. Ann. Cas. 495, holding that indictment charging receipt of notice that union carpenters would not work material from prosecutor's shop does not charge conspiracy.

17 AM. DEC. 573, STATE v. MUMFORD, 12 N. C. (1 DEV. L.) 519.

What constitutes perjury.

Cited in reference note in 28 A. D. 345, on what constitutes perjury.

Indictment for perjury.

Cited in reference notes in 28 A. S. R. 915, on sufficiency of indictment for perjury; 48 A. D. 703; 56 A. D. 160,—on what indictment for perjury must allege.

—Sufficiency of, as to materiality of evidence.

Cited in *State v. Wakefield*, 9 Mo. App. 326, holding allegation in indictment for perjury that it was material matter in examination of cause, sufficient; *State v. Davis*, 69 N. C. 495, holding general allegation that question became

material in indictment for perjury, sufficient; *Kiser v. People*, 211 Ill. 407, 71 N. E. 1035, holding indictment for perjury which alleges certain false testimony to be material, without stating particular application thereof, sufficient; *State v. Holden*, 48 Mo. 93, holding allegation that "said evidence was material to issues," insufficient in indictment for perjury; *Smith v. State*, 1 Tex. App. 620, holding averment that accused swore falsely as to position of party assaulting another, insufficient to show testimony was material.

Cited in note in 124 A. S. R. 667, on necessity of allegation of facts showing materiality of testimony in indictment for perjury.

— **As to false swearing.**

Cited in *King v. State*, 103 Ga. 263, 30 S. E. 30, holding indictment for perjury alleging that certain testimony therein set forth was false, sufficient; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817, on necessity of state proving what was sworn to by accused falsely, on indictment for perjury.

Cited in notes in 85 A. D. 498, on alleging materiality of false swearing in indictment for perjury; 124 A. S. R. 671, on allegation of falsity of testimony in indictment for perjury; 85 A. D. 498, on negating false matter in indictment for perjury.

17 AM. DEC. 576, GUYNNE v. CINCINNATI, 3 OHIO, 24.

Right to dower.

Cited in *Wheeler v. Kirtland*, 27 N. J. Eq. 534, holding wife has interest in award paid for condemned land, by reason of inchoate right of dower; *Re Alexander*, 53 N. J. Eq. 96, 30 Atl. 817, on inchoate right of dower.

Cited in reference note in 68 A. S. R. 432, on dower in lands given for public uses.

Cited in note in 18 L.R.A. 79, on wife's right of dower in lands dedicated or condemned to public use.

— **When barred or lost.**

Cited in *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493, holding dedication to railway company of right of way through land bars widow's dower; *Weaver v. Gregg*, 6 Ohio St. 547, 67 A. D. 355; *Haggerty v. Wagner*, 148 Ind. 625, 39 L.R.A. 384, 48 N. E. 366,—holding wife of cotenant in partition suit loses dower on sale resulting from suit; *Duncan v. Terre Haute*, 85 Ind. 104, holding grant of land by husband to municipal corporation for use as street bars wife's dower; *Steel v. Board of Education*, 1 Ohio Dec. 276, 31 Ohio L. J. 84, holding widow not entitled to dower in real estate granted to board of education for school purposes; *Little Miami R. Co. v. Jones*, 3 Ohio Dec. Reprint, 219, holding widow not entitled to dower in property condemned by statute, on full compensation to husband; *Arnold v. Buffalo, R. & P. R. Co.* 32 Pa. Super. Ct. 452, holding wife loses inchoate dower on construction of public railroad over husband's land; *Blevins v. Smith*, 104 Mo. 583, 13 L.R.A. 441, 16 S. W. 213, on sale under tax judgment barring dower of widow not party to suit; *Baker v. Atchison, T. & S. F. R. Co.* 122 Mo. 396, 30 S. W. 301 (dissenting opinion), on conveyance of land to grantee, who conveyed to railroad company for right of way, barring widow's dower.

17 AM. DEC. 577, ZERBY v. WILSON, 3 OHIO, 42.

Subscribing witness to writing as witness to prove execution.

Cited in *Gaines v. Scott*, 7 Ohio C. C. 447, 4 Ohio, C. D. 673, holding assign-

ment inadmissible, because not proved by testimony of subscribing witness; *Warner v. Baltimore & O. R. Co.* 31 Ohio St. 265, holding subscribing witness to release must be called, or absence accounted for, before examining other witnesses; *Garrett v. Hanshue*, 53 Ohio St. 482, 35 L.R.A. 321, 42 N. E. 258, on necessity of calling or accounting for absence of subscribing witness, to prove execution of writing.

Cited in reference note in 29 A. D. 249, on necessity of producing subscribing witness to instrument to prove its execution.

Cited in note in 35 L.R.A. 346, 347, on admissions by adverse party dispensing with necessity of calling subscribing witnesses to instrument.

Distinguished in *Simmons v. State*, 7 Ohio, pt. 1, p. 116, holding subscribing witness to note need not be called on indictment for forging said note.

17 AM. DEC. 579, WILKINS v. PHILIPS, 3 OHIO, 49.

Statute of limitations affecting all of same interest.

Cited in *Massie v. Matthews*, 12 Ohio, 351, holding right to review decree saved by statute of limitations to one inures to benefit of all; *Sturges v. Longworth*, 1 Ohio St. 544, holding rights of defendant saved by statute of limitations inures to benefit of codefendant, where interests are joint and inseparable; *Snider v. Young*, 72 Ohio St. 494, 74 N. E. 822, holding proceeding in error commenced within limitation of statute as to part, commenced as to all united in interest; *Secor v. Witter*, 39 Ohio St. 218, holding partner omitted from petition in error, allowed to come in after time for filing petition has elapsed; *Moore v. Armstrong*, 10 Ohio, 11, 36 A. D. 63, holding disability which under limitation act saves estate of heir does not protect other heirs; *Trimble v. Longworth*, 13 Ohio St. 431, holding disability which under statute gives heir right to review does not inure to benefit of heirs otherwise barred; *Roll v. Riddle*, 5 Ohio Dec. Reprint, 232, holding action by heirs to recover possession of real estate not barred by statute, where one is infant; *Moore v. Chittenden*, 39 Ohio St. 563 (dissenting opinion), on service on one defendant saving case as to all.

Cited in reference note in 44 A. D. 328, on running of limitations against one cotenant only.

Cited in note in 49 A. S. R. 713, on effect of disability of one of several persons entitled jointly to seek review of judgment.

Not followed in *Shannon v. Dunn*, 8 Blackf. 182; *Moore v. Capps*, 9 Ill. 315,—holding right to writ of error saved by statute to infant plaintiff does not inure to benefit of plaintiffs otherwise barred.

17 AM. DEC. 580, RHODES v. LINDLY, 3 OHIO, 51.

Negotiability of note.

Cited in *White v. Richmond*, 16 Ohio, 5 (dissenting opinion), on negotiability of note for certain sum "in current funds of state."

Cited in reference notes in 38 A. D. 433, on negotiability of note payable in something other than money; 25 A. D. 455, on note payable in merchandise.

Cited in note in 125 A. S. R. 197, on effect of provision for payment in other commodities than money on negotiability of instruments.

Distinguished in *Fallis v. Griffith, Wright* (Ohio) 303, on negotiability of note.

17 AM. DEC. 581, POTTS v. RIDER, 3 OHIO, 70.

Rights and liabilities of agent covenanting in individual name.

Cited in *Miller v. Beebe, Wright* (Ohio) 431, holding party with whom covenant was made to pay others certain sums may sue thereon; *Lockwood v. Gilson*, 12 Ohio St. 526, holding grantor described as administratrix of another, but covenanting individually, individually liable on covenant.

Cited in reference note in 29 A. D. 567, as to when agent must sue on contract in his name.

17 AM. DEC. 582, BURNET v. CINCINNATI, 3 OHIO, 73.

Equitable jurisdiction—To restrain collection of tax.

Cited in *Commercial Bank v. Bowman*, 1 Handy (Ohio) 246, holding equity will restrain county treasurer from collecting tax illegally assessed; *Jones v. Gerke*, 2 Cin. Sup. Ct. Rep. 500, holding equity will restrain collection of illegal assessment by county treasurer for improving village street; *Culbertson v. Cincinnati*, 16 Ohio, 574, holding equity empowered to restrain collection of tax levied by city council without authority; *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 3,275, holding equity cannot restrain municipal corporation from collecting tax under void ordinance, on single property holder's complaint; *Clayton v. Lafargue*, 23 Ark. 137, holding equity not authorized to restrain collection of taxes alleged to be erroneously assessed upon land; *Williams v. Detroit*, 2 Mich. 560, holding equity not empowered to restrain collection of authorized assessment by common council; *English v. Smock*, 34 Ind. 115, 7 A. R. 215, holding equity will enjoin commissioners from issuing bonds, where interest-paying period is contrary to statute; *Carroll v. Perry*, 4 McLean, 25, Fed. Cas. No. 2,456, holding Federal court cannot restrain county treasurer from granting deeds of property sold for taxes; *Hallenbeck v. Hahn*, 2 Neb. 377 (dissenting opinion), on power of equity to restrain collection of tax; *Floyd v. Gilbreath*, 27 Ark. 675 (dissenting opinion), on power of equity to restrain collection of illegal taxes; *Stephan v. Daniels*, 27 Ohio St. 527, on recovering amount paid county treasurer on illegal assessment.

Cited in reference notes in 17 A. D. 608; 56 A. D. 355,—on injunction to restrain collection of taxes; 63 A. D. 86, on injunction against tax sale.

Cited in notes in 20 L. ed. U. S. 66, as to when injunction to restrain collection of tax will be granted; 22 L.R.A. 707, on injunction against collection of illegal taxes; 69 A. D. 199, on right to enjoin collection of taxes and assessments.

Distinguished in *Cincinnati Gaslight & Coke Co. v. Bowman*, 1 Handy (Ohio) 289, holding equity not empowered to restrain county treasurer from collecting alleged illegal state tax.

—As to cloud upon title.

Cited in *Dickerson v. Nelson*, 4 Ind. 160, holding equity will enjoin levying of execution on land which will cast cloud on title; *Tear v. Mathews, Wright* (Ohio) 371, holding equity will restrain casting of cloud upon title by levy thereon as property of another; *Dean v. Madison*, 9 Wis. 402, holding action maintainable to set aside tax certificates as cloud upon title; *Riddle v. Bryan*, 5 Ohio, 48, holding equity has jurisdiction of bill to quiet title of certain land; *Rhea v. Dick*, 34 Ohio St. 420,—holding party in possession may maintain action to quiet title against another claiming adverse interest; *Logan v. Clough*, 2 Colo. 323, on power of equity to restrain probate judge from casting cloud upon title by sale of property; *Harvey v. Jones*, 1 Disney (Ohio) 65, on construction of statute in reference to holder of legal title filing petition against another claimant.

Cited in note in 8 L.R.A. 729, on preventive remedy in equity against casting cloud on title.

Distinguished in *Wabash R. Co. v. Toledo & W. Elevator Co.* 7 Ohio N. P. 198, on maintaining suit in equity to quiet title.

17 AM. DEC. 585, BACKUS v. MCCOY, 3 OHIO, 211.

Followed without discussion in *Spurk v. Vangundy*, 3 Ohio, 307; *Robinson v. Neil*, 3 Ohio, 525.

Covenant in deed.

Cited in *Wade v. Comstock*, 11 Ohio St. 71, on liability of grantor warranting title and subsequently defeating same.

Cited in reference note in 43 A. D. 597, on effect of covenant of seisin.

Cited in notes in 47 A. D. 570, on covenants of seisin; 125 A. S. R. 446, on what satisfies a covenant of seisin.

Distinguished in *Brandt v. Foster*, 5 Iowa, 287, holding covenant of seisin means covenantor is seised of indefeasible estate.

— When passes with land.

Cited in *Dickson v. Desire*, 23 Mo. 151, 66 A. D. 661, holding covenant of seisin inures to benefit of subsequent transferee in possession at time of breach; *Wead v. Larkin*, 54 Ill. 489, 5 A. R. 149, holding covenant of warranty by one not in possession passes to second grantee, whose grantor took possession; *Richard v. Bent*, 59 Ill. 38, 14 A. R. 1, holding remote grantee may maintain action against original grantor upon covenant against encumbrances; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317, 7 A. R. 197, holding same as to covenant of seisin; *King v. Kerr*, 5 Ohio, 154, 22 A. D. 777, holding covenant of warranty passes to assignee of remote grantee, where no eviction intervenes; *Gardner v. Letson*, 5 Ohio N. P. 112, 8 Ohio S. & C. P. Dec. 256, holding covenant against encumbrances run with land until encumbrances are removed; *Foot v. Burnet*, 10 Ohio, 317, 36 A. D. 90, holding covenant against encumbrances runs with land, entitling remote grantee to recover for breach; *Lescateet v. Rickner*, 16 Ohio C. C. 461, 9 Ohio C. D. 422, holding covenant against encumbrances runs with land and goes to devisee.

Cited in reference notes in 36 A. D. 94, on what covenants run with land; 49 A. D. 444, on covenants of seisin running with land.

Cited in notes in 56 A. R. 167, on covenants of seisin running with the land; 82 A. S. R. 685, on covenants of seisin and right to convey running with the land.

Distinguished in *Beddoe v. Wadsworth*, 21 Wend. 120, holding assignee of covenants may maintain action thereon upon eviction although original grantor had no title; *Boyd v. Belmont*, 58 How. Pr. 513, holding covenant against encumbrances passes with land, enabling assignee to bring action thereon.

— When does not pass with land.

Cited in *Pike v. Galvin*, 29 Me. 183, holding covenant of warranty will not run with land where covenantor was not seised of fee simple; *Devore v. Sunderland*, 17 Ohio, 52, 49 A. D. 442, holding remote grantee cannot recover against original grantor, conveying without possession, for breach of covenant of seisin; *Mains v. Henkle*, 2 Ohio Dec. Reprint, 530, holding covenants do not run with land where, because of lack of possession, only an equity is conveyed.

Cited in reference note in 44 A. D. 534, on covenants of seisin and right to convey as mere personal covenants that can not be assigned.

Distinguished in *St. Clair v. Williams*, 7 Ohio, pt. 2, p. 110, holding right of action on covenant of warranty does not pass to widow holding life estate

When covenant broken.

Cited in *Doyle v. Teas*, 5 Ill. 202, on breach of covenant in deed; *Chapman v. Kimball*, 7 Neb. 399, holding covenant against encumbrances broken at time of conveyance where lien for taxes exists; *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, holding covenant of seisin broken immediately where covenantor held only life estate; *Gest v. Kenner*, 2 Handy (Ohio) 86; *Scott v. Twiss*, 4 Neb. 133, holding covenant of seisin in conveyance from grantor having possession under claim of title, unbroken while grantee remains unevicted.

Cited in reference notes in 50 A. D. 766, on what constitutes breach of covenant of seisin; 25 A. S. R. 711, as to when covenant of seisin in deed is broken.

Cited in notes in 125 A. S. R. 448, 452, 453, as to when breach of covenant of seisin occurs; 6 L.R.A. 360, 361, on what is breach of covenant of seisin.

When action for breach of covenant lies.

Cited in *Betz v. Bryan*, 39 Ohio St. 320, 10 Ohio L. J. 263, holding original grantee cannot sue grantor for breach of covenants broken, after property has passed to another; *Williams v. Holcomb*, 4 Ohio L. J. 1147, holding mortgagee of grantee proper party to sue for breach of warranty on eviction of mortgagor.

Cited in note in 17 L.R.A. (N.S.) 1187, on necessity of eviction to maintenance of action for breach of covenant of seisin or right to convey.

Distinguished in *Shell v. Evans*, 6 Ohio N. P. 230, 7 Ohio S. & C. P. Dec. 501, holding proof of eviction unnecessary in action for breach of covenant, where covenantor was not seized at time of conveyance; *Stanbaugh v. Smith*, 23 Ohio St. 584, holding proof of eviction unnecessary in action on covenant against encumbrances.

Who may sue for breach of covenant.

Cited in notes in 15 E. R. C. 250, on who can take advantage of covenants running with the land; 14 L.R.A. (N.S.) 515, on right of remote grantee to sue for breach of covenant when covenantor had neither title nor possession.

Seisin in fact as sustaining covenant.

Cited in *Watts v. Parker*, 27 Ill. 224, holding seisin in fact will sustain covenant that grantor is seised of estate in fee simple; *Parker v. Brown*, 15 N. H. 176, holding seisin in fact, without good title, will not support covenants of seisin in fee; *Barker v. Blanchard*, 5 Ohio N. P. 398, 7 Ohio S. & C. P. Dec. 537, on seisin in fact sustaining covenant in deed.

Measure of damages for breach of covenant.

Cited in *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518, holding measure of damages for breach of covenant of seisin is consideration with interest; *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498, holding measure of damages for breach of covenant of warranty is consideration paid and interest; *Vail v. Junction R. Co.* 1 Cin. Sup. Ct. Rep. 571, holding damages for breach of covenants in deed recoverable by assignee thereof are measured by consideration actually paid and interest; *McAlpin v. Woodruff*, 11 Ohio St. 120, holding measure of damages for eviction from one third of demised premises is one third of rent payable under lease; *King v. Kerr*, 5 Ohio, 154, 22 A. D. 777, holding measure of damages for breach of covenant of warranty is consideration received by warrantor and interest; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004, holding measure of damages for breach of covenants in lease is consideration paid for lease, with interest; *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, holding vendee allowed for permanent improvements and taxes, with purchase money and interest, on breach of covenant of seisin; *Mecklem v. Blake*, 22 Wis. 495, 99 A.

D. 68, holding grantee can recover only nominal damages for breach of covenant of seisin without eviction; *Davis v. Smith*, 5 Ga. 274, 48 A. D. 279; *Allen v. McCoy*, 8 Ohio, 418, on damages for breach of covenant of seisin; *Eaton v. Lyman*, 30 Wis. 41 (dissenting opinion), on right to maintain action for nominal damages for breach of covenants in deed.

Cited in reference notes in 39 A. D. 597, on measure of damages for breach of covenant of seisin; 66 A. D. 670, on measure of damages for breach of warranty of title to land.

Cited in notes in 99 A. D. 73, on measure of damages for breach of covenant of seisin or good right to convey; 125 A. S. R. 458, on measure of damages for breach of covenant of seisin; 125 A. S. R. 464, on measure of damages for partial breach of covenant of seisin.

17 AM. DEC. 590, DIXON v. EWING, 3 OHIO, 280.

When relation of principal and surety exists.

Cited in *Commercial Bank v. Western Reserve Bank*, 11 Ohio, 444, 38 A. D. 739, holding relation of principal and surety continues after judgment.

Cited in note in 68 L.R.A. 566, on judgment against principal and surety as merger of relation.

Distinguished in *Findlay v. Bank of United States*, 2 McLean, 44, Fed. Cas. No. 4,791, holding judgment against accommodation indorser, as surety, and drawer, merges relation of principal and surety.

Rights of sureties.

Cited in notes in 54 A. S. R. 258, on right of sureties to equitable relief against judgment, decree, or other judicial determination; 30 L.R.A. 567, on injunction on behalf of surety against judgment for matters arising subsequently to their rendition.

Discharge of surety by act of creditor.

Cited in *Dunham v. Downer*, 31 Vt. 249, holding extending time of payment of judgment against maker of note by holder discharges sureties; *La Farge v. Herter*, 11 Barb. 159, holding taking mortgage from principal, in full payment of judgment, discharges surety.

Cited in reference notes in 29 A. D. 226, on what acts of creditor discharge surety; 20 A. D. 179; 33 A. D. 521; 42 A. D. 529; 46 A. D. 434,—on surety's release by indulgence to principal.

—By releasing principal, or abandoning levy on his property.

Cited in *Hubbell v. Carpenter*, 5 Barb. 520, holding agreement to release principal debtor from obligation discharges surety; *Hawkins v. Mims*, 36 Ark. 145, 38 A. R. 30, holding release and subsequent insolvency of imprisoned receiver, without payment, with assent of creditor, will not discharge surety; *Hyde v. Rogers*, 59 Wis. 154, 17 N. W. 127, on release of principal debtor's property discharging surety; *Day v. Ramey*, 40 Ohio St. 446, holding abandonment of levy on principal debtor's land discharges nonconsenting surety to that extent; *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351, holding release of debtor's property from judgment on note discharges nonconsenting accommodation indorser *pro tanto*; *Maquoketa v. Willey*, 35 Iowa, 323, holding consent to release of property from levy by principal discharges surety in proportion to value of property; *Sherraden v. Parker*, 24 Iowa, 28, holding release of personal property of principal judgment debtor from levy discharges surety not consenting.

—By releasing cosurety.

Cited in *Rice v. Morton*, 19 Mo. 263, holding releasing surety from execution to extent of portion of debt discharges cosurety to same extent.

17 AM. DEC. 591, MCCOY v. GALLOWAY, 3 OHIO, 282.

Parol evidence as to land intended.

Cited in *Lamar v. Minter*, 13 Ala. 31, holding parol evidence inadmissible to show that larger portion than that mentioned in deed was intended; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668, holding parol evidence inadmissible to substitute call for monument in place of original monument in conveyance; *Stroud v. Springfield*, 28 Tex. 649, holding common reputation in neighborhood with regard to boundaries, inadmissible when not limited to time *ante litem motam*; *Guilmartin v. Wood*, 76 Ala. 204, on admissibility of parol evidence in reference to description in deed.

Cited in reference note in 70 A. D. 61, on parol evidence to identify boundary.

Courses and distances as controlling.

Cited in *Pollard v. Shively*, 5 Colo. 309, holding monuments relied upon to control courses and distances must be bound as called for; *Riley v. Griffin*, 16 Ga. 141, 60 A. D. 726, holding natural object better evidence than courses and distances in identifying land; *Britton v. Ferry*, 14 Mich. 53, holding quarter posts set by virtue of land laws govern in preference to boundaries by courses and distances; *Neff v. City & Suburban Bldg. & Loan Co.* 1 Ohio N. P. 96, 1 Ohio Dec. 120, on corner standing where course and distance lead.

Cited in reference notes in 34 A. D. 106, as to which boundaries will prevail; 88 A. D. 701, on monuments or natural objects as controlling courses, distances, quantity, and description.

17 AM. DEC. 594, HARLAN v. READ, 3 OHIO, 285.

Defenses to note.

Cited in *Pulsifer v. Hotchkiss*, 12 Conn. 234, holding defendant in action on note cannot plead partial failure of consideration because of false representations; *State v. Collins*, 6 Ohio, 126, on partial failure of consideration of note constituting no defense at law.

Cited in reference note in 33 A. S. R. 247, on fraud as defense to negotiable instrument.

Cited in note in 39 A. D. 595, on result where part consideration for note is void and part valid.

17 AM. DEC. 595, GIST v. LYBRAND, 3 OHIO, 307.

Place of demand.

Cited in reference note in 45 A. D. 467, as to place of demand of payment of note when maker does not live at place of date.

Effect of maker's removal from state.

Cited in reference notes in 59 A. D. 178, on removal of maker as excusing demand of payment; 37 A. D. 456, on abscondence of maker of note as affecting necessity for demand to hold indorser; 39 A. D. 736, on maker's waiver of demand.

Cited in note in 13 A. D. 346, on effect of maker's removal from state before maturity of note.

Notice by mail.

Cited in reference notes in 35 A. D. 214, on notice to drawer or indorser by mail; 36 A. D. 127, on notice by mail of nonpayment of note; 38 A. D. 460, on effect of notice by mail to indorser; 27 A. D. 508; 38 A. D. 291; 35 A. R. 487,—on sufficiency of notice by mail to indorser of note.

Cited in note in 43 A. D. 226, on sufficiency of notice of protest by mail to indorser living at two places alternately.

17 AM. DEC. 597, DABNEY v. MANNING, 3 OHIO, 321.**Title to property.**

Cited in *Steele v. Farber*, 37 Mo. 71, holding lawful possession of property passes to mortgagee with power of sale.

—Executor's title under will.

Cited in *Williams v. Veach*, 17 Ohio, 171, 49 A. D. 453, holding power to sell real estate conferred upon executors vests property in fee simple in executors; *Roberts v. Roberts*, 1 Disney (Ohio) 177, holding devise of property to wife for life, to be managed by executors, gives executors right of possession; *Barkman v. Hain*, 5 Ohio, N. P. 508, 5 Ohio S. & C. P. Dec. 474; *Elstner v. Fife*, 32 Ohio St. 358,—holding title to property directed to be sold by executors for benefit of legatees passes to testators heirs, subject to execution of power; *Simmons v. Spratt*, 26 Fla. 449, 9 L.R.A. 343, 8 So. 123, holding provision that residue be divided between children does not vest legal title thereto in executors; *Neff v. Neff*, 3 Ohio Dec. Reprint, 75, holding executors directed by will to sell property at earliest period deemed proper hold as trustees; *Clark v. Hornthal*, 47 Miss. 434, on power to sell surviving to executor where coexecutor failed to qualify.

Cited in reference notes in 22 A. D. 567, on estate of executors in lands which will provided shall be sold; 33 A. D. 98, on effect of power of sale given to executor; 49 A. D. 458, as to when executors take an interest in land intrusted to them to sell.

—Under irregular court order.

Cited in *Ewing v. Higby*, 7 Ohio pt. 1, p. 198, 28 A. D. 633, holding purchaser of property under irregular court order holds good title until order reversed; *Blitz v. Moran*, 17 Colo. App. 253, 67 Pac. 1020, on validity of title conveyed by commissioner erroneously appointed by court.

Effect of reversal on rights of parties.

Cited in reference notes in 26 A. D. 415, on rights of parties on reversal of judgment; 54 A. D. 455, on reversal of erroneous judgment as affecting rights of third persons acquired thereunder; 29 A. D. 372, on conclusiveness of erroneous judgments until reversed.

Statute of uses.

Cited in note in 78 A. D. 409, on construction of statute of uses regarding special or active trusts.

17 AM. DEC. 601, WINTHROP v. HUNTINGTON, 3 OHIO, 327.**Recovery for improvements on eviction.**

Cited in *Raymond v. Ross*, 4 Ohio Dec. Reprint, 578, holding person in possession without title cannot recover for improvements after eviction.

Cited in note in 15 A. D. 353, on rule in equity as to compensation for improvements.

Distinguished in *McClaskey v. Barr*, 62 Fed. 209, 1 Ohio F. D. 76, holding cotenants in possession, claiming full ownership, entitled in partition to improvements made.

Lien for money advanced to intestate.

Cited in *Lieby v. Ludlow*, 4 Ohio, 469, holding person advancing money to pay intestate's debts acquires no lien on intestate's land in hands of heir.

17 AM. DEC. 603, TAYLOR v. BOYD, 3 OHIO, 237.

Divesting of title by decree.

Cited in reference note in 59 A. D. 667, on effect of decree in equity to divest legal title to real property.

Cited in notes in 36 A. D. 38, as to when title divested by judgment or decree *per se*; 25 A. D. 610, on vesting of title in purchaser at sheriff's sale.

Effect of reversal on appeal.

Cited in reference notes in 28 A. D. 371, on restitution of property from third parties on reversal of judgment; 71 A. D. 688, on effect of reversal of judgment on sale under execution; 54 A. D. 455, on reversal of erroneous judgment as affecting rights of third persons acquired thereunder.

Cited in notes in 96 A. S. R. 140, on restitution after reversal of judgment where purchasing plaintiff has transferred the bid or property to another; 96 A. S. R. 135, on loss of title by reversal of judgment where no sale or conveyance has been made; 56 A. S. R. 876, on doctrine of *lis pendens* as applied to appellate proceedings.

— On bona fide purchaser.

Cited in *Cheever v. Minton*, 12 Colo. 557, 13 A. S. R. 258, 21 Pac. 710, holding bona fide purchaser under final chancery decree, unaffected by subsequent reversal of decree on error; *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913; *Parker v. Courtney*, 28 Neb. 605, 26 A. S. R. 360, 44 N. W. 863,—holding bona fide purchaser under decree, unaffected by subsequent reversal; *Wingfield v. Neall*, 60 W. Va. 106, 116 A. S. R. 882, 10 L.R.A.(N.S.) 443, 54 S. E. 47, 9 A. & E. Ann. Cas. 982, holding grantee of purchaser at tax sale, unaffected by subsequent proceedings; *Pierce v. Stinde*, 11 Mo. App. 364, holding bona fide purchaser under judgment, unaffected by rights acquired under writ of error; *Union Bank v. Ames*, 37 Iowa, 672, holding bona fide purchaser under judgment rendered by default on service by publication unaffected by retrial; *Howard v. Entreken*, 24 Kan. 428, holding same as to subsequent vacation of judgment; *Wadhams v. Gay*, 73 Ill. 415, holding purchaser under decree confirming title, unaffected by subsequent reversal of decree, although party to appeal; *Mach v. Blanchard*, 15 S. D. 432, 91 A. S. R. 698, 58 L.R.A. 811, 90 N. W. 1042, holding dismissal of action on opening erroneous judgment, subsequent to execution of mortgage under same, nullifies mortgage; *Park Hill Co. v. Herriot*, 41 App. Div. 324, 58 N. Y. Supp. 552, holding purchaser from trustee under judgment, unaffected by subsequent contrary judgment of appellate court in another action; *McCormick v. McClure*, 6 Blackf. 466, 39 A. D. 441, holding writ to restore property sold to bona fide purchaser under chancery decree, subsequently reversed, overruled; *Rector v. Fitzgerald*, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808, holding title through mortgage given by grantee of successful litigant, unaffected by decree under bill of review subsequently filed; *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665, on title acquired by purchaser of property after judgment and before appeal.

Cited in note in 10 L.R.A. (N.S.) 444, on protection by *lis pendens* to one purchasing after decree and before any steps have been taken to review the same.

— On party to judgment purchasing and his vendee.

Cited in *Mullin v. Atherton*, 61 N. H. 20, holding attorney of successful party purchasing under judgment loses title on reversal of judgment; *Di Nola v. Allison*, 143 Cal. 106, 101 A. S. R. 84, 65 L.R.A. 419, 76 Pac. 976, holding title to land purchased by mortgagee at foreclosure, sold pending appeal, defeated on reversal of judgment; *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209, holding bona fide purchaser from party to suit who purchased under decree, unaffected by reversal of decree; *McAusland v. Pundt*, 1 Neb. 211, 93 A. D. 358, on right of party to suit purchasing under judgment to retain property on reversal.

Distinguished in *Marks v. Cowles*, 61 Ala. 299, holding subsequent reversal of erroneous decree defeats title of assignee of purchaser who is party to decree; *Singly v. Warren*, 18 Wash. 434, 63 A. S. R. 896, 51 Pac. 1066, holding grantee of judgment creditor purchasing at execution sale loses title upon subsequent reversal of judgment; *McBain v. McBain*, 15 Ohio St. 337, 86 A. D. 478, holding contract for conveyance to wife from purchaser under court order will not defeat effect of reversal.

Writ of error, nature of.

Cited in *State ex rel. Andrew v. Canfield*, 40 Fla. 36, 42 L.R.A. 72, 23 So. 591, on writ of error as new suit; *Webster v. Hastings*, 56 Neb. 245, 76 N. W. 565, holding writ of error a new action; *Allen v. Savannah*, 9 Ga. 286, holding that, as writ of error is an original suit, pendency thereof does not affect judgment of lower court; *Widler v. Superior Court*, 94 Cal. 430, 29 Pac. 870, on nature of writ of error.

Distinguished in *Galloway v. Stophlet*, 1 Ohio St. 434, on examining decrees in chancery upon writ of error as affected by statute.

Disapproved in *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100, holding writ of error not an original suit, requiring same notice to defendant required in original action.

17 AM. DEC. 607, McCOY v. CHILLICOTHE, 3 OHIO, 370.

Injunction against tax.

Cited in *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210, denying injunction to restrain collection of tax, in assessment of which irregularities appeared; *Youngblood v. Sexton*, 32 Mich. 406, 20 A. R. 654, denying injunction to restrain collection of personal tax; *Equitable Guarantee & T. Co. v. Donahoe*, 8 Del. Ch. 422, 45 Atl. 583, denying injunction to restrain collection of illegal personal tax, though complainant trustee or guardian; *Mechanics' & T. Branch of State Bank v. Debolt*, 1 Ohio St. 591, denying injunction to restrain collection of tax under unconstitutional statute; *Dean v. Madison*, 9 Wis. 402, granting equitable relief where illegal special tax is levied on property; *Loomis v. Spencer*, 1 Ohio St. 153, denying treasurer's liability in trespass for collecting tax rendered illegal by omission of persons prior to time treasurer's duty commenced.

Cited in reference notes in 56 A. D. 355, on injunction to restrain collection of taxes; 73 A. D. 380, as to whether injunction will lie against collection of tax.

Cited in notes in 69 A. D. 199, on right to enjoin collection of taxes and assessments; 22 L.R.A. 701, on injunction against collection of taxes because of mere illegality, irregularity, etc.; 22 L.R.A. 699, on injunction against collection of illegal taxes; 22 L.R.A. 708, on injunction against collection of illegal personal

tax; 20 L. ed. U. S. 65, 66, as to when injunction to restrain collection of tax will be granted.

Distinguished in *Cincinnati Gaslight & Coke Co. v. Bowman*, 1 Handy (Ohio) 289, granting injunction to restrain collection of illegal tax for general government; *Commercial Bank v. Bowman*, 1 Handy (Ohio) 246, granting injunction against collection of illegal taxes, where irreparable damage would result from its collection; *Jones v. Gerke*, 2 Cin. Sup. Ct. Rep. 500, allowing injunction to restrain collection of illegal tax for improvement of a street in city.

Injunction against arrest.

Cited in *Moses v. Mobile*, 52 Ala. 198, denying injunction to restrain municipal officers from arresting complainants for maintaining lotteries.

Separate repetition of trespass as ground for injunction.

Cited in *Chicago Public Stock Exchange v. McLaughry*, 148 Ill. 372, 36 N. E. 88, denying equitable relief for repeated trespass by same defendant, remedy at law being adequate.

Cited in note in 13 L.R.A.(N.S.) 180, on injunction against repeated trespass.

17 AM. DEC. 609, LUDLOW v. JOHNSON, 3 OHIO, 553.

Decedents' realty as assets for payment of debts.

Cited in *Paine v. Skinner*, 8 Ohio, 159, holding lands to have been withdrawn from administrator's hands between 1805 and 1808 in case of insolvent estate; *Harlan v. Roberts*, 2 Ohio Dec. Reprint, 473, on administrator's having no concern with realty at common law; *Stall v. Macalester*, 9 Ohio, 19; *Perry Twp. v. Board of Directors*, 2 Ohio, Dec. Reprint, 382,—on change in law as to administrators making no change in law as to guardians, in absence of special reference.

Cited in reference note in 21 A. D. 466, on real property as assets for payment of debts.

Validity of, and collateral attack on, proceedings.

Cited in *Beebe v. Scheidt*, 13 Ohio St. 406, on presumption in favor of jurisdiction in regard to courts of general jurisdiction; *Stell v. Glass*, 1 Ga. 475, holding orders of court of ordinary having jurisdiction, unimpeachable collaterally, in absence of fraud; *Wilson v. Wickersham*, 2 Ohio Dec. Reprint, 545, holding that, where record shows justice of peace had jurisdiction of subject-matter and of parties, he will be presumed to have acted properly; *Fisher v. Quillen*, 76 Ohio St. 189, 81 N. E. 182, denying that jurisdiction may be made to depend upon record's disclosure of facts to warrant exercise of court's authority; *Pillsbury v. Dugan*, 9 Ohio, 117, 34 A. D. 427, denying right to attack proceedings collaterally because proof of authority of attorney in fact did not appear in record; *McClaskey v. Barr*, 54 Fed. 781, holding that court of common pleas, after passing on matter referred by probate court, has no further jurisdiction; *Fravert v. Finrock*, 43 Ohio St. 335, 1 N. E. 875, holding proceedings to establish township road void, where record failed to show sufficient notice of presentation of petition.

Cited in note in 21 L.R.A. 854, on collateral attack on judgment obtained on unauthorized appearance by attorney.

— Order for judicial sale generally.

Cited in *Maple v. Nelson*, 31 Iowa, 322, holding sheriff's sale for one-sixth of appraised value void, statute requiring price to be two thirds of value; *Cavender v. Smith*, 1 Iowa, 306, holding sheriff's failure to sell personalty first, as required by statute, does not vitiate purchaser's title to realty acquired at execution sale.

— Sale by administrator.

Cited in *Sheldon v. Newton*, 3 Ohio St. 494, holding that administrator's sale under order of court having jurisdiction cannot be impeached collaterally; *Cadwallader v. Evans*, 1 Disney (Ohio) 585, holding that judgment of common pleas having jurisdiction over administration of decedent's realty, cannot be attacked collaterally for irregularities; *Averill v. Jackson City Bank*, 114 Mich. 20, 72 N. W. 15, holding that administrator's sale, duly confirmed, cannot be attacked collaterally because of irregularity in notice of sale; *Welsh v. Perkins*, 8 Ohio, 52; *Ewing v. Higby*, 7 Ohio, pt. 1, p. 198, 28 A. D. 633; *Ludlow v. Wade*, 5 Ohio, 494,—holding that court orders authorizing administrator's sales of realty afford purchaser as ample protection as judgments; *Norman v. Olney*, 64 Mich. 553, 31 N. W. 555, holding probate court's failure to require bond on sale of realty, insufficient to affect rights of bona fide purchaser; *Bank of Muskingum v. Carpenter*, 7 Ohio, pt. 1, p. 21, 28 A. D. 616, holding that purchasers at administrator's sale under court order, upon payment, hold land discharged of liens; *Campau v. Gillett*, 1 Mich. 416, 53 A. D. 73, holding license granting administratrix power to sell realty for payment of debts, rendered void by repeal, before sale, of statute authorizing it; *Perry v. Clarkson*, 16 Ohio, 571, denying validity of administrator's sale of realty under order authorized by act of 1795, sale not taking place till after repeal of act by act of 1805; *Adams v. Jeffries*, 12 Ohio, 253, 40 A. D. 477, holding administrator's sale under court order, since 1824, without showing heirs to have been parties, void; *Ludlow v. Park*, 4 Ohio, 5, holding court order authorizing administrator's sale of realty, except specified portions, inadmissible to sustain sale of excepted portions.

— Sale of infant's land.

Cited in *Price v. Winter*, 15 Fla. 66, holding purchaser's rights at judicial sale of infant's interest in land, unaffected by irregularities, if court had jurisdiction; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 A. D. 41, holding guardian's noncompliance with statute as to notice of sale of ward's realty, insufficient to invalidate title of bona fide purchaser; *Stall v. Macalester*, 9 Ohio, 19, holding purchaser at guardian's sale protected to same extent as purchaser at administrator's sale; *Robb v. Irwin*, 15 Ohio, 689, upholding sale of land under act of 1824, where guardian *ad litem* appeared, although service upon infants had not been proved; *Dengenhart v. Cracraft*, 36 Ohio St. 549, on validity of guardian's sale of ward's land after termination of his office; *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52, holding that in special proceedings for sale of ward's property, record must show that superior court had jurisdiction.

Pleading recognizing court's jurisdiction as appearance.

Cited in *Whitehead v. Post*, 2 Ohio, Dec. Reprint, 468, on pleading or motion recognizing court's jurisdiction as constituting appearance.

Legislative intent controlling in construction of statute.

Cited in *Spencer v. State*, 5 Ind. 41, holding legislative intent as expressed by statute itself, controlling in construction by court; *Cory v. Carter*, 48 Ind. 327, 17 A. R. 738, holding Constitution to be so construed as to render every word operative; *Stokes v. Logan County*, 2 Ohio, Dec. Reprint, 122 (re-reported in 2 Ohio, Dec. Reprint, 688), holding that legislature's intention is to be carried out, in determining whether later statute repealed earlier one.

Repeal by implication.

Cited in *Erwin v. Moore*, 15 Ga. 361; *Girardey v. Dougherty*, 18 Ga. 259; *State ex rel. Missouri & M. R. Co. v. Macon County Court*, 41 Mo. 453; *Ong v.*

Summer, 1 Cin. Sup. Ct. Rep. 424; *State v. Perkins*, 141 N. C. 797, 9 L.R.A. (N.S.) 165, 53 S. E. 735; *Cass v. Dillon*, 2 Ohio St. 607; *Stahl v. State*, 11 Ohio, C. C. 23, 5 Ohio C. C. Dec. 29; *Bennehoff v. Mansfield*, 2 Ohio N. P. 225, 2 Ohio Dec. 404; *Ruffner v. Hamilton County*, 1 Disney (Ohio) 39; *Miles v. State*, 40 Ala. 39,—to point that court loath to declare earlier statute impliedly repealed by later one, if both can be reconciled; *State v. Young*, 49 La. Ann. 70, 21 So. 142, holding that repeal of statute by implication must be necessary; *Tafava v. Garcia*, 1 N. M. 480 (dissenting opinion), on repeal of statute by implication.

Proof of ancient statute or lost verdict.

Cited in *Warren County v. Butler County*, 4 Ohio N. P. 349, holding that in construction of old statute as to boundary line, meaning given by cotemporary and long public usage is presumed to be a true one; *Sanders v. Sanders*, 24 Ind. 133, holding lost verdict provable by proved copy.

Effect of doubtful description of boundary.

Cited in *Stanberry v. Nelson*, *Wright* (Ohio) 766, on effect of insufficient description as to boundary of tract of land.

Nunc pro tunc order to validate proceedings.

Cited in *Bradford v. Watts*, *Wright* (Ohio) 495, denying *nunc pro tunc* order to make good unauthorized act; *Cleveland Leader Printing Co. v. Green*, 52 Ohio St. 487, 49 A. S. R. 725, 40 N. E. 201, denying right to amend record by *nunc pro tunc* order so as to make it show that act was done at former term, which it in fact was not; *Landon v. Reid*, 10 Ohio, 202, on authority to enter interlocutory orders *nunc pro tunc*; *Torbet v. Coffin*, 6 Ohio, 33, on entry of order *nunc pro tunc*.

Cited in reference note in 37 A. D. 690, on effect of *nunc pro tunc* entry or amendment of judgments or order.

Cited in notes in 4 A. S. R. 831, as to when entry of judgment *nunc pro tunc* is improper; 20 L.R.A. 147, as to *nunc pro tunc* order after change in charter or statute.

Distinguished in *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125, upholding order *nunc pro tunc* authorizing putting in journal entry of proceedings, reason for discharge of jury in criminal case; *Jacks v. Adamson*, 56 Ohio St. 397, 60 A. S. R. 749, 47 N. E. 48, holding that court of record has power to enter *nunc pro tunc* evidence of judicial action previously taken.

Issuance of nunc pro tunc order upon parol proof.

Cited in *Carlyse v. Carlyse*, 10 Md. 440, holding oral proof of order of orphans' court sanctioning guardian's investment of ward's money, insufficient; *Tynan v. Weinhard*, 153 Ill. 598, 38 N. E. 1014, holding that judgment *nunc pro tunc* cannot be entered on oral evidence.

Cited in note in 4 A. S. R. 832, as to evidence on which entry of judgment *nunc pro tunc* may be based.

Modified in *Gould v. Union Cent. L. Ins. Co.* 8 Ohio Dec. Reprint, 525, 8 Ohio L. J. 281, upholding *nunc pro tunc* order allowing bill of exceptions granted on oral testimony.

Necessity that court order be in writing.

Cited in *Willy v. Lewis*, 6 Ohio S. & C. P. Dec. 242, on necessity that court order under Code procedure be in writing; *Newcomb v. Smith*, 5 Ohio, 447, holding court order authorizing administrator's sale of realty, invalid unless entered in record.

Creditor's interest in decedent's estate.

Cited in reference notes in 31 A. D. 72, on priority of creditor's interest in decedent's estate; 53 A. D. 78, on authority of administrator to sell real estate of decedent to pay debts.

17 AM. DEC. 635, BLEAKNEY v. FARMERS' & M. BANK, 17 SERG. & R. 64.**Validity of curative or remedial statutes.**

Cited in *Marble Bldg. Asso. v. Hocker*, 3 Phila. 494, 16 Phila. Leg. Int. 356, on construction of statute retrospective in its nature; *Weister v. Hade*, 52 Pa. 474, upholding statute authorizing payment of money advanced by citizen for additional bonus to volunteers of Civil War; *Lycoming County v. Union County* 15 Pa. 166, 53 A. D. 575, upholding statute apportioning the cost of suit in one county among three counties which were benefited; *O'Brien v. Logan*, 9 Pa. 97, upholding statute providing that former statute extended to certain contracts, though the court had not so extended it; *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312, upholding statute repealing clause exempting homesteads from judgment liens; *People ex rel. Pitts v. Ulster County*, 63 Barb. 83, holding statute authorizing legalization of town officers' irregular acts to be prospective only; *Sayres v. Com.* 88 Pa. 291, 6 W. N. C. 565, 36 Phila. Leg. Int. 37, upholding statute providing that writ of error in capital cases be taken out within twenty days, though it is writ of right; *Searcy v. Stubbs*, 12 Ga. 437, holding statute providing that suit by receiver should not abate at his death, not inoperative; *Wilder v. Lumpkin*, 4 Ga. 208, holding statute rendering unnecessary securities on appeal bonds to be parties to writs of error, void as retrospective.

Cited in reference notes in 30 A. S. R. 740, on retrospective and curative acts; 66 A. D. 152; 58 A. D. 73,—on constitutionality of retrospective act; 33 A. D. 157, on statutes impairing obligation of contracts; 30 A. D. 274, on statutes impairing vested rights or obligation of contracts; 90 A. D. 441, as to constitutionality of retrospective or retroactive law.

Cited in notes in 10 A. D. 133; 36 A. D. 704; 40 A. D. 496,—on retrospective statutes; 22 L.R.A. 382, on statute legalizing an invalid private contract as retroactive law and interference with vested rights.

—Conveyances of real property.

Cited in *Lane v. Nelson*, 79 Pa. 407, 2 W. N. C. 216, 33 Phila. Leg. Int. 5, upholding statute validating sale of realty, defective because land was not in county assuming jurisdiction; *Parkison v. Bracken, Burnett* (Wis.) 13, 39 A. D. 296, 1 Pinney (Wis.) 174, holding that act of Congress confirming land patents cures all defects in patents and relates back to date patent was confirmed; *Dingley v. Paxton*, 60 Miss. 1038, holding statute making tax titles valid which were void before its enactment, unconstitutional; *Dale v. Medcalf*, 9 Pa. 108, holding statute declaring sheriff's sales after return day valid, though they were held void under prior statute, unconstitutional.

—Matters as to corporations.

Cited in *Danville v. Pace*, 25 Gratt. 1, 18 A. R. 663, holding statute forbidding corporation to set up defense of usury, applicable to contracts made before its passage; *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446, upholding statute validating corporation's acts and contracts previously made, providing certain papers are filed within certain date; *Clarke v. Darr*, 156 Ind. 692, 60 N. E. 688, upholding statute providing that receiver of insolvent foreign cor-

poration which had not complied with law should have power to sue in winding up its affairs; *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513, upholding legislative authority to enact statute preserving for creditors funds of corporation forfeiting its charter; *Seranton Trust Co.'s Appeal*, 4 Walk. (Pa.) 208, on constitutionality of statute providing for winding up affairs of insolvent banks; *Moultrie v. Smiley*, 16 Ga. 289, on validity of statute reviving corporation and rendering its old obligations enforceable.

Application of remedial statute to pending suits.

Cited in *Vaughan v. Bowie*, 30 Ark. 278, holding act conferring jurisdiction on equity courts over cases of illegal taxation operated as to pending suits; *Taylor v. Keeler*, 30 Conn. 324, holding that acts allowing costs, in court's discretion, where only nominal damages are recovered, applies to action pending at time of passage.

Extension of franchise.

Cited in *Sullivan County R. Co. v. Connecticut River Lumber Co.* 76 Conn. 464, 57 Atl. 287, on extension of corporation's franchise, though corporation has been dissolved.

Trust for creditors in corporate funds.

Cited in *Robison v. Carey*, 8 Ga. 527, on funds of insolvent corporation being trust fund for creditors.

17 AM. DEC. 638, FRIEDLEY v. HAMILTON, 17 SERG. & R. 70.

What constitutes a mortgage.

Cited in *Russell's Appeal*, 15 Pa. 319, holding vendee's assignment of all his interest in certain realty to creditor as collateral security, a mortgage; *Merkel's Appeal*, 10 W. N. C. 116, 38 Phila. Leg. Int. 301, holding conveyance of land intended merely as security for notes, a mortgage; *Price's Estate*, 2 Woodw. Dec. 467, holding absolute assignment of deed, with understanding between all parties amounting to defeasance, a mortgage.

Cited in reference notes in 93 A. D. 116, on what constitutes a mortgage; 90 A. D. 361, on intention to secure indebtedness by conveyance or bill of sale as criterion of mortgage.

Cited in note in 27 L. ed. U. S. 910, on nature of mortgage.

—Absolute deed with separate defeasance.

Cited in *Kline v. McGuckin*, 24 N. J. Eq. 411, holding absolute conveyance recorded as such, but orally agreed to be taken as security, a valid mortgage; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420, holding conveyance to trustee absolute on its face, accompanied by instrument of defeasance, a mortgage; *Lobban v. Garnett*, 9 Dana, 390, holding bill of sale of slaves, accompanied by instrument of defeasance upon payment of money, a mortgage; *Second Ward Bank v. Upmann*, 12 Wis. 499, upholding absolute deed with separate defeasance, as legal mortgage; *Kelly v. Thompson*, 7 Watts, 401, holding absolute conveyance not rendered mortgage by subsequent agreement to reconvey.

Cited in reference notes in 36 A. D. 102, on effect of absolute deed with agreement to reconvey; 42 A. D. 246; 22 A. S. R. 724; 42 A. S. R. 272,—on deed absolute, with defeasance as mortgage.

Cited in note in 17 A. D. 302, on absolute deed and agreement to reconvey as a mortgage if intended as a security.

Distinguished in *Frick's Appeal*, 87 Pa. 327, 35 Phila. Leg. Int. 315, holding absolute deed accompanied by declaration of trust that money was for grantor's

creditors, not a mortgage; *Null v. Fries*, 110 Pa. 521, 1 Atl. 551, 16 Pittsb. L. J. N. S. 293, 43 Phila. Leg. Int. 253, holding absolute deed with option for repurchase, the consideration being pre-existing judgments canceled upon delivery of deed not a mortgage.

Place of recording instrument.

Cited in reference note in 36 A. D. 138, on how and in what book absolute deed with defeasance recorded.

Effect of failure to record instrument.

Cited in *Garber v. Henry*, 6 Watts, 57, holding mortgages for future advances valid as against junior lien creditor, though accompanying articles were not recorded; *Moroney's Appeal*, 24 Pa. 372, upholding recorded bond and mortgage intended to secure future advances, though loan be not referred to or recorded; *Hibberd v. Bovier*, 1 Grant, Cas. 266, holding unrecorded mortgage to secure payment of sum of money, no lien as against subsequent judgment; *Britton's Appeal*, 45 Pa. 172, holding that purchase-money mortgage executed before, but not recorded till after judgment liens, has priority, where judgment creditor had notice before contracting debts; *Security Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647, holding that deed absolute on its face, but intended as security, is properly recorded in the book of deeds; *Miller v. Musselman*, 6 Whart. 354, holding deed absolute on its face, though given to indemnify surety, notice thereof not appearing on record, discharged by judicial sale under junior encumbrance; *Tavener v. Barrett*, 21 W. Va. 656, on effect of recording trust deed given to secure notes, as to subsequent purchasers.

Cited in reference note in 36 A. D. 138, on irregularities in recording instruments.

Distinguished in *Glading v. Frick*, 88 Pa. 460, 7 W. N. C. 134, holding that under statute giving contractor erecting building a lien, if contract be recorded, specifications need not be recorded.

— Separate defeasance.

Cited in *Corpman v. Baccastow*, 84 Pa. 363, 4 W. N. C. 331, 34 Phila. Leg. Int. 354, holding absolute deed with separate defeasance, which is not recorded, an unrecorded mortgage; *Wilson v. Shoenberger*, 34 Pa. 121, holding that failure to record defeasance accompanying conveyance constitutes instrument unrecorded mortgage; *Manufacturers' & M. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335, 42 A. D. 240, upholding absolute conveyance, with separate defeasance, as valid mortgage against one with actual notice, though defeasance be unrecorded; *Jaques v. Weeks*, 7 Watts, 261, holding record of absolute conveyance, intended as mortgage, ineffectual as such against bona fide purchaser, unless defeasance was recorded; *M'Lanahan v. Reeside*, 9 Watts, 508, 36 A. D. 136, holding absolute conveyance accompanied by instrument of defeasance, not prior lien, where the defeasance was not recorded with deed; *Grand Rapid Nat. Bank v. Ford*, 143 Mich. 402, 114 A. S. R. 668, 107 N. W. 76, 8 A. & E. Ann. Cas. 102, holding deed absolute in form but intended as mortgage, being accompanied with unrecorded defeasance, void as to bona fide purchaser.

Distinguished in *Mohr v. Scherer*, 30 Pa. Super. Ct. 509, upholding mortgage correctly describing property, but describing it as situate in township of which it was formerly part, instead of present township.

Priority of liens.

Cited in reference note in 77 A. D. 142, on relative priority of judgment lien and mortgage.

Cited in note in 16 L.R.A. 669, on priority of judgment over unrecorded conveyance by virtue of statute.

Fraud upon creditors by deed intended as mortgage.

Cited in *Weare Commission Co. v. Druley*, 156 Ill. 25, 30 L.R.A. 465, 41 N. E. 48, on deed absolute in form but intended as mortgage as fraudulent as to existing creditors; *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786, holding deed absolute on face, but intended as mortgage, not conclusively fraudulent as to grantor's creditors.

Necessity of seal to instrument.

Cited in *Barney v. Sutton*, 2 Watts, 31, holding record of deed without sealed certificate of probate, not constructive notice of title conveyed.

17 AM. DEC. 644, WITMAN v. LEX, 17 SERG. & R. 88.

Common law.

Cited in notes in 22 L.R.A. 510, on adoption of common law in United States; 22 L.R.A. 504, on adoption of common law in United States in particular matters.

Adoption of statute of uses.

Cited in *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436,—holding common-law jurisdiction of equity over charitable uses anterior to 43 Eliz. 4, in force in Pennsylvania; *Grimes v. Harmon*, 35 Ind. 245, 9 A. R. 690, holding that 43 Eliz. 4, created no new rights, but merely new remedy, which is inapplicable to Indiana courts; *Going v. Emery*, 16 Pick. 116, 26 A. D. 645, holding 43 Eliz. 4 in force in Massachusetts in principle, though not in form; also in Pennsylvania, *Stuart v. Easton*, 21 C. C. A. 146, 39 U. S. App. 238, 74 Fed. 854; *Wright v. Linn*, 9 Pa. 433; *Miller v. Porter*, 53 Pa. 292; *Bethlehem v. Perseverance Fire Co.* 81 Pa. 445, 3 W. N. C. 107, 33 Phila. Leg. Int. 304; *Henry v. Deitrich*, 84 Pa. 291, 34 Phila. Leg. Int. 383,—holding statute 43 Eliz. 4 not being controlling in Pennsylvania, courts will be liberal in extending objects enumerated therein; *Dickson v. Montgomery*, 1 Swan, 348, holding 43 Eliz. 4 in force in Tennessee in so far as its provisions derived from common law are applicable therein.

Cited in reference notes in 26 A. D. 68, on charitable uses; 59 A. D. 619, on existence of statute of uses in the United States; 42 A. D. 355, on states in which statute of 43 Elizabeth as to use is in force.

Cited in notes in 9 A. D. 581, on charitable uses in United States; 63 A. S. R. 254, 255, on statute of uses; 1 L.R.A. 417, on the statute of Elizabeth; 5 L.R.A. 33, as to whether statute of uses and trusts prevails in United States.

Interpretation of statute of uses.

Cited in *Lewis's Estate*, 11 Pa. Co. Ct. 561, 1 Pa. Dist. R. 423, on liberal interpretation of statute, 43 Eliz. 4.

Capacity of trustees or donees — Voluntary unincorporated society.

Cited in *Wright v. Methodist Church*, Hoffm. Ch. 202, holding valid, charitable bequest to "yearly meeting of Friends in New York" a voluntary, unincorporated society; *Evangelical Asso's. Appeal*, 35 Pa. 316, holding valid bequest to unincorporated religious society, though not for any defined charitable use; *McGinnis v. Watson*, 2 Pittsb. 220, on enforceability of trust in favor of unincorporated religious congregation; *Craig v. Lilly*, 6 Sadler (Pa.) 183, 19 W. N. C. 375, 9 Atl. 171, 44 Phila. Leg. Int. 342, on gift of law books to county law library as charitable bequest.

Cited in note in 32 L.R.A. 628, on right of unincorporated charity to take personal property by gift.

— **Society to be created.**

Cited in *Vincennes University v. Indiana*, 14 How. 268, 14 L. ed. 416, holding valid grant by United States for establishment of college, though grantee board of trustees not organized until two years thereafter; *American Bible Soc. v. Wetmore*, 17 Conn. 181, holding charitable institution proper devisee, whether incorporated before or after testatrix's death; *Miller v. Chittenden*, 2 Iowa, 315, sustaining validity of grant of land to trustees for erection of church to be there-after organized.

Purpose of gift.

Cited in *Magill v. Brown*, Fed. Cas. No. 8,952, sustaining validity, as charitable use, of gift to citizens of town, of money for purchase of fire engine; *Haines v. Allen*, 78 Ind. 100, 41 A. R. 555, holding valid bequest to church trustees, for suppression of manufacture, sale, and use of intoxicating liquors.

Cited in reference note in 35 A. D. 318, as to when charitable bequests are valid.

Cited in notes in 3 L.R.A. 147, on what constitutes public charities; 5 E. R. C. 578, on validity of bequest in trust for charitable purposes; 63 A. S. R. 265, on charitable trusts for religion; 5 L.R.A.(N.S.) 693, on gift for benefit of members of particular organization as a charity.

— **Relief of poor or unfortunate.**

Followed in *Philadelphia v. Elliott*, 3 Rawle, 170, holding valid bequest to city for construction and maintenance of hospital for blind and lame.

Cited in *Cresson v. Cresson*, 5 Clark (Pa.) 431, Fed. Cas. No. 3,389, holding valid devise for "formation and support of home for aged gentlemen and merchants;" *Williams v. Pearson*, 38 Ala. 299, holding valid bequests to "Pilgrim's Rest Association," for use of ministers, and to certain townships for education of poor children; *Union M. E. Church v. Wilkinson*, 36 N. J. Eq. 141, holding valid charitable bequest to certain church, for use of poor members thereof; *Apprentice's Fund Case*, 2 Pa. Dist. R. 435, 13 Pa. Co. Ct. 241, holding Franklin's bequest to Philadelphia, in trust for loans to needy artificers, valid charity.

Cited in notes in 63 A. S. R. 263, on charitable trusts for poor and unfortunate; 14 L.R.A.(N.S.) 101, on enforcement of general bequest for relief of the poor.

— **Education.**

Cited in *Swasey v. American Bible Soc.* 57 Me. 523, holding valid charitable bequests for "education of pious relative;" "benefit of needy women," "instruction of poor children," etc.; *Re John*, 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, sustaining validity of bequest to executors to establish school, with description of method of perpetuating trustees; *Price v. Maxwell*, 28 Pa. 23, holding devise for school for children of members of certain sect, valid as charitable use.

Cited in reference note in 35 A. S. R. 504, on validity of charitable trusts for educational purposes.

Cited in notes in 63 A. S. R. 258, on charitable uses or trusts for education; 14 L.R.A.(N.S.) 94, on enforcement of general bequest for education and support of ministry.

Effect of uncertainty as to extent of grant.

Cited in *McLain v. School Dist.* 23 Phila. Leg. Int. 165, holding grant to charity not allowed to fail because of uncertainty as to extent of grant.

Certainty of trustees.

Cited in *Carter v. Balfour*, 19 Ala. 814, holding bequests to "Baptist Societies for Foreign Missions" and "American Bible Society," valid, if societies known by those names, though unincorporated, exist; *Chapin v. School Dist. No. 2*, 35 N. H. 445, holding grant of land for school purposes, not void because of inaccurate naming of grantee; *Williams v. First Presby. Soc.* 1 Ohio St. 478, holding not invalid for uncertainty, deed of land to trustees of Presbyterian congregation, for use of said congregation forever; *Domestic & F. Missionary Soc.'s Appeal*, 30 Pa. 425, holding valid charitable bequest "to missions and schools of Episcopal Church at Port Cresson," as to missionary society having charge of such mission; *Croxall's Estate*, 162 Pa. 579, 29 Atl. 759, holding society providing wayfarers' lodges for night's shelter, proper claimant of bequest to "any institution that will give shelter to homeless people at night;" *Dugan's Estate*, 24 W. N. C. 287, holding bequest to charitable institutions given effect where objects ascertainable, though legal title incorrectly stated in will.

Cited in note in 7 L.R.A. 765, on municipal power to administer public charity.

Certainty of beneficiaries.

Cited in *Doughten v. Vandever*, 5 Del. Ch. 51, holding that equity sustains charitable bequest, notwithstanding mistaken corporate designation, where real objects ascertainable; *Quinn v. Shields*, 62 Iowa, 129, 49 A. R. 141, 17 N. W. 437, holding not invalid for uncertainty bequest to one, for support of such charitable Roman Catholic institutions as devisee deems meritorious; *Tappan v. Deblois*, 45 Me. 122, holding not invalid for uncertainty, bequest of residue to trustees for benefit of American Peace Society; *Catt v. Catt*, 118 App. Div. 742, 103 N. Y. Supp. 740, on validity of charitable trust, though there be no trustee and beneficiaries be indefinite; *Casey's Estate*, 12 Pa. Dist. R. 15, 28 Pa. Co. Ct. 82, upholding trust for charitable, benevolent, and religious purposes, money distributed as church should direct; *Kinike's Estate*, 11 Pa. Co. Ct. 232, 9 Lanc. L. Rev. 180, 1 Pa. Dist. R. 172, 30 W. N. C. 22 (affirmed in 155 Pa. 101, 25 Atl. 1016); *Murphy's Estate*, 184 Pa. 310, 63 A. S. R. 802, 39 Atl. 70,—holding valid bequest to executors for distribution among such charitable institutions as they deem proper.

Distinguished in *Mount v. Tuttle*, 40 Misc. 456, 82 N. Y. Supp. 655, holding bequest to bishop for benefit of "Protestant Episcopal jurisdiction," which was abolished and divided before testator's death, invalid because beneficiary indefinite; *Zeisweiss v. James*, 63 Pa. 465, 3 A. R. 558, holding devise of residuary estate to "infidel society," to be incorporated, invalid for uncertainty that it will ever exist.

— Relief of poor or unfortunate.

Cited in *Heuser v. Harris*, 42 Ill. 425; *Moore v. Moore*, 4 Dana, 354, 29 A. D. 417; *Landis v. Wooden*, 1 Ohio St. 160, 59 A. D. 615,—holding not invalid for uncertainty bequest for support of poor of town or county; *Lawrence County v. Leonard*, 83 Pa. 206, 34 Phila. Leg. Int. 104, 4 W. N. C. 121, holding bequest to county, income for use of poor of designated township, not invalid for uncertainty.

Distinguished in *Coltman v. Moore*, 1 MacArth, 197, holding bequest for establishment of home for "destitute reputable females," void for uncertainty.

— Education.

Cited in *Handley v. Palmer*, 43 C. C. A. 100, 103 Fed. 39 (affirming 91 Fed. 948), holding not void for uncertainty, bequest to city for erection of schoolhouses

for poor children; *McIntire Poor School v. Zanesville Canal & Mfg. Co.* 9 Ohio, 203, 34 A. D. 436, holding not invalid for uncertainty bequest for education of poor children of certain town; *Martin v. M'Cord*, 5 Watts, 493, 30 A. D. 342; *McLain v. White Twp.* 51 Pa. 196,—holding not invalid for uncertainty trust for erection of schoolhouse by subscribers, for benefit of such neighboring children as trustees received; *Green v. Allen*, 5 Humph. 170, on validity of devise to Methodist conference, for benefit of its institutions of learning.

Distinguished in *White v. Fisk*, 22 Conn. 31, holding provision in will directing trustees to expend sum for support of indigent young men preparing for ministry in New Haven, void for uncertainty.

—Promotion of religion.

Cited in *Beaver v. Filson*, 8 Pa. 327, holding not invalid for uncertainty trust for erection of church by subscribers thereto.

Modification of charitable trust.

Cited in *Re Philadelphia*, 2 Brewst. (Pa.) 462, affirming power of equity to vary terms of leases prescribed in charitable devise, where testator's directions impracticable of execution; *Harrisburg v. Hope Fire Co.* 2 Pearson (Pa.) 269, denying power of fire company to sell apparatus purchased with donations of citizens, where it is proposed to reinvest proceeds in bill; *Re Lower Dublin Academy*, 14 Phila. 72, 37 Phila. Leg. Int. 282, 8 W. N. C. 564, holding charitable bequest for academy may, by court of equity, be converted to use of library, where unnecessary for support of academy owing to extension of public school system; *United States v. Church of Jesus Christ of L. D. S.* 8 Utah, 310, 31 Pac. 436, holding that court should vest property in trustee for effecting legal charitable objects of Mormon church on annulment of charter because of teachings as to polygamy.

Termination of charitable trust.

Cited in *Lewis's Estate*, 11 Pa. Co. Ct. 561, 1 Pa. Dist. R. 423, sustaining validity of charitable trust giving trustees power to terminate at any time when it becomes impracticable of execution.

Validity of charitable devise over.

Cited in *Storr's Agri. School v. Whitney*, 54 Conn. 342, 8 Atl. 141, holding valid charitable devise over for benefit of theological students, in case of abandonment of original charitable devise for school.

Effect of partial invalidity.

Cited in *Odell v. Odell*, 10 Allen, 1, holding charitable bequest of annual sum, to be applied in establishing old folks' home, valid, though accumulation as directed, invalid.

Vesting of charitable bequest.

Cited in *Franklin's Estate*, 9 Pa. Co. Ct. 484, 27 W. N. C. 545, 8 Lanc. L. Rev. 188, 48 Phila. Leg. Int. 136, holding bequest to city, to be loaned to artificers during fixed period, vested in city immediately, subject to carrying out trust during period.

Judicial supervision of charitable bequests.

Cited in *Williams v. Pearson*, 38 Ala. 299; *State v. Griffith*, 2 Del. Ch. 392,—holding equity has jurisdiction over charitable bequests, independent of 43 Eliz. 4; *Clayton v. Hallett*, 30 Colo. 245, 97 A. S. R. 117, 59 L.R.A. 407, 70 Pac. 429, sustaining equitable jurisdiction over charitable uses, whether derived from common law or 43 Eliz. 4; *Burr v. Smith*, 7 Vt. 241, 29 A. D. 154, holding

equitable jurisdiction over charitable bequests, not derived from 43 Eliz. 4, but from common law anterior to said statute; *Henry v. Deitrich*, 84 Pa. 286, 4 W. N. C. 487, 34 Phila. Leg. Int. 383, sustaining equity's jurisdiction in controversies between unincorporated religious societies, as to estate conveyed for their use; *Bell County v. Alexander*, 22 Tex. 350, 73 A. D. 268, affirming (*obiter*) that equity has jurisdiction to enforce donation to charitable uses, notwithstanding donees, beneficiaries, or objects of trust are uncertain.

Cited in reference note in 59 A. D. 619, on jurisdiction of equity over charitable trusts independent of statute of charitable uses.

Cited in note in 14 L.R.A.(N.S.) 57, on origin and nature of chancery jurisdiction over charities.

— **Appointment of trustees.**

Cited in *Newson v. Starke*, 46 Ga. 88, holding valid charitable bequest to trustees, to be appointed by "inferior court," to expend same for education of poor children.

— **Regulation of mode of executing trust.**

Cited in *Philadelphia v. Girard*, 20 Phila. Leg. Int. 220, upholding gift of fund for charitable use, though mode for carrying same out be impracticable; *Frazier v. St. Luke's Church*, 10 Pa. Co. Ct. 53, 48 Phila. Leg. Int. 276, 28 W. N. C. 307, holding court may appoint trustee to hold charitable bequest to be administered by the corporation to which given, though latter unable to hold; *Steven's Estate*, 200 Pa. 318, 49 Atl. 985, 18 Lanc. L. Rev. 316, on payment of fund after death of designated trustees, to corporation formed to execute charitable bequest.

— **Doctrine of *cy près*.**

Cited in *Fontain v. Ravenel*, 17 How. 369, 15 L. ed. 80, denying power of equity to designate charitable institutions as objects of testator's bounty, when executors named for that purpose died before making designation; *Jackson v. Phillips*, 14 Allen, 539, as to distinction between English doctrine of *cy près* exercised under the sign manual and doctrine as applied in America; *Beekman v. People*, 27 Barb. 260, denying right of courts of equity in New York to apply doctrine of *cy près* to give effect to invalid charitable bequest; *Philadelphia v. Girard*, 45 Pa. 9, 84 A. D. 470, defining Pennsylvania doctrine of *cy près* to carry out testator's wishes in some lawful manner, approximating to invalid scheme proposed by him; *Houston's Estate*, 12 Pa. Dist. R. 121, holding bequest to antislavery society which has ceased to exist, not payable to society for improving African race; *Re Flaherty*, 2 Pars. Sel. Eq. Cas. 186, holding fund bequeathed to educate relative for priesthood will not be appropriated to found theological scholarship.

Cited in note in 5 L.R.A. 34, as to whether doctrine of *cy près* adopted in construction of wills.

Right to enforce trust.

Cited in *Methodist Church v. Remington*, 1 Watts, 218, 26 A. D. 61, holding trust for benefit of Methodist society not composed entirely of residents of state, not enforceable by it against trustees.

Right of religious corporation to hold or dispose of property.

Cited in *Burton's Appeal*, 57 Pa. 213, holding that incorporated religious society has power to acquire, hold, and alienate; *Burton's Appeal*, 25 Phila. Leg. Int. 325, on power of church corporations to acquire and hold property.

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Dedication of land to public use.

Cited in *Macon v. Franklin*, 12 Ga. 239, holding that dedication of lands to city inures to benefit of future as well as present citizens thereof.

Distinguished in *Pearsall v. Post*, 20 Wend. 111 (affirmed in 22 Wend. 425), denying possibility of dedication of land, as landing and place of deposit, to public at large, as distinguished from public corporations.

17 AM. DEC. 648, KEARNEY v. TANNER, 17 SERG. & R. 94.**Personal liability of vendee of property subject to encumbrances.**

Cited in *Girard L. Ins. Co. v. Addicks*, 12 Phila. 490, 5 W. N. C. 75, 35 Phila. Leg. Int. 17, holding vendee of premises subject to mortgage, not personally bound therefor, in absence of agreement; *Blood v. Crew* Levick Co. 171 Pa. 328, 33 Atl. 344, 37 W. N. C. 181, holding vendee of property "under and subject to payment of mortgage," liable to pay mortgage as part of purchase price; *Trevor v. Perkins*, 5 Whart. 244, granting vendor of shares of stock recovery from vendee, who had agreed to pay balance of price due company, which vendor was compelled to pay; *Lawrence v. Towle*, 59 N. H. 28, holding purchaser of property subject to mortgage, not personally liable therefor, in absence of assumption of debt; *Sargent v. Currier*, 49 N. H. 310, 6 A. R. 524, holding that vendee of personalty compelled to discharge encumbrance existing at time of purchase may recover in assumpsit against vendor; *Hirst's Estate*, 12 Phila. 106, 35 Phila. Leg. Int. 222, holding that when decedent purchased property subject to mortgage, which he agreed to pay, it will be paid out of personalty.

Cited in reference notes in 71 A. S. R. 719, on grantor's remedy against grantee assuming mortgage debt; 78 A. D. 216, on personal liability of grantee of land on mortgage which he assumes.

Cited in note in 78 A. D. 79, on grantor's remedy against grantee assuming mortgage.

17 AM. DEC. 650, LEVY v. CADET, 17 SERG. & R. 126.**Effect of bar of limitations.**

Cited in note in 95 A. S. R. 657, on effect of bar of limitations.

New promise or part payment by one joint obligor.

Cited in *Smith v. Wesner*, 1 Woodw. Dec. 182; *Coleman v. Fobes*, 22 Pa. 156, 60 A. D. 75; *Bush v. Stowell*, 71 Pa. 208, 10 A. R. 694, 4 Legal Gaz. 114, 29 Phila. Leg. Int. 110; *Clark v. Burn*, 86 Pa. 502, 6 W. N. C. 294; *Miller v. Miller*, Mac-Arth. & M. 109, 48 A. R. 738,—holding part payment of note by one joint maker, insufficient to deprive other joint maker of defense of limitations; *Cowhick v. Shingle*, 5 Wyo. 87, 63 A. S. R. 17, 25 L.R.A. 608, 37 Pac. 689; *Willoughby v. Irish*, 35 Minn. 63, 59 A. R. 297, 27 N. W. 379,—holding part payment by one joint and several maker, insufficient to prevent running of limitations against others; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 A. R. 47, holding part payment by one joint debtor, insufficient to prevent running of limitations against other debtor; *Biscoe v. Jenkins*, 10 Ark. 108, holding part payment by one joint and several debtor after debt is barred by limitations, insufficient to revive debt as to codebtor; *Cox v. Bailey*, 9 Ga. 467, 54 A. D. 358, holding that promise to pay by one joint and several maker, before running of limitations, removes case from statute as to other joint promisors; *Tillinghast v. Nourse*, 14 Ga. 641, holding payment on joint note before running of limitation, sufficient to remove case from statute as to copromisor; *Clark v. Beven*, 35 Phila. Leg. Int. 210, holding

receipt of payment indorsed by payee of joint note, insufficient to stop running of statute of limitations as to promisor not named in receipt; *Lowther v. Chappell*, 8 Ala. 353, 42 A. D. 643, holding surety's liability on promissory note barred by limitations, not revived by principal's subsequent promise to pay; *Rogers v. Burr*, 105 Ga. 432, 70 A. S. R. 50, 31 S. E. 438, holding that where persons jointly guaranteed payment of dividend and payment, upon notice, of certain money upon election to sell stock, notice to one promisor was not notice to others.

Cited in notes in 65 A. S. R. 689, 690, on payment or acknowledgment by one joint debtor before statute of limitations has run; 55 A. R. 52, as to whether payment by one joint debtor will avoid the effect of statute of limitations as to another; 62 A. D. 102, on promise, acknowledgment, or payment by joint debtor, or partner, as taking case out of statute of limitations.

Distinguished in *Craig v. Callaway County Court*, 12 Mo. 94, holding payment of interest by one joint obligor in bond, before attachment of limitations, takes case out of statute as to others.

— By one partner after dissolution.

Cited in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 A. D. 322; *Reppert v. Colvin*, 48 Pa. 248; *Wilson v. Waugh*, 101 Pa. 233, 13 Pittsb. L. J. N. S. 176, 40 Phila. Leg. Int. 242; *Tate v. Clements*, 16 Fla. 339, 26 A. R. 709,—holding promise by partner after dissolution, to pay debt, insufficient to prevent running of limitations as to other partner; *Schoneman v. Fegley*, 7 Pa. 433, holding promise of partner, after dissolution, to pay firm note, not binding on other partners; *Robinson v. Floyd*, 159 Pa. 165, 28 Atl. 258, 33 W. N. C. 409, 24 Pittsb. L. J. N. S. 425 (dissenting opinion), on partner's right, after dissolution, to revive partnership debt barred by limitations; *Hogg v. Orgill*, 34 Pa. 344, holding admissions, after dissolution, by partner, of execution of firm note, inadmissible against anyone but himself.

Cited in reference notes in 36 A. D. 311, on power of partner after dissolution of firm; 28 A. D. 147, on admissions of partner to remove bar of limitations after dissolution of firm; 25 A. D. 45; 38 A. D. 771,—on effect of acknowledgment by partner after dissolution to take firm debt out of statute of limitations.

Cited in notes in 6 A. D. 576, on partner's power to revive liabilities after dissolution; 18 L. ed. U. S. 736, on effect of admissions of partner, after dissolution of firm, on copartners; 15 L.R.A. 657, on power of partner after dissolution to interrupt statute of limitations as to firm debt; 40 A. S. R. 566, on acknowledgments and new promises by partners after dissolution in connection with the statute of limitations.

Distinguished in *Kauffman v. Fisher*, 3 Grant, Cas. 302; *Houser v. Irvine*, 3 Watts & S. 345, 348, 38 A. D. 768,—holding that payment by liquidating partner within six years, on note made after dissolution, for firm debt, takes case out of statute of limitations as to other partners.

17 AM. DEC. 654, *STARRETT v. WYNN*, 17 SERG. & R. 130.

Rights of deserted wife.

Cited in notes in 37 A. D. 711, on deserted wife of citizen as *feme sole*; 36 A. R. 765, 766, on liability of married woman on her contracts made while living apart from her husband.

— Rights to acquire and control property.

Cited in *Wright v. Hays*, 10 Tex. 130, 60 A. D. 200, upholding deed of gift of

realty acquired by wife after husband's desertion; *Re Wagner*, 2 Ashm. (Pa.) 448, holding that where husband, by separation deed, relinquishes right to wife's property, her devise of property acquired thereafter, the husband consenting to probate of will, is valid; *Bonslaugh v. Bonslaugh*, 17 Serg. & R. 361, holding that where husband, by deed of separation, relinquishes claim to wife's land, it is not liable for his debts; *Love v. Moynahan*, 16 Ill. 277, 63 A. D. 306, holding that wife may acquire and control property where husband, without wife's fault, compels her to live separately from him; *Bell v. Bell*, 36 Ala. 195, on right of wife's administrator to wife's property acquired after husband had abandoned her; *Buford v. Adair*, 43 W. Va. 211, 64 A. S. R. 854, 27 S. E. 260, holding that wife abandoned by husband and living in another state is restored to rights as *feme sole*; *Slator v. Neal*, 64 Tex. 222, holding that wife whose husband has been sentenced to penitentiary may manage and dispose of common property.

Cited in note in 64 A. S. R. 865, on effect of husband's abjuration of realm or leaving state on wife's property rights or power to contract.

Distinguished in *Cain v. Bunkley*, 35 Miss. 119, holding wife not invested with privileges of *feme sole* in regard to disposition of property by will, by husband's desertion three months before her death; *Thorndell v. Morrison*, 25 Pa. 326, holding separate deed of married woman's realty, void, though husband had previously deserted her.

— Right to sue in own name.

Cited in *Mead v. Hughes*, 15 Ala. 141, 50 A. D. 123, holding that wife may contract and sue as *feme sole* where husband has abandoned her; *Wolf v. Bauereis*, 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045, holding when husband has abandoned wife she may sue in her own name for assault and battery; *Nickerson v. Nickerson*, 65 Tex. 281, holding where husband and codefendant injure wife during coverture, she may recover against codefendant, after separation from husband.

Separate property of married woman.

Cited in notes in 39 A. D. 556; 40 A. D. 444,—as to what is wife's separate property; 57 A. D. 343, on power of married woman to dispose of her separate personal estate by will.

17 AM. DEC. 658, *KILHEFFER v. HERR*, 17 SERG. & R. 319.

Conclusiveness of judgment.

Cited as leading case in *Amrhein v. Quaker City Dye Works*, 192 Pa. 253, 43 Atl. 1008, holding that, where in subsequent suit for negligence additional negligent acts committed since former suit are alleged, former judgment no estoppel.

Cited in *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 7 C. C. A. 442, 18 U. S. App. 455, 58 Fed. 721, holding former decree between same parties, on same matter, bars second suit between them; *Waring v. Lewis*, 53 Ala. 615, holding that matters judicially determined cannot again be questioned by parties or privies, though parties be minors; *Whitehurst v. Rogers*, 38 Md. 503, holding former judgment as to infringement of trademark bars subsequent suit between same parties involving same question; *Lacey v. Pennsylvania, & N. Y. Canal & R. Co.* 10 Luzerne Leg. Reg. 97, denying recovery of damages for negligent burning of contents of building, where recovery has already been had for burning of building; *Brown v. Howell*, 8 North. Co. Rep. 181, holding that upon bill to restrain trespass established by former suit for damages equitable defenses then inter-

posed will be treated as adjudicated; *Lewis v. Nenzel*, 38 Pa. 222, holding evidence of fraud in procurement of mortgage, inadmissible in ejectment for property sold under mortgage, same defense having been set up in prior sci. fa. on mortgage; *Wickersham v. Savage*, 58 Pa. 365, 25 Phila. Leg. Int. 68, holding former decree that power given under will was improperly exercised, conclusive in subsequent case involving said decree; *Bell v. Allegheny County*, 184 Pa. 296, 63 A. S. R. 795, 39 Atl. 227, 41 W. N. C. 390, 28 Pittab. L. J. N. S. 286, holding former judgment in action for salary, that it is payable at certain rate, estops officer to raise question in suit for subsequent month's salary; *Kerr v. Chess*, 7 Watts, 367, on former judgment between same parties involving same cause of action as estoppel to subsequent suit; *Wilbur v. Brown*, 3 Denio, 356, on effect of judgment as estoppel to subsequent action between same parties on same subject; *Murphy v. Creath*, 26 Mo. App. 581, on dismissal of cause without passing on merits as bar to subsequent suit thereon.

Cited in reference notes in 24 A. D. 615, as to when former judgment is a bar; 19 A. D. 561, on conclusiveness of judgments; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded.

Cited in notes in 26 A. D. 609, as to when former judgment is a bar or estoppel; 59 L.R.A. 890, on conclusiveness of judgment as to damming back water of stream.

Distinguished in *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 484, 24 A. S. R. 512, 21 Atl. 982, 28 W. N. C. 106, 48 Phila. Leg. Int. 362, holding estoppel by former litigation not applicable to subsequent action setting up unconstitutionality of statute upon which prior action proceeded.

—As to nuisance.

Cited in *Long v. Long*, 5 Watts, 102, holding in action for erection of nuisance, former recovery pleaded by defendant as to same cause and between same parties bars recovery; *Hartman v. Pittsburgh Incline Plane Co.* 2 Pa. Super. Ct. 123, 27 Pittab. L. J. N. S. 146, 39 W. N. C. 28; *Hartman v. Pittsburgh Incline Plane Co.* 11 Pa. Super. Ct. 438,—holding that in action for continuance of nuisance, judgment in former action involving same matter between parties is conclusive evidence; *Fell v. Bennett*, 110 Pa. 181, 17 W. N. C. 117, 42 Phila. Leg. Int. 510, 5 Atl. 17, holding former judgment against defendant by tenant in common, for nuisance to common property, admissible in subsequent action by both tenants for continuance of nuisance; *Smith v. Elliott*, 9 Pa. 345, holding former judgment of damages for nuisance conclusive, between parties or privies, in suit for continuance thereof.

Parol evidence to connect former record of decree or judgment with subsequent suit.

Cited in *Ansley v. Pearson*, 8 Ala. 431; *Wallace v. Peck*, 12 Ala. 768; *Tarleton v. Johnson*, 25 Ala. 300, 60 A. D. 515,—holding parol evidence admissible to explain record showing parties' connection with former suit upon same matter.

Cited in note in 42 L. ed. U. S. 358, on parol evidence as to judgments.

Necessity for pleading former judgment or decree to effect estoppel.

Cited in *Tibbetts v. Shapleigh*, 60 N. H. 487, holding where party pleads matter which former judgment estops him from pleading, judgment may be rendered on fact if other party takes issue on fact; *Smith v. Elliott*, 9 Pa. 345, holding former judgment as to erection of nuisance given under plea of general issue, not conclusive, where plaintiff declared for nuisance instead of continuance; *Bank of Beloit v. Beale*, 7 Bosw. 611, on necessity that estoppel be pleaded in order to

have benefit thereof; *Elliott v. Eslava*, 3 Ala. 568, holding that estoppel must be pleaded to preclude jury from passing on fact; *Miller v. Manice*, 6 Hill, 114, holding that in action of trover estoppel in nature of *res judicata* must be pleaded, if defendant wishes to rely on it; *Gilchrist v. Bale*, 8 Watts, 355, 34 A. D. 469, holding that former recovery, release, or satisfaction may be given in evidence in action on case, though not pleaded; *Little v. Barlow*, 37 Fla. 232, 53 A. S. R. 249, 20 So. 240, holding that record of former judgment between same parties, on same matter, may be shown under general issue in assumpsit; *Wright v. Butler*, 6 Wend. 284, 21 A. D. 323, holding that in assumpsit by second indorsee to recover money paid on note, record of former judgment between same parties may be shown, though not pleaded; *Finley v. Hanbest*, 30 Pa. 190, holding that in assumpsit former recovery is admissible under general issue, with same effect as if pleaded specially; *Offutt v. John*, 8 Mo. 120, 40 A. D. 125, holding former judgment given in evidence as conclusive as if specially pleaded; *Isaacs v. Clark*, 12 Vt. 692, 36 A. D. 372, holding former decree given in evidence conclusive as estoppel, where no opportunity is afforded to plead it specially; *Walton v. Dickerson*, 7 Pa. 376, on right to put former recovery in evidence, whether pleaded or not.

Cited in reference note in 29 A. S. R. 485, on necessity for pleading *res judicata*.

Cited in notes in 27 A. S. R. 347, on failure to plead estoppel; 63 A. D. 632, on distinction between pleading former recovery in bar and proving it under general issue.

Distinguished in *Marsh v. Pier*, 4 Rawle, 273, 26 A. D. 131, holding judgment in former replevin suit admissible, though not pleaded, in subsequent action for price of goods, between same parties, involving same matter.

Disapproved in *Man v. Drexel*, 2 Pa. St. 202, holding former judgment in ejectment conclusive as to mesne profits between parties, even though not pleaded.

17 AM. DEC. 668, MASSER v. STRICKLAND, 17 SERG. & R. 354.

Conclusiveness against sureties or indorsers, of judgment against principal.

Cited in *Watt v. Riddle*, 8 Watts, 545; *Hare v. Marsh*, 61 Wis. 435, 50 A. R. 141, 21 N. W. 267,—on conclusiveness as to sureties of judgment against principal; *McConnell v. Poor*, 113 Iowa, 133, 52 L.R.A. 312, 84 N. W. 968, holding judgment against contractor for breach of contract, not *res judicata* as to surety on his bond; *Com. v. Smith*, 4 Phila. 51, 17 Phila. Leg. Int. 125, extending to cases of trustees principle that judgment against principal on official bond is conclusive as to sureties; *Ringgold v. Newkirk*, 3 Ark. 96, holding guarantor not liable on bond where creditor failed to make demand of debtor and notify guarantor of nonpayment; *Spencer v. Dearth*, 43 Vt. 98, holding arbitrator's decision that note had been paid by principal, conclusive in trover by principal and surety for recovery of note; *Lloyd v. Barr*, 11 Pa. 41, holding judgment by holder against indorsers, conclusive in action by subsequent indorser, who paid same, against prior indorser; *Bank of Mobile v. Mobile & O. R. Co.* 69 Ala. 305, holding compromise and judgment thereon for less than face of bonds sued on limits recovery to amount of judgment; *Ihrig v. Scott*, 13 Wash. 559, 43 Pac. 633, holding judgment against principal upon statutory bond for protection of those furnishing materials for public improvement, conclusive as to sureties; *Com. use of Anthony v. Steigerwalt*, 18 Lanc. L. Rev. 301, on surety's right to set up personal defenses, though judgment against principal be conclusive as to other matters.

Cited in reference note in 56 A. D. 96, on binding effect on bail and sureties of judgment against principals.

Distinguished in *Giltinan v. Strong*, 64 Pa. 242, 27 Phila. Leg. Int. 84 (reversing *Strong v. Giltinan*, 7 Phila. 176, 26 Phila. Leg. Int. 340), holding judgment against tenant not evidence against his surety for rent due landlord.

— On administrator's bond.

Cited in *Garber v. Com.* 7 Pa. 265; *Com. use of Rarrick v. Smith*, 6 Pa. Dist. R. 416, 3 Lack. Leg. News, 65; *Com. ex rel. Whiteside v. Woods*, 14 Pa. Dist. R. 509, 22 Lanc. L. Rev. 245,—holding decision by probate court as to amount due from administrator, conclusive as against surety on bond.

— On official bond.

Cited in *Burlington School Dist. v. Alexander*, 6 Pa. Co. Ct. 413, holding judgment by confession against tax collector, not conclusive, where sureties allege that money was collected and paid over but applied to prior taxes, for which other sureties were bound; *Musselman v. Com.* 7 Pa. 240; *Eagles v. Kern*, 5 Whart. 144; *Evans v. Com.* 8 Watts, 398, 34 A. D. 477,—holding judgment against constable for amount for which he became liable, conclusive as to his sureties; *Tracy v. Goodwin*, 5 Allen, 409, holding judgment against constable for wrongful attachment, conclusive against his sureties as to damages and costs; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 A. D. 690, holding sureties for faithful performance of duty by deputy sheriff bound by judgment against deputy for misconduct; *Pasewalk v. Bollman*, 29 Neb. 519, 26 A. S. R. 399, 45 N. W. 780, holding judgment in suit against sheriff for seizing wrong property, defended by plaintiff in execution who indemnified sheriff, conclusive against sureties on indemnity bond; *Beauchaine v. McKinnon*, 55 Minn. 318, 43 A. S. R. 506, 56 N. W. 1065; *McMicken v. Com.* 58 Pa. 213, 25 Phila. Leg. Int. 340; *Stephens v. Shafer*, 48 Wis. 54, 33 A. R. 793, 3 N. W. 835; *Charles v. Hoskins*, 14 Iowa, 471, 83 A. D. 378,—holding judgment against sheriff for misconduct prima facie evidence against sureties on bond, in absence of fraud.

Cited in reference notes in 43 A. D. 440, on judgment against constable as evidence against sureties; 33 A. R. 804, on judgment against principal in official bond as prima facie evidence of right to recover from sureties not having notice of the suit.

Cited in notes in 83 A. D. 383, on conclusiveness of judgment against sheriffs and constables on their sureties; 52 L.R.A. 172, 174, as to when judgment recovered in action against officer is prima facie evidence against surety on official bond; 52 L.R.A. 176, 179, as to when judgment recovered in action against officer is conclusive evidence against surety on official bond.

Distinguished in *Snapp v. Com.* 2 Pa. St. 49, holding sureties on sheriff's bond, not bound when sheriff acted as agent in levying execution.

Denied in *Pico v. Webster*, 14 Cal. 202, 73 A. D. 647, holding judgment against officer for misconduct, not conclusive against sureties on his official bond; *Rodini v. Lytle*, 17 Mont. 448, 52 L.R.A. 165, 43 Pac. 501, holding judgment against constable for misconduct, neither conclusive nor prima facie evidence against sureties on bond.

17 AM. DEC. 677, HEPBURN v. McDOWELL, 17 SERG. & R. 383.

Termination of license.

Cited in *Baldwin v. Aldrich*, 34 Vt. 526, 80 A. D. 695, holding grant of right to erect and run mill, a license, terminating with the decay of the structure;

Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 A. R. 628, 27 Phila. Leg. Int. 205, 2 Legal Gaz. 148, holding notice revoking permissive use of land need only be given to bona fide user.

Cited in note in 49 L.R.A. 505, on duration of right to maintain burden on land, after licensee has incurred expense.

Revocability of license.

Cited in **Ameriscoggin Bridge v. Bragg**, 11 N. H. 102, holding license to erect dam on another's land, irrevocable when acted upon; **Grant v. Leach**, 20 La. Ann. 329, 96 A. D. 403, on revocation without remuneration, of legislative grant to maintain canal.

Distinguished in **Babcock v. Utter**, 1 Keyes, 397, 1 Abb. App. Dec. 27, 32 How. Pr. 439, holding parol license to maintain dam and canal, revocable; **Read v. Church of St. Ambrose**, 6 Pa. Co. Ct. 76, 19 Phila. 466, 45 Phila. Leg. Int. 184, holding permissive occupation of land at will of owner, revocable.

Validity of license.

Cited in **Millerd v. Reeves**, 1 Mich. 107, holding parol license to flow land, valid if followed by expenditure of money.

Estoppel by silence.

Cited in **Kingman v. Graham**, 51 Wis. 232, 8 N. W. 181, holding that mere silence does not estop owner of title appearing of record; **Miller v. Cresson**, 5 Watts & S. 284, holding that disclaimer as to part of tract will not estop one from asserting title to balance; **Hill v. Epley**, 31 Pa. 331, holding that silence of one party works no estoppel where both have equal means of knowledge; **Hammett v. Hammett**, 3 W. N. C. 189, holding widow not estopped from repudiating postnuptial contract, in absence of injury to estate; **Kreiser's Appeal**, 69 Pa. 194, holding widow not estopped from revoking election to take under will, made in ignorance of facts; **Lehman v. Murtoff**, 7 Pa. Super. Ct. 485, holding estoppel from mere silence cannot operate in favor of wrongdoer; **Com. v. Moltz**, 10 Pa. 527, 51 A. D. 499, holding ward deceived by guardian as to amount due, not estopped by receipt or failure to make claim against his estate.

Distinguished in **Garr v. Wallace**, 7 Watts, 394, holding one silently permitting another to purchase and improve land, estopped from asserting his legal rights.

17 AM. DEC. 680, GRAY v. HOLDSHIP, 17 SERG. & R. 413.

What are and rights as to fixtures.

Cited in **Langston v. State**, 96 Ala. 44, 11 So. 334, holding valves screwed to iron pipes attached to building for manufacturing purposes are fixtures; **Voorhis v. Freeman**, 2 Watts & S. 116, 37 A. D. 490, holding machinery in iron-rolling mill part of realty; **Heaton v. Findlay**, 12 Pa. 304, holding cylinder attached to furnace, part of freehold; **Capen v. Peckham**, 35 Conn. 88, holding windlass annexed to slaughterhouse forms part of realty; **Overton v. Williston**, 31 Pa. 155, holding machinery used to operate sawmill part of realty; **Bradley v. Ritchie**, 12 Pa. Dist. R. 658, 20 Lanc. L. Rev. 260, holding lathe and planer in machine shop and planer in sawmill, part of realty; **Ritchie v. McAllister**, 14 Pa. Co. Ct. 267, holding cars, rails, and scales used at quarry are part of freehold; **Covey v. Pittsburg, Ft. W. & C. R. Co.** 3 Phila. 173, 15 Phila. Leg. Int. 228, holding rails and chairs of railroad company, part of realty; **Equitable Guarantee & T. Co. v. Knowles**, 8 Del. Ch. 106, 67 Atl. 961, holding machinery and appurtenances of a cotton and woolen factory forms part of freehold; **Pa-**

terson v. Delaware County, 70 Pa. 381, holding machinery in cotton factory taxable as real estate; *Rogers v. Gillinger*, 30 Pa. 185, 72 A. D. 604, holding broken materials of fallen building, part of realty; *Walker v. Sherman*, 20 Wend. 636, holding machinery in woolen factory not attached to freehold is personalty; *Steinmetz v. Witmer*, 1 Pearson (Pa.) 524, holding removal of mill machinery to preserve it does not convert it into personalty.

Cited in reference notes in 20 A. D. 322, 386; 21 A. D. 732; 28 A. D. 203; 30 A. D. 367; 36 A. D. 557; 37 A. D. 219; 42 A. D. 601; 52 A. D. 617; 64 A. D. 75; 77 A. D. 788; 83 A. D. 480; 91 A. D. 213; 94 A. D. 395; 2 A. S. R. 412; 13 A. S. R. 153; 14 A. S. R. 461; 30 A. S. R. 491; 79 A. S. R. 939; 84 A. S. R. 273; 87 A. S. R. 268; 92 A. S. R. 825; 96 A. S. R. 322; 97 A. S. R. 411, 492,—on what are fixtures; 39 A. S. R. 172; 76 A. S. R. 864,—on test of fixtures; 83 A. D. 669; 94 A. D. 395,—on criterion for determining what is a fixture; 93 A. D. 303, on rules for determining what are fixtures; 59 A. D. 657, 658, on annexation to realty as criterion of fixture; 59 A. D. 657, on intention as criterion of fixture; 83 A. D. 480, on intent and purpose of design as determining what is a fixture; 40 A. D. 659, as to what are fixtures when erected by owner of freehold; 69 A. S. R. 343, on house built on land of another as a fixture; 83 A. D. 480, on gas appliances as fixtures; 64 A. D. 76, on gas fixtures as fixtures; 59 A. D. 658, on machinery as fixture; 32 A. D. 271, on manure as a fixture.

Cited in notes in 19 A. D. 205; 62 A. D. 69, 70,—as to what are fixtures.

Distinguished in *Spruance's Opinion*, 8 Del. Ch. 539 Appx., holding machinery and articles forming integral parts of it in cotton mill are part of freehold.

—Subject to mechanic's lien.

Cited in *Morgan v. Arthurs*, 3 Watts, 140, holding engine in steam sawmill subject to mechanic's lien; *Progress Press Brick & Mach. Co. v. Gratiot Brick & Quarry Co.* 151 Mo. 501, 74 A. S. R. 557, 52 S. W. 401, holding machinery put in manufacturing plant, subject to mechanic's lien; *Moore v. Smith*, 24 Ill. 512, holding brewery trade fixtures pass to purchaser on sale under mechanic's lien, unless reserved or removed by tenant; *Heidegger v. Atlantic Mill Co.* 16 Mo. App. 327, holding bolting cloths in flouring mill, subject to mechanic's lien; *Parrish's Appeal*, 83 Pa. 111, 34 Phila. Leg. Int. 258, holding engine and boilers in iron factory subject to mechanic's lien; *Wheeler v. Pierce*, 167 Pa. 416, 46 A. S. R. 679, 31 Atl. 649, holding boilers in furnace plant subject to mechanic's lien; *Kelley v. Border City Mills*, 126 Mass. 148, holding boilers on boiler house adjoining mill subject to mechanic's lien for repairs; *White v. Chaffin*, 32 Ark. 59, holding gin stands and idler placed in building for ginning cotton, subject to mechanic's lien; *Meek v. Parker*, 63 Ark. 367, 58 A. S. R. 119, 38 S. W. 900, holding wheels and axes operated on tramway in dry kiln, subject to mechanic's lien; *Wethered v. Garrett*, 7 Pa. Co. Ct. 529, holding boiler and steam pipes in green houses, subject to mechanic's lien; *Grewar v. Alloway*, 3 Tenn. Ch. 584, holding scenery and stage properties of a theater subject to mechanic's lien.

Cited in reference notes in 65 A. S. R. 165, on what structures are subject to mechanics' liens; 90 A. D. 286, on enforcement of lien upon fixtures removed to the detriment of a lien holder.

Cited in note in 13 L.R.A. 702, as to what mechanics' lien attaches.

Distinguished in *Latta v. Cambridge Springs Co.* 25 Pa. Co. Ct. 310, holding rubber hose attached to water mains of hotel, not subject to mechanic's lien.

—Subject to levy and sale.

Cited in *Witmer's Appeal*, 45 Pa. 455, 84 A. D. 505, holding judgment debtor

cannot sever engine from realty, so that it may be levied upon by subsequent judgment creditors; *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102, 15 Pa. Co. Ct. 97, 3 Pa. Dist. R. 573, holding refrigerating machinery placed in brewery under contract of conditional sale, part of realty subject to execution against brewer; *Stillman v. Flenniken*, 58 Iowa, 450, 43 A. R. 120, 10 N. W. 842, holding smutter placed in mill as part of machinery passes to purchaser on judicial sale.

— **As between vendor and purchaser.**

Cited in reference notes in 18 A. S. R. 907, on fixtures between vendor and vendee; 44 A. D. 356, on what are fixtures as between grantor and grantea.

— **As to mortgagee or purchaser on foreclosure.**

Cited in *Winslow v. Merchants Ins. Co.* 4 Met. 306, 38 A. D. 368, holding steam works erected to move mill are covered by mortgage of the real estate; *Great Western Mfg. Co. v. Bathgate*, 15 Okla. 87, 79 Pac. 903, holding machinery placed in gristmill, subject to existing mortgage as against vendor's subsequent mortgage and conditional bill of sale; *Smith v. Altick*, 24 Ohio St. 369, sustaining right of mortgagee to recover of purchaser from mortgagor the value of fixtures removed from mortgaged premises; *Gunderson v. Swarthout*, 104 Wis. 186, 76 A. S. R. 860, 80 N. W. 465, holding dynamo, exciter, and belts in electric light plant are fixtures as between their vendor and a purchaser on foreclosure sale.

Cited in reference notes in 31 A. S. R. 623, on fixtures as between mortgagor and mortgagee; 38 A. D. 376, on fixtures placed on mortgaged premises as part of the freehold.

Disapproved in *Teaff v. Hewitt*, 1 Ohio St. 511, 59 A. D. 634, holding machinery used in woolen manufactory not subject to real-estate mortgage.

— **As between landlord and tenant.**

Cited in *Gulick v. Heermans*, 6 Luzerne Leg. Reg. 231, upholding right of tenant to remove trade fixtures; *Sigur v. Lloyd*, 1 La. Ann. 421, holding tenant of warehouse entitled to remove hoisting wheel placed in building by him.

Cited in reference notes in 67 A. D. 575, on gas fixtures as fixtures between landlord and tenant; 55 A. D. 554, on right of way-going tenant to remove manure made on farm directly or indirectly from products thereof.

Cited in note in 69 A. D. 515, on tenant's right to remove fixtures after expiration of his term.

Distinguished in *Lemar v. Miles*, 4 Watts, 330, holding steam engine placed in salt factory by tenant is personal property; *State use of Kidney v. Marshall & Co.* 4 Mo. App. 29, holding tenant's intent in affixing boilers to freehold, not decisive as to status of property.

— **On severance of chattel.**

Cited in *Ross's Appeal*, 9 Pa. 491, holding chattel ceases to be fixture on complete severance from freehold; *Bringholff v. Munzenmaier*, 20 Iowa, 513, on constructive severance of property from freehold.

17 AM. DEC. 696, WILEY v. MOOR, 17 SERG. & R. 438.

Validity of altered instruments.

Cited in reference notes in 29 A. D. 400, on filling blanks in instruments already signed; 33 A. S. R. 707, on effect of filling blanks.

Cited in note in 13 A. D. 671, on effect of filling up blanks left in written instruments.

- Bonds.

Cited in *Bartlett v. Board of Education*, 59 Ill. 364, holding valid official bond of school board treasurer, who filled in authorized penalty, left blank when signed by sureties, and delivered it to board without sureties' knowledge of alteration; *Lee County v. Welsing*, 70 Iowa, 198, 30 N. W. 481, holding valid several official bonds of county treasurer, signed by sureties with blank penalty in each, but with intent and understanding that such blanks should be filled when fixed by board; *Williams v. Crutcher*, 5 How. (Miss.) 71, 35 A. D. 422, holding void replevin bond which was signed and sealed by surety with penalty and amount of execution in blank, without redelivery; *Xander v. Com.* 102 Pa. 434, 40 Phila. Leg. Int. 296, 14 Pittsb. L. J. N. S. 21, holding one signing bond on condition that another sign, liable, although latter's name subsequently erased.

Cited in reference note in 24 A. D. 441, on validity of bond signed in blank.

Criticized in *Cross v. State Bank*, 5 Ark. 525, holding paper purporting to be a bond, not valid if altered in material point.

Disapproved in *Walla Walla County v. Ping*, 1 Wash. Terr. 340, holding void official bond of county treasurer altered after delivery by inserting in blank the penalty.

- Deeds.

Cited in *State v. Tripp*, 113 Iowa, 698, 84 N. W. 546, holding property obtained under false pretenses, where one party claiming to be able to obtain deed of land induced another to execute and deliver deed of his own property in exchange, although such deed had blank for grantee's name; *Burns v. Lynde*, 6 Allen, 305, holding invalid release of dower and homestead by married woman, who executed deed of husband's property wholly in blank, subsequently filled up and delivered, without sufficient subsequent ratification by her; *Cribben v. Deal*, 21 Or. 217, 28 A. S. R. 746, 27 Pac. 1046, holding blank in general assignment deed may be filled by inserting name of grantee, after execution and before delivery, upon parol authority of grantor; *Kirtland v. Hoey*, 2 Luzerne Leg. Reg. 47, holding stranger cannot object to insertion of grantee's name, either by grantor, grantee, or his duly authorized agent, in deed executed and delivered; *Threadgill v. Butler*, 60 Tex. 599, holding grantee, upon parol authorization of grantor at delivery, may insert his own name in deed, even after sale to third party.

Distinguished in *Simms v. Hervey*, 19 Iowa, 273, holding conveyance of real estate signed in blank and wholly filled in thereafter, not valid without subsequent ratification.

- Notes.

Cited in *Chism v. Toomer*, 27 Ark. 108, holding invalid note altered by decreasing the amount; *Ogle v. Graham*, 2 Penr. & W. 132, holding valid joint and several note, executed by one at request of another, who altered it by reducing amount and then executed and delivered to payee; *Wessell v. Glenn*, 108 Pa. 104, holding accommodation indorser of note given to renew note of maker presumptively knew that place of payment was blank and that it must be filled before used.

Validity of note imperfect as to amount.

Cited in *Weaver v. Paul*, 4 Dauphin Co. Rep. 305, 16 Pa. Co. Ct. 473, 4 Pa. Dist. 493, holding non-negotiable note imperfect as to amount but with marginal figures in maker's handwriting, good as to that amount.

Implied consent to fill blank in bond.

Cited in *South Berwick v. Huntress*, 53 Me. 89, 87 A. D. 535, holding consent to insert penal sum in blank fidelity bond, implied by agreeing to execute such bond.

Parol authority to alter or fill blank in instrument.

Cited in *Gibbs v. Frost*, 4 Ala. 720, holding good parol authority to alter bond signed in blank by sureties; *State v. Young*, 23 Minn. 551, holding parol authority good in case of unsealed instrument, sufficient also to authorize filling blank in official bond of county treasurer; *Dickson v. Hamer*, Freem. Ch. (Miss.) 284, holding bond executed in blank, with verbal authority to fill up blanks, is void.

Cited in notes in 5 E. R. C. 182, on authority to fill up blank in deed after delivery; 2 E. R. C. 280, on validity of parol authority to fill blanks, in deed; 8 E. R. C. 632, on sufficiency of parol authorization to fill blanks in deeds; 2 L.R.A. 530, on validity of deed delivered, with name of grantee blank, to grantee or another for him, with oral instructions to fill blank.

Parol ratification of deed executed by agent.

Cited in *Drumright v. Philpot*, 16 Ga. 424, 60 A. D. 738, holding ratification of agent's authority to execute deed of slaves need not be evidenced in writing.

Cited in note in 8 E. R. C. 634, on validity of parol ratification of unauthorized deed by agent.

17 AM. DEC. 699, SINGLETON v. BREMAR, 4 M'CORD, L. 12.**Validity of deed taking effect in futuro.**

Cited in reference note in 42 A. D. 235, on invalidity of conveyance of freehold estate to take effect in futuro.

Cited in note in 55 A. D. 414, on invalidity of deed of freehold to commence in futuro.

—Taking effect on death generally.

Cited in *Murphy v. Gabbert*, 166 Mo. 596, 89 A. S. R. 733, 66 S. W. 536, holding instrument taking effect upon death of grantor is testamentary in character and insufficient as a deed.

—Reservation of life estate.

Cited in *Cribb v. Rogers*, 12 S. C. 564, 32 A. R. 511, holding grant of fee with reservation of life estate to grantor, valid; *Ellen v. Ellen*, 16 S. C. 132, holding deed of land reserving usufruct to grantor for life, not good as covenant to stand seised.

Distinguished in *Chancellor v. Windham*, 1 Rich. L. 161, 42 A. D. 411, holding deed granting lands at grantor's death, good as covenant to stand seised to uses.

Necessity of consideration.

Cited in reference notes in 33 A. D. 749, on consideration of covenant to stand seised to uses; 42 A. D. 416, on necessity of consideration for covenant to stand seised.

Necessity of expressing consideration.

Cited in note in 17 A. D. 702, on expressing consideration in deed.

Disapproved in *Okison v. Patterson*, 1 Watts & S. 395, holding deed of bargain and sale must express valuable consideration but need not state its amount.

Measure of damages for breach of covenant.

Cited in reference note in 36 A. D. 94, on measure of damages for breach of covenant to stand seised.

What instruments are wills.

Cited in notes in 92 A. D. 384, as to when instruments are wills and when deeds or contracts; 92 A. D. 386, on miscellaneous writings probated as wills.

Ademption.

Cited in note in 2 E. R. C. 26, on ademption of specific legacies.

17 AM. DEC. 702, STATE v. RYAN, 4 M'CORD, L. 16.**Averment of joint ownership of stolen property.**

Cited in McDowell v. State, 68 Miss. 348, 8 So. 508, holding if two or more persons own the property stolen, the indictment must so allege; State v. Owens, 10 Rich. L. 169, holding names of joint owners of stolen goods should be correctly averred in the indictment.

Necessity of proving ownership as alleged.

Cited in State v. Dwyre, 2 Hill, L. 287, holding allegation of ownership of stolen property must be proved as laid; State v. Thurston, 2 McMull. L. 382, holding ownership of property stolen must be proved as laid in the indictment; State v. Hamilton, 77 S. C. 383, 57 S. E. 1098, holding proof of separate ownership of property stolen will not sustain indictment charging joint ownership.

17 AM. DEC. 703, ELCOCK'S WILL, 4 M'CORD, L. 89.**When will takes effect.**

Cited in Donagher's Estate, 2 Para. Sel. Eq. Cas. 164, holding will of personal property exists only from death of testator.

Distinguished in Martindale v. Warner, 15 Pa. 471, holding that, while will takes effect at testator's death, it may for many purposes relate to time of making it.

Disapproved in Battle v. Speight, 31 N. C. (9 Ired. L.) 288, holding statutory rule construing wills as if executed immediately before testator's death, prospective in operation.

Execution and validity of will.

Cited in Colonna v. Alton, 23 App. D. C. 296, holding will of personalty must be executed in conformity with law existing at death of testator; Sutton v. Chenault, 18 Ga. 1; Salter v. Bryan, 26 N. C. (4 Ired. L.) 494,—holding validity of will determined by law as it exists at death of testator.

Cited in reference note in 57 A. S. R. 617, on law governing validity of will.

Cited in note in 51 A. D. 574, on governing force of law at testator's death as to sufficiency of execution of will.

Disapproved in Lane's Appeal, 57 Conn. 182, 14 A. S. R. 94, 4 L.R.A. 45, 17 Atl. 926, holding validity of will depends upon statute in force when it is made.

On what property will operates.

Cited in Mayo v. Mayo, 4 Md. Ch. 103, holding will operates upon testator's personalty, whether acquired before or after its execution; Ford v. Gaithur, 2

Rich. Eq. 270, holding testament operates on whatever personalty testator dies possessed of; *Garrett v. Garrett*, 2 Strobb. Eq. 272, holding will of personalty operates upon after-acquired property.

Retrospective statutes.

Cited in reference note in 14 A. S. R. 100, on retrospective operation of statutes.

17 AM. DEC. 707, BOYD v. LADSON, 4 M'CORD. L. 76.

Account book as evidence.

Cited in *Taylor v. Tucker*, 1 Ga. 231, holding party's account book of original entries admissible in evidence.

Cited in reference notes in 25 A. D. 596; 27 A. D. 279,—on books of account as evidence; 39 A. D. 128, on competency of books of account as evidence; 1 A. S. R. 451, on what are account books so as to be admissible in evidence; 22 A. D. 416, on what are admissible as books of original entries.

Cited in note in 52 L.R.A. 697, on provability of sale and delivery of goods by books of account.

17 AM. DEC. 710, TAYLOR v. HAMPTON, 4 M'CORD, L. 96.

Rights of grantee.

Cited in *Kieffer v. Imhoff*, 26 Pa. 438, holding grant of part of estate passes privileges affixed by grantor to property conveyed; *Jackson v. Trullinger*, 9 Or. 393, holding grant of will with appurtenances passes necessary privileges of flowing lands; *Hathorn v. Stinson*, 10 Me. 224, 25 A. D. 228, holding grantee of mill and dam entitled to flow other lands of grantor as had been done before grant.

Right of flowage as easement.

Cited in *Garrett v. McKie*, 1 Rich. L. 444 (dissenting opinion), on right to flow another's land as easement.

How easement acquired.

Cited in note in 10 E. R. O. 97, on acquisition of easement by prescription.

What is a servitude.

Cited in reference note in 24 A. D. 222, on definition of "servitude."

Rights in easement.

Cited in reference note in 28 A. S. R. 254, on right of mill owner to maintain height of dam.

Extinguishment of easement.

Cited in *Ohio & M. R. Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258, holding easement extinguished if severed from dominant estate; *Smith v. Musgrove*, 32 Mo. App. 241, holding acquiescence raising inference of abandonment may extinguish easement; *Holmes v. Cleveland, C. & C. R. Co.* 93 Fed. 100, holding interruption of travel due to washing away of part of street is not an abandonment of the easement.

Cited in notes in 5 L.R.A. 259, on what constitutes abandonment of right; 24 A. D. 222, as to how easement may be destroyed; 40 A. D. 468, on abandonment of easements and other interests in land; 59 L.R.A. 846, on abandonment of right to dam back water of stream.

Distinguished in *West v. Fox River Paper Co.* 82 Wis. 647, 52 N. W. 803,

holding removal of part of island for erection of buildings does not extinguish riparian rights.

—By disuse.

Cited in *Rhodes v. Whitehead*, 27 Tex. 304, 84 A. D. 631, holding servitude acquired by prescription may be lost by nonexercise; *Jewett v. Jewett*, 16 Barb. 150, holding right created by deed to have water flow in channel not lost by disuse for a few years; *State ex rel. Gervais v. Charleston*, 11 Rich. Eq. 432, holding right to public landing extinguished by erection of sea wall and twenty years nonuser; *Day v. Walden*, 46 Mich. 575, 10 N. W. 26, holding grant of easement to take water for water power, not lost by mere neglect to use it for twenty years.

Cited in reference note in 84 A. D. 640, as to when easements are lost by non-user or adverse possession.

—By adverse possession.

Cited in *Louisville & N. R. Co. v. Welch*, 94 Ky. 310, 22 S. W. 221, holding adverse possession for fifteen years by owner of servient estate extinguishes easement; *Pollock v. Maysville & B. S. R. Co.* 103 Ky. 84, 44 S. W. 359, holding right of way extinguished by fifteen years adverse possession by owner of servient estate.

—By incompatible act.

Cited in *Corning v. Gould*, 16 Wend. 531, holding easement may be extinguished by incompatible act of party beneficially interested; *Mississippi C. R. Co. v. Mason*, 51 Miss. 234, holding right to continued flow of water in natural channel may be extinguished by incompatible or destructive act; *Beattie v. Carolina C. R. Co.* 108 N. C. 425, 12 S. E. 913, holding failure to complete railroad and permitting inconsistent use of roadbed constitute abandonment of easement.

—By obstruction.

Cited in *Akrainka v. Oertel*, 14 Mo. App. 474, holding obstruction of passage by dominant owner destroys right of way; *Steere v. Tiffany*, 13 R. I. 568, holding right of way extinguished where owner of dominant tenement takes exclusive possession; *Robinson v. Myers*, 67 Pa. 9, holding right of way over lot extinguished by fencing it up and using it as a yard; *Monaghan v. Memphis Fair Co.* 95 Tenn. 108, 31 S. W. 497, holding easement in land laid out as a street, extinguished if way is obstructed by dominant owner; *Stenz v. Mahoney*, 114 Wis. 117, 89 N. W. 819, holding moving building upon land reserved for common stairway extinguishes easement; *Ballard v. Butler*, 30 Me. 94, holding right to take water from well extinguished by suffering erection of building over it.

Cited in reference notes in 71 A. D. 525, as to when servitudes are lost by obstruction; 36 A. D. 255, on permanent obstruction of easement by party himself as destroying it.

17 AM. DEC. 722, *LEE v. LEE*, 4 M'CORD, L. 183.

Testamentary capacity.

Cited in *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, holding testamentary incapacity does not mean total want of mind, reason, or understanding; *Kaufman v. Caughman*, 49 S. C. 159, 61 A. S. R. 808, 27 S. E. 16, holding will valid, although unjust to relatives or unequal in its provisions.

Cited in reference notes in 44 A. S. R. 687, on effect of partial insanity on testamentary capacity; 55 A. D. 717, on will executed during lucid interval.

Cited in note in 21 A. D. 737, on testamentary capacity.

—Eccentricity or delusion.

Cited in *Potts v. House*, 6 Ga. 324, 50 A. D. 329; *Scarborough v. Baskin*, 65 S. C. 558, 44 S. E. 63,—holding eccentricities do not disclose want of testamentary capacity; *Re Vedder*, 6 Dem. 92, holding insane delusion not relating to provisions of will does not incapacitate testator; *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, holding insane delusion respecting hidden treasure does not show want of testamentary capacity.

Cited in reference notes in 41 A. S. R. 854, on insane delusions invalidating will; 63 A. S. R. 577, on insane delusions affecting testamentary capacity; 61 A. D. 84, on eccentricity of testator as no ground for invalidating will.

Cited in notes in 61 A. D. 85, on belief in witchcraft as evidence of testamentary incapacity; 16 L.R.A. 677, on belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed; 37 L.R.A. 273, on belief in witchcraft as insane delusion.

Contractual capacity.

Cited in *Team v. Bryant*, 71 S. C. 331, 51 S. E. 148, holding validity of contract of alleged lunatic determined by his mental capacity when it was made; *Parker v. Marco*, 76 Fed. 510, holding want of contractual capacity at time contract was made by alleged insane person must be shown to invalidate it.

Cited in notes in 20 A. D. 203; 22 A. D. 375; 71 A. S. R. 428,—on contracts of insane persons; 71 A. S. R. 429, on contracts of insane person, entered into during lucid intervals.

Presumption and burden of proof as to insanity.

Cited in reference note in 83 A. D. 523, on presumptions regarding sanity.

Cited in notes in 35 L.R.A. 119, on presumption of continuance of habitual insanity; 36 L.R.A. 724, on presumption of sanity with relation to wills; 35 L.R.A. 118, on presumption of continuance of habitual insanity.

—Of testator.

Cited in reference notes in 47 A. D. 422, on presumption of testator's sanity; 99 A. D. 709, on burden of proof of insanity of testator; 39 A. D. 592, on necessity for proof of testamentary capacity by parties claiming under will; 99 A. D. 709, on necessity for proof that insane person's will was made during lucid interval.

17 AM. DEC. 731, GREIR v. TAYLOR, 4 M'CORD, L. 206.**Jurisdiction to issue prohibition.**

Cited in *Thomas v. Mead*, 36 Mo. 232, holding supreme court has original jurisdiction to issue writ of prohibition.

Cited in reference notes in 30 A. D. 677, as to when prohibition lies; 37 A. S. R. 494, on writ of prohibition to restrain governor.

Cited in notes in 12 A. D. 607, as against whom prohibition will be issued; 111 A. S. R. 942, on denial of prohibition to individual officers in case of ministerial acts.

Removal of officers.

Cited in *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185, 11 A. & E. Ann. Cas. 613, holding writ of certiorari will not issue to review removal of officers by governor in exercise of executive duty; *Segars v. Parrott*, 54 S. C. 1, 31 S. E. 677 (dissenting opinion), on discretionary nature of power of removal conferred on governor.

Distinguished in *People ex rel. Wheeler v. Cooper*, 57 How. Pr. 416, holding

writ of prohibition lies to prevent wrongful removal by mayor of holdover officer.

Removal of county seat.

Cited in *State ex rel. West v. Clark County Ct. Justices*, 41 Mo. 44, holding writ of prohibition will not issue to restrain the removal of a county seat.

17 AM. DEC. 734, DUNCAN v. HODGES, 4 M'CORD, L. 239.

Validity of instrument incomplete when executed.

Cited in *Exchange Nat. Bank v. Fleming*, 63 Kan. 139, 65 Pac. 213, holding deed valid, although lacking name of grantee when executed; *Cribben v. Deal*, 21 Or. 211, 28 A. S. R. 746, 27 Pac. 1046, holding deed executed with blank left for name of grantor, valid; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492, sustaining validity of deed where blank left for name of grantee was filled before delivery; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262, holding blank left in deed for grantee's name may be filled by parol authority; *Pope v. Chafee*, 14 Rich. Eq. 69, sustaining validity of deed in which blank was filled up by grantor's agent before delivery; *Lamar v. Simpson*, 1 Rich. Eq. 71, 48 A. D. 345, holding deed executed in blank by authorized agent and filled up by party in interest constitutes good conveyance; *Gourdin v. Commander*, 6 Rich. L. 497, holding agent may be authorized by parol to fill blank in sealed instrument.

Disapproved in *Simms v. Hervey*, 19 Iowa, 273, holding mortgage executed by wife in blank and delivered to husband to negotiate, invalid; *Walla Walla County v. Ping*, 1 Wash. Terr. 340, holding bond in which penal sum was filled in after delivery is invalid.

Confirmation of defective instrument.

Cited in *Pursley v. Hayes*, 22 Iowa, 11, 92 A. D. 350, upholding deed defective as conveyance of *feme covert* when executed and delivered by her after she became discover; *Perminster v. M'Daniel*, 1 Hill, L. 267, holding bond executed in blank in attachment suit, not confirmed by subsequent prosecution of attachment.

Cited in note in 8 E. R. C. 634, on validity of parol ratification of unauthorized deed by agent.

What constitutes and effect of material alteration.

Cited in *Collins v. Collins*, 51 Miss. 311, 24 A. R. 632, holding alteration of recorded deed by consent, ineffectual to change rights of parties; *Chappell v. Spencer*, 23 Barb. 584, holding signing note by payee as surety, upon transfer of instrument, constitutes material alteration.

Cited in reference notes in 31 A. D. 422, on deeds executed in blank; 42 A. D. 349, on filling blanks in instrument after execution.

Cited in notes in 10 A. R. 268, on filling blanks in deed; 5 E. R. C. 182, on authority to fill up blank in deed after delivery; 28 L. ed. U. S. 91, on deeds executed in blank as to name of grantee.

Sufficiency of delivery.

Cited in reference notes in 30 A. D. 89, on necessity of delivery to validity of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed.

Cited in notes in 21 A. D. 361, on what is a delivery of deed; 53 A. S. R. 539, on by whom and to whom deed may be delivered.

Sufficiency of seal.

Cited in *McKain v. Miller*, 1 McMull. L. 313, holding any stamp or mark affixed to written contract by signer as his seal, sufficient.

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17 AM. DEC. 735, CHESHIRE v. BARRETT, 4 M'CORD, L. 241.**Voidability of infant's contract.**

Cited in *Fetrow v. Wiseman*, 40 Ind. 148, holding contracts of infant not illegal are voidable only; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468, holding deed made by infant not void but voidable; *Salinas v. Bennett*, 33 S. C. 285, 11 S. E. 968, on validity of mortgage executed by infant partner.

Cited in notes in 21 A. D. 593, on voidability of infant's contract; 18 A. S. R. 578, on infant's contracts as void or voidable; 18 A. S. R. 608, on infant's bills and notes.

Confirmation of contract made during minority.

Cited in *Little v. Duncan*, 9 Rich. L. 55, 64 A. D. 760, holding adult may confirm note under seal given during infancy; *Williams v. Harrison*, 11 S. C. 412, holding adult may confirm contract of suretyship made during minority; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468, holding deed made by minor confirmed where acquiesced in for fourteen years after attaining majority; *Stoddard v. McElwain*, 7 Rich. L. 525, holding ratification by an adult of his acts as a minor may be established by slight circumstances; *Miller v. Sims*, 2 Hill, L. 479, holding carrying on business or receiving profits after coming of age confirms partnership contract; *Norris v. Wait*, 2 Rich. L. 148, 44 A. D. 283, holding infant's confirmation of sale of his property, not presumed unless he received equivalent for it; *Harris v. Musgrove*, 59 Tex. 401, holding unequivocal assertion of ownership by adult of property sold when a minor amounts to disavowal of contract.

Cited in reference notes in 23 A. D. 529; 26 A. D. 254; 36 A. D. 298,—on ratification of contract by infant; 21 A. D. 593, on ratification of infant's voidable contract; 34 A. D. 150, as to what amounts to ratification of infants' contracts; 25 A. R. 31, as to what constitutes ratification after majority of contract made during infancy.

Cited in notes in 18 A. S. R. 700, 701, on nature and effect of infant's ratification; 23 A. D. 361, on ratification of infant's contract by slight circumstance showing assent after majority.

— By retaining consideration.

Cited in *American Freehold Land Mortg. Co. v. Dykes*, 111 Ala. 178, 56 A. S. R. 38, 18 So. 292, holding infant, on attaining full age cannot retain purchase and avoid payment of purchase money; *Kitchen v. Lee*, 11 Paige, 107, 13 A. D. 101, 4 Ch. Sent. 25, holding infant cannot retain property purchased and at the same time repudiate the contract; *Boody v. McKenney*, 23 Me. 517; *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848, holding contract of infant ratified by retention and use of property after attaining majority; *Philpot v. Sandwich Mfg. Co.* 18 Neb. 54, 24 N. W. 428, holding infant's purchase of personal property confirmed by retaining property after attaining majority; *Corey v. Burton*, 32 Mich. 30, holding retention after coming of age of money borrowed during infancy is an affirmation of the contract; *Alexander v. Heriot*, Bail. Eq. 223, holding retention after attaining majority of slave purchased during infancy confirms purchase; *Eubanks v. Peak*, 2 Bail. L. 497, holding release of adult by infant from contract, binding where he retains consideration after coming of age; *Henry v. Root*, 33 N. Y. 526, holding infant retaining real estate after attaining full age, liable for purchase money.

Cited in reference note in 64 A. D. 763, on retaining and using horse purchased during infancy as ratification.

— By sale of property purchased.

Cited in *Necker v. Koehn*, 21 Neb. 550, 59 A. R. 849, 32 N. W. 583, holding conveyance of real property purchased during infancy affirms purchase-money mortgage.

Cited in note in 18 A. S. R. 718, on infant's ratification by sale or conveyance of property.

Disaffirmance of infant's contracts.

Cited in reference note in 93 A. D. 124, as to when infant cannot disaffirm contract after coming of age.

Cited in notes in 18 A. S. R. 673, on disaffirmance of contracts within reasonable time after reaching majority; 42 L. ed. U. S. 326, on power and right of infant to disaffirm contract without restoring consideration.

17 AM. DEC. 740, BYRD v. BOYD, 4 M'CORD. L. 246.

Rights and remedies of discharged servant.

Cited in reference note in 40 A. D. 498, on liability of master for wrongfully discharging servant hired for definite term.

Cited in notes in 58 A. R. 829, on remedy of servant when wrongfully discharged; 5 L.R.A.(N.S.) 527, on rights and remedies of servant discharged for good cause; 24 L.R.A. 232, on effect of part performance of contract for services on right to wages on discharge without cause.

Apportionment of contract for services.

Cited in *Verner v. Sullivan*, 26 S. C. 327, 2 S. E. 391, sustaining right of attorney withdrawing services to recover on *quantum meruit*; *Collins v. Woodruff*, 9 Ark. 463, holding hirer of slave dying within term of hiring only liable for hire until slave's death; *Bacot v. Parnell*, 2 Bail. L. 424, holding wages of slave dying within term of hiring should be apportioned.

Cited in note in 39 A. D. 534, on apportionment of servant's contract.

— As overseer.

Cited in *Meade v. Rutledge*, 11 Tex. 44, holding contract for employment as overseer capable of apportionment; *Hariston v. Sale*, 6 Smedes & M. 634, holding overseer employed for year entitled to recover wages for shorter period; *Eaken v. Harrison*, 4 McCord, L. 249, holding overseer employed for year may recover wages for faithful services during shorter period; *M'Clure v. Pyatt*, 4 McCord, L. 26, holding discharged overseer entitled to recover for services actually rendered; *Prichard v. Martin*, 27 Miss. 305, holding overseer employed for year but discharged without cause may recover wages for year; *Willoughby v. Thomas*, 24 Gratt. 521, holding overseer hired for year but wrongfully discharged may recover to extent of damages sustained; *Suber v. Vanlew*, 2 Speers, L. 126, holding overseer may recover wages if discharged without cause, but not if he leaves without cause; *Wright v. Morrison*, 15 Ark. 444, sustaining right of overseer performing contract, but not wholly according to its terms, to recover in *indebitatus assumpsit*; *Givhan v. Dailey*, 4 Ala. 336, denying right of personal representative of one contracting to serve as overseer for definite time, at certain wages, to recover for part performance.

Performance of condition or contract.

Cited in *Shuman v. Heldman*, 63 S. C. 474, 41 S. E. 510, holding condition that devisee live with testator's widow during life must be fully performed; *McGehee v. Walke*, 15 Ala. 183, holding mortgagor's undertaking with owner of equity of redemption, to make good defense to foreclosure suit is entire.

Cited in reference note in 37 A. D. 464, on recovery for part performance of contract to give services.

Cited in note in 24 L.R.A. 234, on effect of employee's abandonment of contract for services without cause.

Disapproved in *Timberlake v. Thayer*, 71 Miss. 279, 24 L.R.A. 231, 14 So. 446, denying right of employee guilty of breach of contract for services to recover for part performance.

Termination of contract.

Cited in *Saunders v. Anderson*, 2 Hill, L. 486, holding either party may terminate contract of hiring if conduct of other makes their relations offensive or degrading.

Extent of recovery by servant wrongfully discharged.

Cited in reference note in 43 A. D. 762, on right of discharged employee to stipulated wages for entire period.

Cited in notes in 6 L.R.A.(N.S.) 83, on prima facie measure of damages for wrongful discharge of servant; 43 A. D. 208, on recovery by servant discharged for justifiable cause; 5 L.R.A. 762, on measure of damages where servant is wrongfully discharged; 5 L.R.A.(N.S.) 441, on right of wrongfully discharged servant to recover wages for contract period subsequent to discharge, on theory of constructive service.

17 AM. DEC. 742, GIVENS v. HIGGINS, 4 M'CORD, L. 286.

Who liable as executor *de son tort*.

Cited in *Jones v. Jones*, 39 S. C. 247, 17 S. E. 587, holding administrator collecting assets and paying debts in another state is executor *de son tort*; *Ward v. Beville*, 10 Ala. 197, 44 A. D. 478, holding widow taking care of husband's estate until appointment of administrator not liable as executrix *de son tort*.

Cited in reference notes in 20 A. D. 462, on executor *de son tort*; 85 A. D. 423, on definition of executor *de son tort*; 22 A. D. 719, on who is an executor *de son tort*; 45 A. D. 778, as to how executor *de son tort* is constituted; 65 A. D. 140, as to when intermeddling with goods will convert one into executor *de son tort*.

Cited in notes in 23 A. D. 376, on who liable as executor *de son tort*; 85 A. D. 424; 98 A. S. R. 193,—on what constitutes one an executor *de son tort*; 85 A. D. 425, on what acts will not constitute person executor *de son tort*; 98 A. S. R. 196, on acts of charity or kindness as constituting one an executor *de son tort*.

— Person acting as widow's agent.

Cited in *Perkins v. Ladd*, 114 Mass. 420, 19 A. R. 374, holding one selling perishable property at request of intestate's widow to whom he accounted, not liable to administrator; *Rutherford v. Thompson*, 14 Or. 236, 12 Pac. 382; *Magner v. Ryan*, 19 Mo. 196,—holding persons selling intestate's property at request of his widow, not liable as executors of their own wrong.

Liability of executor *de son tort*.

Cited in reference notes in 45 A. D. 778; 57 A. D. 154,—on liability of executor *de son tort*.

17 AM. DEC. 744, HUDNAL v. WILDER, 4 M'CORD, L. 294.

Scope of statutes as to fraudulent conveyances.

Cited in *Sumner v. Hicks*, 2 Black, 532, 17 L. ed. 355, holding statute of 13th Elizabeth declaratory of the common law; *Miller v. Marekle*, 21 Ill. 152, holding

acts of 13th and 27th Elizabeth but in affirmance of the common law; *Fleming v. Townsend*, 6 Ga. 103, 50 A. D. 318, holding although purchasers not within terms of act of 13th Elizabeth, nor personal property within 27th Elizabeth, both are embraced in spirit of those acts; *Gibson v. Love*, 4 Fla. 217, holding statute of 27th Elizabeth may be interpreted as defining the nature and effect of fraudulent conveyances generally.

Cited in reference note in 39 A. D. 263, on statutes against fraudulent conveyances as declarative of common law.

Doubted in *Beckwith v. Burrough*, 14 R. I. 366, 51 A. R. 392, holding statute of fraudulent conveyances extends to fraudulent transfers of corporate stock.
Effect of indebtedness or insolvency of grantor.

Cited in *M'Elwee v. Sutton*, 2 Bail. L. 128, holding slight indebtedness will not vitiate a gift made by a parent to his child; *Moritz v. Hoffman*, 35 Ill. 553, holding voluntary settlement fraudulent if grantor is deeply indebted; *Foot v. Cobb*, 18 Ala. 585, holding deed of gift by insolvent debtor fraudulent.

Validity of conveyance as against creditors or purchasers.

Cited in *Van Wyck v. Seward*, 18 Wend. 375, holding voluntary settlement by parent upon children, invalid as to existing creditor; *Jones v. Light*, 86 Me. 437, 30 Atl. 71, holding fraudulent conveyance void, not only against existing, but subsequent, creditors and bona fide purchasers; *Wyman v. Brown*, 50 Me. 139, holding conveyance on inadequate consideration void against existing or subsequent creditors and purchasers with notice; *Enders v. Williams*, 1 Met. (Ky.) 346, holding voluntary conveyance presumptively fraudulent as to subsequent bona fide purchaser of property; *Reynolds v. Vilas*, 8 Wis. 471, 76 A. D. 238, holding fraudulent conveyance void as against subsequent purchaser for valuable consideration; *Caston v. Ballard*, 1 Hill, L. 406, holding voluntary deed invalid as to subsequent purchaser for valuable consideration with notice; *Moultrie v. Jennings*, 2 McMull. L. 508, holding voluntary conveyance of chattel is good against a subsequent purchaser with notice.

Cited in reference notes in 18 A. D. 770; 20 A. D. 141; 25 A. D. 59; 26 A. D. 194; 44 A. D. 305,—on voluntary conveyances; 28 A. D. 572, as to when voluntary conveyances are void; 28 A. D. 113; 31 A. D. 216,—on conveyances fraudulent as to creditors; 28 A. D. 206, on validity of fraudulent conveyances as between parties; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers; 82 A. D. 520, on validity of voluntary deed intended to place grantor's property beyond reach of his creditors; 78 A. S. R. 824, on fraudulent intent in making conveyance; 28 A. D. 207, on rights of purchasers with notice of fraud; 28 A. D. 207, on protection of bona fide purchaser under fraudulent conveyance; 72 A. D. 152, on protection of bona fide purchaser of personalty for value without notice; 26 A. D. 386, as to when conveyance from father to son is fraudulent.

Cited in note in 14 A. D. 708, on validity of voluntary conveyance as to subsequent purchasers.

Distinguished in *Doolittle v. Lyman*, 44 N. H. 608, holding chattel mortgage designed to defraud creditors not void as against subsequent purchaser; *Footman v. Pendergrass*, 3 Rich. Eq. 33, holding voluntary settlement not fraudulent in fact, valid as against subsequent purchasers and creditors of donor.

Effect of continued possession by grantor or donor.

Cited in *Watson v. Williams*, 4 Blackf. 28, 28 A. D. 36, holding mortgagor's subsequent possession of mortgaged goods, evidence of fraud susceptible of explanation by proof.

Cited in reference note in 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor.

Distinguished in *Howard v. Williams*, 1 Bail. L. 575, 21 A. D. 483, holding possession of parent after gift to minor child is not a badge of fraud; *Farr v. Sims*, Rich. Eq. Cas. 122, 24 A. D. 396, holding gift to minor child is void against subsequent creditors without notice, where donor retains possession.

Sale by trustee.

Cited in reference note in 52 A. D. 384, on bona fide purchaser taking property discharged of the trust.

Cited in notes in 99 A. D. 399, on title acquired by bona fide purchase from trustee; 19 A. S. R. 266, on sales and conveyances by trustee; 64 A. D. 202, on title of purchaser without notice of trust.

Payment of individual debt with trust funds.

Cited in *Bailey v. Colton*, 25 S. C. 436, on liability of creditor receiving trust funds in good faith in payment of trustees individual indebtedness.

17 AM. DEC. 756, PEIGNE v. SUTCLIFE, 4 M'CORD, L. 387.

Liability of infant for torts.

Cited in *Lewis v. Littlefield*, 15 Me. 233, holding infant liable in trover where goods converted came to his hands under illegal contract; *Eckstein v. Frank*, 1 Daly, 334, holding minor obtaining goods on representations that he was of age, liable in tort; *Wilt v. Welsh*, 6 Watts, 9, holding infant not liable where substantive ground of action against him in contract; *Gilson v. Spear*, 38 Vt. 311, 88 A. D. 659, holding infant not liable in action on case for deceit in sale of a horse.

Cited in reference note in 56 A. D. 88, on infant's liability for torts growing out of or connected with contracts.

Cited in notes in 19 A. D. 568; 24 A. D. 359; 33 A. D. 179; 4 L.R.A. 561,—on liability of infants for their torts; 18 A. S. R. 723, 724, on torts of infants connected with contracts; 33 A. D. 181, on liability of infant for torts growing out of or connected with contracts; 57 L.R.A. 681, on liability of infant for damage to bailed property by wilful act.

17 AM. DEC. 758, PEYTON v. SMITH, 4 M'CORD, L. 476.

What title passes by will.

Cited in *Robinson v. Randolph*, 21 Fla. 629, 58 A. R. 692, holding word "property" in dispositive part of will carries the fee, in absence of limiting clause; *Robert v. Ellis*, 59 S. C. 137, 37 S. E. 250, on necessity of using words of inheritance in devise of land, in order to create fee.

Cited in reference note in 41 A. D. 714, as to when fee passes by will.

Cited in note in 12 L.R.A. 722, on necessity of technical words to creation of estate by will.

What statutes are retrospective.

Cited in *Graham v. Moore*, 13 S. C. 115; *Adams v. Chaplin*, 1 Hill, Eq. 265,—on retrospective effect of act of 1824 relating to words of limitation to pass fee; *Craig v. Pinson*, Cheves, L. 272 (dissenting opinion), on act of 1824, relating to words of limitation to pass fee simple, being declaratory.

Cited in reference notes in 36 A. D. 704; 40 A. D. 496,—on retrospective statutes.

Authority to review decree on appeal.

Cited in *Price v. Nesbit*, 1 Hill, Eq. 445, on authority of court of appeals to review or reverse decree when properly before it.

17 AM. DEC. 762, ROBINSON v. CROWDER, 4 M'CORD, L. 519.**Authority of partner.**

Cited in *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314, holding partner not bound by sealed instrument executed by copartner, unless authorized or ratified.

Cited in reference notes in 28 A. D. 381, on partner's power to affix seal; 29 A. D. 584; 30 A. D. 291,—on power of partner to bind copartners by sealed instrument; 60 A. D. 310, on power of partner to bind copartner by instrument under seal executed without authority; 48 A. S. R. 74, on sale and conveyance of realty by one partner.

Cited in notes in 21 A. D. 387, on partner's right to bind copartners by deed; 30 A. D. 290, on partner's power to sell all firm goods without copartner's consent; 20 L. ed. U. S. 797, on right of partners to convey partnership realty; 37 A. S. R. 205, on power of partner to bind firm, by sealed instrument.

—To make assignment for creditors.

Cited in *Daniel's Petition*, 14 R. I. 500, holding one partner in charge can make assignment to meet business crisis without copartner's consent, when latter absent; *Rumery v. McCulloch*, 54 Wis. 565, 12 N. W. 65, upholding assignment by remaining partner after nonexecuting partner had permanently left the country; *Hennessey v. Western Bank*, 6 Watts & S. (Pa.) 300, 40 A. D. 560, holding assignment executed by two of three partners and delivery thereof, valid; *McGregor v. Ellis*, 2 Disney (Ohio) 286, holding one partner can assign a portion of joint effects to pay debt or as security; *Mabbett v. White*, 12 N. Y. 442, holding partner has authority without copartner's consent, though latter present, to transfer all firm property to pay debt; *Hitchcock v. St. John*, Hoffm. Ch. 511, holding partner, on eve of insolvency, cannot assign, with preferences, without assent of copartner; *Deming v. Colt*, 3 Sandf. 284, holding partner cannot make assignment without acquiescence or consent of copartner, latter being present and competent; *Fisher v. Murray*, 1 E. D. Smith, 341, holding assignment cannot be made by two of three partners without consultation with other, such consultation being practicable; *Leitensdorfer v. Webb*, 1 N. M. 34 (dissenting opinion), on authority of one partner to make assignment for creditors in absence of others; *Stegall v. Coney*, 49 Miss. 761, on right of one partner to make assignment of firm assets for benefit of creditors; *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477, holding assignment by one partner creating preferences, without assent of other partner, who was present, void; *Egberts v. Wood*, 3 Paige, 517, 34 A. D. 236, on right of partner to assign for creditors, with preferences, without copartner's consent.

Cited in note in 48 A. R. 359, on assignment for benefit of creditors by one partner.

Necessity of seal.

Cited in reference notes in 24 A. D. 128, on necessity of seal to authority to execute deed; 52 A. D. 533, on necessity of authority under seal to enable one copartner to bind others by note.

Ratification of sealed instrument.

Cited in *Edwards v. Dillon*, 147 Ill. 14, 37 A. S. R. 199, 35 N. E. 135, holding

sealed instrument executed by partner but valid without seal may be ratified as simple contract.

Purposes for which partnership may be formed.

Cited in *Sage v. Sherman*, 2 N. Y. 417; *Benness v. Harrison*, 19 Barb. 53,—on right to form partnership for purpose of buying and selling land.

Extraterritorial effect of state bankruptcy proceedings.

Cited in *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, holding assignee under state law not vested with title to personalty outside state; *Willits v. Waite*, 25 N. Y. 577, holding receiver of Ohio bank took assets here subject to attachments levied after act of insolvency; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115, on priority of lien where property seized under United States process before possession by assignee under state law; *Russell v. Tunno*, 11 Rich. L. 303, holding voluntary assignment of personalty by foreign debtor, executed abroad, takes precedence over subsequent attachments here; *Goodsell v. Benson*, 13 R. I. 225, as to whether decrees in bankruptcy have any extraterritorial effect except as to persons making themselves parties; *Ex parte Dickinson*, 29 S. C. 453, 13 A. S. R. 749, 1 L.R.A. 685, 7 S. E. 593; *Beall v. Lowndes*, 4 S. C. 258,—on effect of bankruptcy proceedings in foreign court as concluding another jurisdiction.

Cited in reference notes in 45 A. D. 93, on effect of foreign assignment for benefit of creditors; 78 A. D. 617, on extraterritorial effect of assignments for benefit of creditors; 93 A. D. 438, on extraterritorial effect of assignments in bankruptcy and insolvency.

Cited in notes in 1 L.R.A. 121, on foreign bankrupt and insolvent laws; 94 A. S. R. 556, on foreign proceedings in bankruptcy and in insolvency; 23 L.R.A. 43, on transfer of personal property out of state by bankruptcy transfers.

Rights of foreign assignee.

Cited in reference note in 73 A. D. 676, on right of foreign assignee to sue.

Partnership land as personalty.

Cited in *Divine v. Mitchum*, 4 B. Mon. 488, 41 A. D. 241, holding land purchased by firm and treated as partnership property, a fund for payment of firm debts.

Cited in note in 27 L.R.A. 481, on real estate of partnership formed for purchase and sale of real estate.

17 AM. DEC. 770, VAUGHAN v. PHEBE, 1 MART. & Y. 4.

Evidence of pedigree, status, or characteristics.

Cited in *Miller v. Denman*, 8 Yerg. 233, holding that in action for enticing away slave defendant may show alleged slave was of light complexion; *Vigel v. Naylor*, 24 How. 208, 16 L. ed. 646, holding recoveries of freedom of petitioner's mother and sister against defendant's intestate, admissible to show emancipation.

Cited in reference note in 80 A. S. R. 735, on evidence of pedigree.

Cited in notes in 91 A. D. 528, on proof of death; 11 E. R. C. 334, on admissibility of declarations regarding pedigree by deceased members of the family.

— Common reputation.

Cited in *Ewell v. State*, 6 Yerg. 364, 27 A. D. 480, holding relationship of parties may be proved by reputation, on trial of indictment for incest; *Swink v. French*, 11 Lea, 78, 47 A. R. 277, holding time of birth as matter of pedigree may be proved by reputation; *United States v. Morris*, 1 Curt. C. C. 23, Fed.

Cas. No. 15,815, holding evidence that a person was held and treated as slave in Virginia, admissible to show legal slavery.

Cited in reference notes in 39 A. D. 686, on reputation as evidence of title; 27 A. D. 487, on reputation as proof of relationship or pedigree; 69 A. D. 504, as to kind of reputation which will establish a right or franchise.

—Hearsay.

Cited in *Carter v. Montgomery*, 2 Tenn. Ch. 216, holding hearsay inadmissible to establish specific fact, as shade of color, for purpose of showing pedigree; *Pearce v. Kyzer*, 16 Lea, 521, 57 A. R. 240, holding infant defending on ground of infancy, competent to prove his own age, basing testimony on mother's statement; *Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413, holding testimony of person that ancestor of plaintiff in mandamus for admission to white school voted forty years before, admissible.

Cited in reference notes in 55 A. D. 705; 77 A. D. 328,—on hearsay evidence upon matters of pedigree.

Adoption of construction of statute.

Cited in reference note in 39 A. D. 50, on binding force in other states of construction of statute by enacting state.

Degrees of secondary evidence.

Cited in note in 11 E. R. C. 507, as to whether there are degrees of secondary evidence.

Proof of judgment.

Cited in reference notes in 26 A. D. 82, on proof of judgment by best evidence available; 24 A. D. 630, on mode of proving judgment.

Judgment as evidence.

Cited in reference notes in 20 A. D. 158, on record in ejectment as evidence of eviction; 43 A. D. 180, on judgment in former suit as evidence against one not a party; 41 A. D. 682, on admissibility and effect of former judgment as plea in bar, or as evidence under general issue in subsequent action.

17 AM. DEC. 782, *FERRISS v. HARSHEA*, 1 MART. & Y. 47.

Covenants of warranty.

Cited in reference notes in 22 A. D. 784, on covenants of warranty; 26 A. D. 322, on personal nature of covenant of warranty.

When action for breach of covenant lies.

Cited in *Wight v. Gottschalk* (Tenn. Ch.) 43 L.R.A. 189, 48 S. W. 140, holding eviction, either actual or constructive, necessary before cause of action arises on covenant of warranty; *Robinson v. Bierce*, 102 Tenn. 428, 47 L.R.A. 275, 52 S. W. 992, holding covenant of warranty not broken so that action lies, until actual eviction; *Morgan v. Henderson*, 2 Wash. Terr. 367, 8 Pac. 491, holding action on covenant for quiet enjoyment will not lie until some hostile assertion of better title; *Dennis v. Heath*, 11 Smedes & M. 206, 49 A. D. 51, holding judgment in ejectment without actual eviction, not breach of covenant of warranty; *Price v. Hubbard*, 8 S. D. 92, 65 N. W. 436, holding grantee not disturbed in possession cannot defeat action for purchase price by showing defect of title; *Hannah v. Henderson*, 4 Ind. 174, holding action on covenant of warranty does not lie because of execution issued on judgment against land; *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623, holding warrantor required to defend warrantee's title, and warrantee may recover on warranty in same suit, if title fail.

Cited in reference notes in 25 A. D. 221; 36 A. D. 352; 39 A. D. 322; 41 A. D. 37; 49 A. D. 447,—on necessity for eviction to maintenance of action for breach of covenant of warranty.

What is eviction.

Cited in reference notes in 25 A. D. 434; 49 A. D. 53,—on what constitutes an eviction; 29 A. D. 447, on what constitutes an eviction or breach of covenant of warranty.

Measure of damages for breach of covenant.

Cited in reference notes in 36 A. D. 352; 79 A. D. 467,—on measure of damages for breach of warranty of title to land; 49 A. S. R. 823, on damages for partial eviction constituting partial breach of warranty.

17 AM. DEC. 788, CRENSHAW v. STATE, 1 MART. & Y. 122.

Former jeopardy.

Cited in *Singleton v. State*, 71 Miss. 782, 42 A. S. R. 488, 16 So. 295, holding imprisonment for life under former conviction of murder, no defense to indictment for murder during imprisonment; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114, holding trial and sentence of convict for trying to escape may take place during his term of imprisonment; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, 6 Legal Gaz. 140, holding imprisonment cannot be substituted for "fine and imprisonment," after fine is paid, where statute prescribes "fine or imprisonment;" *Parks v. Nashville, C. & St. L. R. Co.* 13 Lea, 1, 49 A. R. 655, holding only one penalty recoverable in action against railroad for its failure to announce stations.

Cited in reference notes in 24 A. D. 463; 51 A. D. 464; 54 A. D. 614; 59 A. D. 229,—on what constitutes jeopardy; 10 A. S. R. 356, defining "felony;" 27 A. D. 642; 11 A. S. R. 83; 92 A. S. R. 89,—as to when conviction of felony bars further prosecution; 42 A. S. R. 492, on conviction or pardon as discharge of distinct offense.

Cited in notes in 6 A. S. R. 251; 92 A. S. R. 94,—on plea of *autrefois attainé*; 58 A. D. 547, as to when conviction bars prosecution for prior offenses.

17 AM. DEC. 795, BONDS v. STATE, 1 MART. & Y. 142.

Insanity after conviction.

Cited in notes in 38 L.R.A. 587, on insanity after verdict in criminal prosecution; 38 L.R.A. 589, on insanity after judgment in criminal prosecution.

Suggestion of insanity in criminal cases.

Cited in *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87, sustaining court's right, by inspection, to dispose of suggestion of insanity after sentence, upon conviction for murder; *Youtsey v. United States*, 38 C. C. A. 562, 97 Fed. 937, sustaining accused's right to have question of sanity disposed of upon application for continuance; *Adler v. State*, 35 Ark. 517, 37 A. R. 48, sustaining circuit judge's right, after expiration of term, to issue writ of error coram nobis to reverse conviction for murder, because accused insane when tried; *Williams v. State*, 45 Fla. 128, 34 So. 279, holding after verdict of murder refusal to stay sentence to inquire into sanity, not error, judge being satisfied; *People v. McElvaine*, 8 N. Y. Crim. Rep. 156, holding trial court invested with discretion to order examination of prisoner as to sanity; *State v. Nordstrom*, 21 Wash. 403, 53 L.R.A. 585, 58 Pac. 248, sustaining trial court's right, by commission, to investigate question of accused's alleged in-

sanity, after conviction and sentence for murder; *State v. Harrison*, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, holding that question of sanity of person called to trial for murder need not be submitted to jury, where court sees no reasonable ground therefor.

Distinguished in *State v. Peacock*, 50 N. J. L. 34, 11 Atl. 270, holding court not bound to arrest progress of trial on suggestion of defendant's insanity, without substantial evidence thereof.

Mode of trying sanity in criminal case.

Cited in reference note in 47 A. D. 288, on how insanity after conviction determined.

Cited in note in 38 L.R.A. 582, on mode of trial of issue as to insanity after commission of criminal act.

Right of clerk to appoint deputy.

Cited in *Small v. Field*, 102 Mo. 104, 14 S. W. 815, sustaining right of clerk of territorial district court to appoint deputy, though Federal statutes make no provision therefor.

Qualification of grand jurors.

Cited in *Williams v. State*, 3 Heisk. 37, holding record showing grand jury composed of good and lawful citizens of specified county reveals every necessary qualification.

Statutory recognition of power as authorization.

Cited in *State v. Evans*, 161 Mo. 95, 84 A. S. R. 669, 61 S. W. 590, holding statutory recognition of policeman's power to make arrests, equivalent to prior authorization.

17 AM. DEC. 798, SMITH T. v. BELL, 1 MART. & Y. 301.

Power of disposition as creating estate in fee.

Cited in *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12, holding the unlimited power of disposition which will defeat limitation over need not be given in express words; *McCullough v. Anderson*, 90 Ky. 126, 7 L.R.A. 836, 13 S. W. 353, holding power to defeat remainder by disposition does not convert life estate into fee, unless exercised; *Sommerville v. Horton*, 4 Yerg. 541, 26 A. D. 242, holding trust deed for creditors void, where stipulated that grantor use property, if "use" is its consumption; *Moore v. Walker*, 3 Lea, 656, holding deed retaining life use for grantor, grantee having disposal of remainder, vests legal title in latter; *Harding v. St. Louis L. Ins. Co.* 2 Tenn. Ch. 465, holding deed to trustee authorizing management, control, leasing, selling, when necessary for support, not general authority to mortgage.

— By marriage settlement.

Cited in *Brown v. Foote*, 2 Tenn. Ch. 255; *Deadrick v. Armour*, 10 Humph. 588,—on effect of power of disposal of estate for life created by marriage settlement; *Cook v. Walker*, 15 Ga. 457, holding estate for life with absolute power of disposal, created by marriage settlement, vests absolute estate.

— By devise.

Cited in *Fraker v. Fraker*, 6 Baxt. 350; *Campbell v. Taul*, 3 Yerg. 548,—on effect of power of disposition on devise for life; *David v. Bridgman*, 2 Yerg. 557 (dissenting opinion), on conversion of life estate into fee by giving absolute power of disposition; *Thompson v. McKisick*, 3 Humph. 631; *Booker v. Booker*, 5 Humph. 505; *Sevier v. Brown*, 2 Swan, 112; *Williams v. Jones*, 2 Swan. 620;

Davis v. Richardson, 10 Yerg. 290, 31 A. D. 591; *McRee v. Means*, 34 Ala. 349,—holding absolute power of disposition in first taker defeats limitation over by way of executory devise; *Bean v. Myers*, 1 Coldw. 226, holding devise “during her natural life, with full power to sell and use,” vests whole estate; *Brown v. Hunt*, 12 Heisk. 404, holding power of disposition which will defeat executory devise is power given by will itself; *Bradley v. Carnes*, 94 Tenn. 27, 45 A. S. R. 696, 27 S. W. 1007, holding bequest “for benefit and support,” with power to sell, remaindermen to take if anything left, passes fee; *Cockrill v. Maney*, 2 Tenn. Ch. 49, holding devise for life, “with power to sell and reinvest and manage, without accountability,” creates life estate only; *Ballentine v. Spear*, 2 Baxt. 269, holding devise for life, “to use the same for her comfortable support during life,” vests life estate only; *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250, holding devise to woman “for her use absolutely, provided she does not remarry,” creates estate determinable on marriage; *Pool v. Pool*, 10 Lea. 486, holding bequest “to wife’s use and benefit for life,” and balance after death to children, creates life estate only; *McGavock v. Pugsley*, 12 Heisk. 689 (affirming 1 Tenn. Ch. 410), holding devise for life authorizing sale “for convenience and support” of devisee, passes life estate only; *Martin v. Fort*, 27 C. C. A. 428, 54 U. S. App. 316, 83 Fed. 19, holding bequest in trust for benefit of another, without restrictive words, vests absolute property in beneficiary; *Henderson v. Vaulx*, 10 Yerg. 30, on effect of power given life tenant to dispose of property by will.

Remainders and their validity.

Cited in reference notes in 52 A. D. 389, on remainder in chattels; 31 A. D. 583, on invalidity of remainder in personal estate after determination of estate of life tenant who enjoys absolute power of disposal.

17 AM. DEC. 802, WHITE v. DOUGHERTY, 1 MART. & Y. 309.

Mortgagor’s right to surplus.

Cited in reference note in 32 A. S. R. 140, on right of junior mortgagee to surplus on foreclosure of senior mortgage.

Cited in note in 18 E. R. C. 462, on liability of mortgagee to mortgagor or other persons interested in equity of redemption for surplus of sale after satisfying principal, interest and costs.

Priority of innocent purchaser’s title over equitable lien.

Cited in *Weston v. Dunlap*, 50 Iowa, 183, holding mechanic’s lien not filed in time, not enforceable against innocent purchaser, though no actual payment made.

Cited in reference note in 42 A. D. 627, on effect of secret equity on bona fide purchaser.

Rights of partnership and individual creditors of firm.

Cited in *Cleghorn v. Insurance Bank*, 9 Ga. 319, holding the equity in favor of separate creditors to separate estate will not prevail over joint creditors’ execution.

Cited in reference notes in 25 A. D. 745, on liability of partnership property: 63 A. S. R. 683, on rights of individual creditors of partnership; 59 A. D. 758, on right of creditors of partnership to lien on its property; 45 A. D. 415, on copartnership assets as trust fund for payment of partnership debts; 33 A. D. 617, as to when partnership assets will be applied to debt of individual partner.

Cited in notes in 18 A. D. 282, on liability of partners’ separate property

for partnership debts; 21 A. D. 374, on extent of partner's interest in partnership property and rights of partnership and individual creditors.

Distinguished in *Carver Gin & Mach. Co. v. Bannon*, 85 Tenn. 712, 4 A. S. R. 803, 4 S. W. 831, holding conveyance by partners of firm property for individual debts gives latter priority over firm creditors.

Jurisdiction of courts of equity over partnership affairs.

Cited in *Phillips v. Cook*, 24 Wend. 389, on courts of equity as being the proper forum to enforce partnership creditor's lien against firm property.

Waiver of vendor's lien.

Cited in reference note in 47 A. D. 111, on waiver of vendor's lien by taking security other than vendee's.

Cited in notes in 39 A. D. 202, on presumption of waiver of vendor's lien where mortgage is taken; 21 L. ed. U. S. 859, as to how liens are waived; 28 A. D. 199, on existence, waiver, and assignability of vendor's lien.

17 AM. DEC. 809, COCKE v. MCGINNIS, 1 MART. & Y. 261.

Construction of statutes.

Cited in *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Dyche v. Gass*, 3 Yerg. 397; *French v. Spencer*, 21 How. 228, 16 L. ed. 97,—holding no exception to provisions of a statute can be made by the court, where provisions are plain; *Amy v. Watertown*, 22 Fed. 418, on inquiries to be made under plea of statute, in order to determine its application and operation; *Girdner v. Stephens*, 1 Heisk. 280, 2 A. R. 700, holding court cannot add exceptions to statute of limitations; *Peak v. Buck*, 3 Baxt. 71, on right of courts to make exceptions to statute of limitations where legislature made none; *Guion v. Bradley*, 4 Yerg. 232; *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* 68 Kan. 585, 75 Pac. 1051, 1 A. & E. Ann. Cas. 639,—holding the enumeration by the legislature of specific exception to statute of limitations excludes all others.

Cited in reference note in 61 A. D. 528, on general words in statute of limitations receiving general construction.

Cited in note in 5 L.R.A. 341, on allowing an exception not allowed in statute.

Running of statute of limitations.

Cited in *Hawkins v. Walker*, 4 Yerg. 188, holding three year statute runs in favor of agent's administrator, from time money collected by agent; *Mattingly v. Boyd*, 20 How. 128, 15 L. ed. 845, holding statute does not run against claim for money in the hands of a garnishee; *Governor v. Gordon*, 15 Ala. 72, holding statute runs in favor of notary's sureties from date of default, where notary failed to notify indorser; *Lawrence v. Bridleman*, 3 Yerg. 496, holding suit in detinue by mortgage of personal property against mortgagor, barred by three years limitation; *Kegler v. Miles*, 1 Mart. & Y. 426, 17 A. D. 819, holding adverse possession of a slave for statutory period vests in possessor absolute right of property; *Goodloe v. Pope*, 3 Shannon Cas. 634, holding adverse possession under champertous deed is holding under color of title, under statute of limitations; *Love v. Love*, 2 Yerg. 288, holding statute bar to ejectment, although defendant knew his grantor had no title, statute containing no available exception; *Hughes v. Brown*, 88 Tenn. 578, 8 L.R.A. 480, 13 S. W. 286, holding statute applicable in all courts and all causes of action except express trusts; *Reeves v. Dougherty*, 7 Yerg. 222, 27 A. D. 490, holding statute runs in favor of fraudulent grantee in action by creditor for property received;

Mulloy v. Paul, 2 Tenn. Ch. 156, holding adverse possession by fraudulent grantee good defense to bill by person who was creditor when possession commenced.

Cited in reference notes in 23 A. D. 755; 27 A. D. 502,—on limitations in equity; 52 A. D. 221, on conformation by courts of equity to statute of limitations.

Cited in notes in 13 A. D. 370, on effect of absence from state upon operation of statute of limitations; 25 L.R.A. 567, on how far statutes of limitation will be regarded as having abrogated the maxim that one cannot profit by his own wrong.

— In cases of trusts.

Cited in Maury v. Mason, 8 Port. (Ala.) 211, holding statute runs against money received by trustee, not kept separate so that it may be identified; Porter v. Porter, 3 Humph. 586, holding that statute of limitations does not run against express trust; Peebles v. Green, 6 Lea, 471, holding statute applies to case arising out of a trust, where law and equity courts have concurrent jurisdiction; Hooper v. Bryant, 3 Yerg. 1, holding money received by an intestate as guardian must be sued for within statutory two year period; Armstrong v. Campbell, 3 Yerg. 201, 24 A. D. 556, on application of statute of limitations by courts of equity in relation to trusts.

Cited in notes in 8 L.R.A. 650, on application of statute of limitations to trusts where remedies are concurrent; 99 A. D. 391, on statute of limitations as between trustee and *cestui que trust*; 17 L.R.A. (N.S.) 663, as to when limitation commences to run against action to recover money collected by agent not an attorney.

17 AM. DEC. 813, SMILEY v. BELL, 1 MART. & Y. 378.

Equity jurisdiction — Over legal rights.

Cited in Ontario Bank v. Mumford, 2 Barb. Ch. 596; Walker v. Brooks, 125 Mass. 241,—on right of assignee of strictly legal right to maintain bill in equity; New York Guaranty & I. Co. v. Memphis Water Co. 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279, holding that bondholder secured by mortgage cannot maintain bill on contract of mortgagor assigned in mortgage as security.

Cited in reference notes in 50 A. D. 67; 51 A. D. 142,—on equity jurisdiction in matters of account; 1 A. S. R. 440, on jurisdiction in equity of bill for accounting although a remedy at law exists.

Cited in note in 1 E. R. C. 418, on equitable cognizance of complicated account.

— To appoint receiver until administration.

Cited in Slover v. Coal Creek Coal Co. 113 Tenn. 421, 106 A. S. R. 851, 68 L.R.A. 852, 82 S. W. 1131, upholding power of chancery to appoint receiver until administration can be granted, where right of administration is in litigation.

In whose name action must be maintained.

Cited in Glenn v. Marbury, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914, holding that action to recover calls for assessments on stock of corporation in District of Columbia must be in company's name.

Cited in note in 10 E. R. C. 410, on right of assignee of chose in action to sue in his own name.

What constitutes mutual accounts.

Cited in State v. Churchill, 48 Ark. 426, 3 S. W. 352, holding account kept by party against himself and debtor, with numerous items of debts and credits, mutual.

17 AM. DEC. 817, MAISE v. GARNER, 1 MART. & Y. 382.**Cancellation of Instruments.**

Cited in *Scruggs v. Driver*, 31 Ala. 274, holding that equity will order cancellation of negotiable notes on rescinding contract for mistake, though legal defense exists; *Apperson v. Ford*, 23 Ark. 746, on power of court of chancery to cancel instrument void at law, but which is apparently good.

Cited in notes in 11 L.R.A. 67, on concurrent jurisdiction of equity in cases of fraud; 23 L. ed. U. S. 471, on cancellation of deed or contract in equity for fraud, concealment, or misrepresentation.

17 AM. DEC. 819, KEGLER v. MILES, 1 MART. & Y. 426.**Statute of limitations.**

Cited in *Peters v. Hanger*, 67 C. C. A. 386, 134 Fed. 586, holding statute prohibiting recovery for infringement of patent more than six years before suit is for a restriction on right of recovery, not statute of limitations.

— When statute runs.

Cited in *Ramsey v. Quillen*, 5 Lea, 184, holding that statute runs in favor of fraudulent grantee from time grantor's creditor had right to test validity; *Mulloy v. Paul*, 2 Tenn. Ch. 156, on running of statute in favor of fraudulent grantee as against bill by grantor's creditors; *Shute v. Wade*, 5 Yerg. 1, holding statute not bar in B's favor where A converted infants' joint property, selling to B after majority of infants; *Goodman v. Munks*, 8 Port. (Ala.) 84, holding that note barred by statute where made is barred in other state.

Necessity of pleading statute of limitations.

Cited in *Bomar v. Hagler*, 7 Lea, 85, holding that heir may rely on statute, though not pleaded, against bill to sell lands for debts; *Cooper v. Lyons*, 9 Lea, 596, holding that statute which not only bars remedy, but extinguishes right, need not be pleaded.

Distinguished in *Maury v. Lewis*, 10 Yerg. 115, holding that statute must be pleaded to be effective as defense in action for appropriating land warrant; *Merriman v. Cannavan*, 9 Baxt. 93, holding that statute must be pleaded to be effective in cases where it acts only on remedy.

Title by adverse possession.

Cited in *Reeves v. Dougherty*, 7 Yerg. 222, 27 A. D. 496, holding that fraudulent grantee may plead statute in bar of bill filed by creditor of grantor; *Turner v. Turner*, 2 Sneed, 27, holding that life estate cannot be created by operation of statute, against reversioner, from whom possession was obtained; *Garrett v. Vaughan*, 1 Baxt. 113; *Partee v. Badget*, 4 Yerg. 174, 26 A. D. 220,—holding that three years' adverse possession of personal property vests right of property in possessor.

Cited in note in 95 A. S. R. 671, on prescriptive title to personal property.

— Of slave.

Cited in *Hardeson v. Hays*, 4 Yerg. 507, holding that parol gift of slave in North Carolina, and possession for three years thereunder, vested title; *Graham v. Grisham*, 8 Yerg. 339, holding that possession of negro by guardian for three years vests title in infant; *Norment v. Smith*, 1 Humph. 46, holding that adverse possession of slave for more than three years vests title.

Right of recapture of property.

Cited in *Neely v. Lyon*, 10 Yerg. 473, on right of person who forcibly pos-

sesses himself of property adversely held, to set up right to possession as defense; *Stanford v. Howard*, 103 Tenn. 24, 76 A. S. R. 635, 52 S. W. 140, holding that loser at poker has right to recapture identical money lost under pretense of borrowing it; *Marshall v. Penington*, 8 Yerg. 424, holding that right of recapture of slave does not exist in this state.

Distinguished in *Collomb v. Taylor*, 9 Humph. 689, holding slave wrongfully taken may be recaptured, if done without breach of peace or trespass.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 18 AM. DEC.

18 AM. DEC. 23, BRUCE v. EDWARDS, 1 STEW. (ALA.) 11.

Discharge of surety by notice to principal to sue.

Cited in *Prior v. Gentry*, 11 Ga. 300, holding even if noncompliance with request to sue and resulting damage will discharge, that there must be an offer of indemnity.

Cited in reference notes in 29 A. D. 226, on what acts of creditor discharge surety; 19 A. D. 319, on release of surety by failure to sue; 45 A. D. 640, on effect in discharging surety of creditor's failure to sue debtor when notified to do so; 37 A. D. 725, on right of surety to require creditor to sue principal.

Cited in notes in 11 A. D. 589, on release of surety by creditor's failure to sue principal when requested; 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal.

Distinguished in *Branch Bank v. Perdue*, 3 Ala. 409, holding surety cannot compel creditor to proceed on collateral security so as to have noncompliance operate as a discharge.

Criticized in *Wilds v. Attix*, 4 Del. Ch. 253, on liability after noncompliance with request to sue principal resulting in loss to surety.

— **Sufficiency of request by parol.**

Cited in *Goodman v. Griffin*, 3 Stew. (Ala.) 160, holding it error to charge that request to sue must be in writing; *Gayle v. Randle*, 4 Port. (Ala.) 232, holding plea of discharge by refusal to sue should state that debt was lost by the failure, or that request was in writing; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9, holding verbal request to sue, no discharge of surety either in law or equity without proof of resulting loss; *Strader v. Houghton*, 9 Port. (Ala.) 334, holding surety discharged by failure to comply with verbal request to sue and resulting loss from insolvency of principal; *Howle v. Edwards*, 97 Ala. 649, 11 So. 748, holding statute providing for discharge after request in writing cumulative so as not to abrogate the foregoing rule; *Shehan v. Hampton*, 8 Ala. 942, holding surety wholly discharged by omission to sue after statutory notice regardless of question as to injury; *Pickens v. Yarborough*, 26 Ala. 417, 62

A. D. 728, holding insufficient statutory notice a discharge upon proof of non-compliance and resulting damage.

Parol evidence as to suretyship.

Cited in *Smith v. Freyler*, 4 Mont. 489, 47 A. R. 358, 1 Pac. 214, holding fact of suretyship may be proved by parol.

Cited in notes in 20 L.R.A. 712, on parol evidence to show who is principal and who surety on note not under seal; 17 A. D. 416, as to when apparent principal may show himself to be a surety.

18 AM. DEC. 34, BUMPASS v. WEBB, 1 STEW. (ALA.) 19.

Admitting whole transaction in evidence.

Cited in note in 82 A. D. 345, on admission in evidence of part of conversation or transaction, and its effect to authorize admission of remainder.

Action at law against copartner.

Cited in *Robinson v. Bullock*, 58 Ala. 618, upholding action at law against copartner on positive stipulation in articles; *Sprout v. Crowley*, 30 Wis. 187, holding same on express promise to pay share of advances made; *Scott v. Campbell*, 30 Ala. 728, holding same on note given to copartner on formation of partnership for one half the stock furnished.

Cited in reference notes in 22 A. D. 370; 23 A. D. 618,—on actions between partners; 29 A. D. 652, on right of action between partners; 55 A. D. 587, on partner's right of action at law before complete settlement of accounts.

18 AM. DEC. 35, WRIGHT v. TURNER, 1 STEW. (ALA.) 29.

Recovery for part performance of entire contract for services.

Cited in *Larkin v. Buck*, 11 Ohio St. 561; *Pettigrew v. Bishop*, 3 Ala. 440,—holding one hiring out for certain period and leaving before that time without consent or cause cannot recover for services rendered; *Nesbitt v. Drew*, 17 Ala. 379, holding hirer who took slave away before expiration of term cannot recover any part of compensation in absence of waiver; *Martin v. Massie*, 127 Ala. 504, 29 So. 31, holding one contracting to do certain work at so much per month with maximum figure for entire job, and not entirely performing, cannot recover for *quantum meruit*.

Cited in reference notes in 26 A. D. 625, on necessity of averring performance or offer thereof by plaintiff; 37 A. D. 464, on recovery for part performance of contract to give services.

Cited in notes in 39 A. D. 534, on apportionment of servant's contract; 54 A. D. 480, on recovery for work and materials when not furnished in time or manner required by special contract; 59 A. S. R. 290, as to when complete performance is essential to cause of action on contract for personal services.

Distinguished in *Shaw v. Wallace*, 2 Stew. & P. (Ala.) 193, holding question of substantial performance properly left to jury where labor was performed for full period excepting seven days.

18 AM. DEC. 36, BROWN v. ADAMS, 1 STEW. (ALA.) 51.

Validity of parol promise to indemnify signer of obligation.

Cited in *Bissig v. Britton*, 59 Mo. 204, 21 A. R. 379, 7 Legal Gaz. 161; *Wolverton v. Davis*, 85 Va. 64, 17 A. S. R. 56, 6 S. E. 619,—holding parol promise of indemnity by one surety to another thereby induced to sign unenforceable; *Macey v. Childress*, 2 Tenn. Ch. 438, on nullity of parol promise of indemnity

by assignor for creditors, to secure third person as surety for trustee; *Hartley v. Sandford*, 66 N. J. L. 627, 55 L.R.A. 206, 50 Atl. 454, holding oral promise of indemnity by father to secure third person to act as surety for son, unenforceable; *Gansey v. Orr*, 173 Mo. 532, 73 S. W. 477, holding parol promise to save investor in corporation harmless unenforceable.

Cited in note in 42 A. S. R. 192, on promise indemnifying surety as within statute of frauds.

Disapproved in *Horn v. Bray*, 51 Ind. 555, 19 A. R. 742, holding oral promise of indemnity by one surety to secure another to sign not within statute and provable by parol.

Necessity of consideration.

Cited in note in 6 E. R. C. 9, on necessity of consideration to support action on contract not under seal.

Expression of consideration in memorandum of contract.

Cited in *Rigby v. Norwood*, 34 Ala. 129, holding writing to answer for debt of another, signed by party to be charged therewith, void unless consideration is expressed.

Promise of indemnity as consideration.

Cited in *Rutledge v. Townsend*, 38 Ala. 706, holding promise of indemnity from principal to surety sufficient consideration to uphold liability of latter to creditor; *Carr v. Wyley*, 23 Ala. 821, holding warranty of third person given by plaintiff at request of defendant, valuable consideration especially if on promise of indemnity.

Averment of right of action subject to condition.

Cited in *Whilden v. Merchants' & P. Nat. Bank*, 64 Ala. 1, 38 A. R. 1, holding declaration on acceptance of bill need not aver it to be in writing, though statute requires such proof; *Baker v. Slater Mill & Power Co.* 14 R. I. 531, holding fulfilment of condition must be alleged in declaration based on statutory right of action subject to a condition.

18 AM. DEC. 38, *DRAUGHAN v. TOMBECKBEE BANK*, 1 STEW. (ALA.) 66.

Judgment *nunc pro tunc* generally.

Cited in reference notes in 35 A. D. 526, on entry of judgment *nunc pro tunc*; 37 A. D. 690, on effect of *nunc pro tunc* entry or amendment of judgments or order.

Predicate for judgment *nunc pro tunc*.

Cited in *Herring v. Cherry*, 75 Ala. 376; *Ex parte Gilmer*, 64 Ala. 234,—holding judgment *nunc pro tunc* enterable only upon record evidence or evidence quasi of record; *Wilkerson v. Goldthwaite*, 1 Stew. & P. (Ala.) 159,—upholding power to insert omitted amount, *nunc pro tunc*; *Allen v. Bradford*, 3 Ala. 281, 37 A. D. 689, holding recital in record that first judgment was irregularly entered raises presumption that legal proof was adduced; *Bancroft v. Stanton*, 7 Ala. 351, holding judgment against appellant, together with appeal bond, sufficient to sustain judgment *nunc pro tunc* at later term against surety; *Tombeckbee Bank v. Strong*, 1 Stew. & P. (Ala.) 187, 21 A. D. 657, on sufficiency of facts to authorize judgment *nunc pro tunc*.

Cited in reference note in 60 A. S. R. 52, 752, on evidence authorizing entry of judgment *nunc pro tunc*.

Cited in notes in 20 L.R.A. 145, as to evidence used in obtaining judgment

nunc pro tunc; 4 A. S. R. 832, as to evidence on which entry of judgment *nunc pro tunc* may be based.

Appeal from judgment *nunc pro tunc*.

Cited in *Ex parte Gilmer*, 64 Ala. 234, holding appeal lies from judgment *nunc pro tunc* when it is final, leaving nothing to be done but to enforce its execution.

Sufficiency of judgment entry.

Cited in *Page v. Coleman*, 9 Port. (Ala.) 275, holding sole entry of judgment in words "judgment by default" insufficient to allow execution; *Tombeckbee Bank v. Strong*, 1 Stew. & P. (Ala.) 187, 21 A. D. 657, holding judgment entered in short cannot be aided by reference to another; *Dickerson v. Walker*, 1 Ala. 48, holding judgment nisi against garnishee cannot be rendered for uncertain amount to be ascertained by judgment afterwards to be rendered; *Bonner v. Martin*, 37 Ala. 83, holding words "judgment nisi as to J. T. B." following judgment against defendant in attachment insufficient against garnishee.

18 AM. DEC. 39, HUNTSVILLE BANK v. HILL, 1 STEW. (ALA.) 201.

Liability of custodian of moneys for loss by robbery.

Cited in *State v. Houston*, 78 Ala. 576, 56 A. R. 59, denying liability on bond for robbery of tax collector exercising the highest degree of care to prevent loss; *Chicago, R. & Q. R. Co. v. Bartlett*, 20 Ill. App. 96, holding fidelity bond of paymaster does not insure employer against loss of money by theft without negligence on part of employee.

18 AM. DEC. 42, GILLESPIE v. DEW, 1 STEW. (ALA.) 229.

Title and possession to maintain trespass.

Cited in *McCall v. Capehart*, 20 Ala. 521, holding owner may maintain trespass against a wrongdoer, where there is no adverse possession; *Casey v. Mason*, 8 Okla. 665, 59 Pac. 252, holding legal title will not sustain trespass without averments of constructive possession and that land is unoccupied; *Gill v. Taylor*, 3 Port. (Ala.) 182, holding mere government certificate of first payment for lands will not sustain trespass; *Blevins v. Cole*, 1 Ala. 210, holding purchaser from government may maintain trespass for injury after purchase and previous to possession and after abandonment by squatter; *Segar v. Kirkley*, 23 Ala. 680, holding plaintiff after one recovery and satisfaction in trespass cannot maintain second action for continuation without title which would carry constructive possession.

Cited in reference notes in 22 A. D. 41, on necessity of possession to maintain trespass *quare clausum fregit*; 53 A. D. 207, on possession required to maintain trespass *quare clausum fregit*; 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 72 A. D. 123, on maintenance of trespass against wrongdoer for cutting timber by one having title but not possession.

Elements of constructive possession.

Cited in *Blackburn v. Baker*, 7 Port. (Ala.) 284, on legal title as element in constructive possession.

18 AM. DEC. 43, McJIMSEY v. TRAVERSE, 1 STEW. (ALA.) 244.

Conclusiveness of award.

Cited in *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, 21 So. 958, holding it

not permissible in action at law to contradict recital that certain matters were considered; *Burnham v. Milwaukee*, 100 Wis. 55, 75 N. W. 1014, holding finding of arbitrators appointed by contract to pass upon claims for extras, final.

Cited in reference notes in 29 A. D. 277; 38 A. D. 493,—on conclusiveness of award.

Cited in notes in 3 E. R. C. 511, on award as bar to all matters included in submission; 11 E. R. C. 235, on conclusiveness of awards as to matters which might have been, but were not, submitted.

Distinguished in *M'Rae v. Buck*, 2 Stew. & P. (Ala.) 155, holding equity will not disturb award after payment and acquiescence for five years.

18 AM. DEC. 45, COMEGYS v. COX, 1 STEW. (ALA.) 262.

Discharge of sureties by extension or composition.

Cited in *Ellis v. Bibb*, 2 Stew. (Ala.) 63, holding surety on note discharged by binding extension between principal and creditor without his consent; *Pyke v. Searcy*, 4 Port. (Ala.) 52, holding same of valid contract between administrator and creditor to arbitrate claim and allow time for payment; *Cox v. Robinson*, 2 Stew. & P. (Ala.) 91, holding valid agreed suspension of cause of action on bond discharges nonconsenting surety.

—Of sureties on appeal bond by compromise.

Cited in *Leonard v. Gibson*, 6 Ill. App. 503, holding compromise between plaintiff and defendant discharged sureties on appeal bond.

18 AM. DEC. 46, STATE v. BECKWITH, 1 STEW. (ALA.) 318.

Averment of time in indictment.

Cited in *Roberts v. State*, 19 Ala. 526, holding indictment demurrable for failure to state time when offense was committed; *People v. Miller*, 12 Cal. 291, holding allegation of day within period of limitation material when offense is subject to limitation.

Cited in reference notes in 34 A. D. 121, on what caption of indictment should show; 56 A. D. 418, on alleging day certain in indictment; 96 A. S. R. 801, on necessity of alleging day certain on which offense was committed; 33 A. D. 96, on insufficiency of indictment which does not state date of commission of offense.

Cited in note in 3 L.R.A.(N.S.) 1020, on charge of time of act causing death in indictment for homicide.

18 AM. DEC. 48, BRANDON v. HUNTSVILLE BANK, 1 STEW. (ALA.) 320.

Demurrer to evidence as a matter of right.

Cited in *Alexander v. Fitzpatrick*, 4 Port. (Ala.) 405, upholding right in defendant admitting truth but denying legal effect of evidence; *Thompson v. Jones*, 1 Stew. (Ala.) 556, upholding right in plaintiff where evidence consisted of facts detailed by defendant under plea of usury; *Martin v. State*, 62 Ala. 240, denying right in either party in criminal case, though otherwise by statute as to civil cases.

Practice on demurrer to evidence.

Cited in *Sawyer v. Fitts*, 2 Port. (Ala.) 9, on whether it is discretionary with court to compel joinder in demurrer to evidence.

Cited in reference notes in 57 A. S. R. 846, on practice on demurrer to evidence; 29 A. D. 372, on procedure on demurrer to evidence.

Right of finder of lost article.

Cited in reference notes in 29 A. D. 215, on lost property; 19 A. D. 743, on trover by finder of lost articles; 62 A. D. 301, on right of finder of property to reward from owner.

Cited in notes in 37 L.R.A. 119, on right of action by finder of property; 21 A. D. 240, on finder's right of action in case of lost chose in action; 55 A. D. 511, on property in goods left derelict at sea; 52 A. D. 454, on right of finder of bank bill as against his bailee.

Title by occupancy or possession.

Cited in *Eads v. Brazelton*, 22 Ark. 499, 79 A. D. 88, holding equity will protect right of possession as salvor in finder of wreck, as against third persons.

Annotation cited in *Frank v. Symons*, 35 Mont. 56, 88 Pac. 561, holding title of donee of finder of estray good against whole world except the true owner.

Cited in reference note in 23 A. D. 685, on property and possession sufficient to maintain trover.

Cited in note in 2 L.R.A. 449, on sufficiency of possession alone to support action of trover.

Disability of slave.

Cited in *Murray v. State*, 9 Fla. 246, holding slave not liable to indictment for gaming unless expressly included in statute; *Wood v. Ward*, 2 Flipp. 336, Fed. Cas. No. 17,966, 3 Shannon Cas. 58, holding judgment against slave who appeared a nullity; *Trotter v. Blacker*, 6 Port. (Ala.) 269, holding slave has no power to take property hence cannot accept bequest of its own freedom.

Slave's property as pertaining to master.

Cited in *Devaughn v. Heath*, 37 Ala. 595, holding title and possession of chattel given to slave inures to master; *Sterrett v. Kaster*, 37 Ala. 366, holding party illegally selling property to slave cannot set up illegality as a bar to trespass by master for injury to property; *Webb v. Kelly*, 37 Ala. 333, holding title of master not divested by purchase of slave by third person, with funds given by slave; *Shanklin v. Johnson*, 9 Ala. 271, holding purchase of slave does not carry his rights as beneficiary in real estate trust, though otherwise if trust is in money and declared at time of purchase; *Martin v. Reed*, 37 Ala. 198, on maintenance of action for money had and received by master against party borrowing money from slave.

Right of employer to property found by employee.

Cited in *Bowen v. Sullivan*, 62 Ind. 281, 30 A. R. 172, holding employee finding bank notes while sorting rags entitled thereto as against employer.

Liability of master for acts of slave.

Cited in *McConnell v. Hardeman*, 15 Ark. 151, holding under statutes that liability is restricted to those trespasses which are indictable or specified in statute.

18 AM. DEC. 60, POPE v. NANCE, 1 STEW. (ALA.) 354.

Recovery of money paid on void or broken contract.

Cited in *Branch Bank v. Parrish*, 20 Ala. 433, holding defendant who fraudulently caused bank to cash an insolvent's paper for his benefit liable in action for money had and received; *Pharr v. Bachelor*, 3 Ala. 237, holding party upon re-

rescission of contract may recover money paid, in action for money had and received.

Renewal of obligation.

Cited in notes in 33 L.R.A. 630, on liability of obligors on original contract as affected by renewal void for forgery; 9 L.R.A.(N.S.) 86, on acceptance of note for old debt as indicating creditor's assent to continuing partner's assumption of debt.

Liability for making payment in counterfeit money.

Cited in reference note in 45 A. D. 178, on liability of party making payment in counterfeit bills.

Competency of witnesses.

Cited in note in 22 A. D. 776, on competency of witness whose name has been forged.

18 AM. DEC. 67, COOK v. COCKRILL, 1 STEW. (ALA.) 475.

Measure of recovery against indorser.

Cited in *Coye v. Palmer*, 16 Cal. 158, holding true consideration for indorsement is measure of recovery in action by indorsee against his indorser.

Parol evidence as to consideration.

Cited in note in 13 L.R.A. 53, on parol evidence to show want of consideration for indorsement.

18 AM. DEC. 68, CHRISTIAN v. SCOTT, 1 STEW. (ALA.) 490.

Vendor's fraud as defense to action for price.

Referred to as a leading case in *Knight v. Turner*, 11 Ala. 636, holding purchaser in possession with covenants cannot defeat recovery of purchase money by proof of fraud.

Cited in *Stone v. Grover*, 1 Ala. 287, holding at law, that vendee in possession cannot set up fraud as defense to action for purchase money; *Lett v. Brown*, 56 Ala. 550, holding same also that he cannot recover it back, if paid, for fraud; *Kelly v. Allen*, 34 Ala. 663, holding defrauded purchaser may maintain bill for compensation or abatement of purchase money where vendor died out of state and his estate was settled there.

Cited in reference note in 27 A. D. 229, on effect of acquiescence in fraud by party injured.

Distinguished in *Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 A. D. 649, holding purchaser of chattels may defend action on notes, when ever a cross action could be maintained for defects or noncompliance with contract.

— Mistake or failure of title as defense.

Cited in *Homer v. Purser*, 20 Ala. 573, holding mistake in sale of land, and subsequent offer to return deed and rescind, do not entitle grantee to recover money paid at law; *Terry v. Ferguson*, 8 Port. (Ala.) 500, holding tenant who enjoyed possession under lease from administrator cannot set up want of title in action for rent; *George v. Stockton*, 1 Ala. 136; *Wade v. Killough*, 3 Stew. & P. (Ala.) 431,—holding same as to vendee in possession with bond for title, not claiming a rescission; *Cullum v. Branch Bank*, 4 Ala. 21, 37 A. D. 725, holding purchaser with covenants cannot defeat action at law for purchase money by proof of actual eviction.

Right of purchaser to rescind after acceptance.

Cited in *Proctor v. Spratley*, 78 Va. 254, holding purchaser cannot rescind for inferiority of goods to sample after acceptance, with knowledge of the fact.

18 AM. DEC. 70, RICHARDSON v. HOBART, 1 STEW. (ALA.) 500.**Decree of court as evidence.**

Cited in *Jay v. Stein*, 49 Ala. 514, holding record of proceedings in probate court for sale admissible to show title in purchaser.

Cited in reference notes in 60 A. D. 181, on conclusiveness of decree of orphans' court as to point necessary to be decided; 43 A. D. 180, on judgment in former suit as evidence against one not a party; 41 A. D. 682, on admissibility and effect of former judgment as plea in bar, or as evidence under general issue in subsequent action.

Certificate of title as evidence.

Cited in *Lewis v. Goguette*, 3 Stew. (Ala.) 184, holding certificate of confirmation will sustain recovery in trespass to try title, in absence of adverse title or right of possession.

Cited in reference notes in 41 A. D. 616, on certificate of title as evidence; 43 A. D. 561, on right of trespasser to question certificate of title; 43 A. D. 175, on right of stranger to impeach grant; 34 A. D. 108, on how far validity of patent may be impeached.

18 AM. DEC. 73, BOARDMAN v. GORE, 1 STEW. (ALA.) 517.**Authority to fill blanks in sealed writings.**

Cited in *Gibbs v. Frost*, 4 Ala. 720, holding bond signed in blank may be afterwards filled up in a material part by parol express authority of obligor; *Cribben v. Deal*, 21 Or. 211, 28 A. S. R. 746, 27 Pac. 1046, holding deed with name of grantee left blank and filled in before delivery under parol authority, valid; *Bartlett v. Board of Education*, 59 Ill. 364, holding treasurer's bond executed by sureties with penalty blank, and delivered by treasurer to board after being filled in, valid; *Drumright v. Philpot*, 16 Ga. 424, 60 A. D. 738, holding prior authority or subsequent unsealed ratification, either express or implied, sufficient to make deed executed by copartner binding; *Simms v. Hervey*, 19 Iowa, 273, on invalidity of parol authority to fill blank in conveyance otherwise duly executed; *Carrington v. Caller*, 2 Stew. (Ala.) 175 (dissenting opinion), on right to exercise authority to fill up payee's name left blank in note.

Cited in note in 2 E. R. C. 280, on validity of parol authority to fill blanks in deed.

Criticized in *Walla Walla County v. Ping*, 1 Wash. Terr. 340, holding bond, delivered as altered in absence of sureties, without authority from them under seal, not their bond.

Parol ratification of deed.

Cited in note in 8 E. R. C. 634, on validity of parol ratification of unauthorized deed by agent.

18 AM. DEC. 76, WRIGHT v. SPENCER, 1 STEW. (ALA.) 576.**Judicial sale without notice.**

Cited in *Brock v. Berry*, 132 Ala. 95, 90 A. S. R. 896, 31 So. 517, holding sheriff, not advertising all the property or selling at place advertised, liable as trespasser *ab initio*.

Cited in reference note in 24 A. D. 409, on want of, or defect in, notice of sheriff's sale.

Cited in note in 44 A. D. 240, on effect of execution or judicial sale in case of failure to advertise or properly give notice.

Necessity of notice of involuntary sale.

Cited in Nathan v. Shivers, 71 Ala. 117, 46 A. R. 303, holding carrier withholding knowledge of contents on sale of barrels of freight in favor of purchaser, liable to injured party.

Validity of irregular judicial sale.

Cited in Savage v. Forward, 7 Ala. 463, holding creditor, subsequently levying, cannot question validity of sale by constable, on ground that there was an older levy in hands of sheriff.

Liability of officer for wrongful sale under process.

Distinguished in Ryan v. Young, 147 Ala. 660, 41 So. 954; Hartshorn v. Williams, 31 Ala. 149,—holding sheriff who was trespasser *ab initio* as to defendant in attachment not liable to party claiming under transfer fraudulent as to creditors.

Demand as prerequisite to action of trover.

Cited in reference note in 25 A. D. 400, as to when trover lies without demand and refusal.

Measure of damages in trover.

Cited in Bates v. Murphy, 2 Stew. & P. (Ala.) 165, holding recovery by mortgagee against mortgagor or stranger limited to amount of mortgage debt; Dole v. McGraw, 71 Mich. 106, 38 N. W. 686, refusing set-off of debt due from plaintiff, secured by lien on property in question, but enforceable only in equity.

Cited in reference notes in 24 A. D. 39; 26 A.D. 370,—on measure of damages in trover.

Cited in note in 24 A. D. 72, on value at time of conversion and interest as measure of damages where value is enhanced by wrongdoing.

18 AM. DEC. 79, COOK v. BRADLEY, 7 CONN. 57.

Written and parol contracts.

Cited in Barnum v. Barnum, 9 Conn. 242, holding written contract not under seal stands on same footing as parol contract.

Necessity of consideration for sealed contract.

Cited in notes in 62 A. D. 489, on necessity of proving consideration of contract under seal; 6 E. R. C. 9, on necessity of consideration to support action on contract not under seal.

What constitutes valuable consideration.

Cited in Russell v. Buck, 11 Vt. 166, holding promise to pay debt of another, if waited on for certain time, leaving the debt to be enforced during that time, against the debtor is a *nudum pactum*; Bean v. Jones, 8 N. H. 149, holding that where creditor charged expenses incurred on a journey for purpose of collecting debt, which expenses were included in new note given by debtor, note to that extent was without consideration; Raymond v. Sellick, 10 Conn. 480, holding expectation on part of payee of note that maker would marry her not sufficient consideration for note; State ex rel. McKown v. Williams, 77 Mo. 463; Templin v. Hobson, 10 Colo. App. 525, 51 Pac. 1019,—on question of what constitutes

valuable consideration; *Doe ex dem. Leverich v. Bates*, 6 Ala. 480, on necessity of consideration in contracts.

Cited in note in 6 E. R. C. 41, on past consideration to support promise.

— **Performance of or promise to perform existing duty.**

Cited in *Sullivan v. Sullivan*, 99 Cal. 187, 33 Pac. 862, holding neither promise to perform nor performance of a duty constitutes consideration; *Barron v. Vandvert*, 13 Ala. 232, holding payment of part of sum due on note, not sufficient consideration for promise to remit interest due or to delay suit; *Spencer v. Ballou*, 18 N. Y. 327, holding subsisting legal obligation to do an act is sufficient consideration for promise to do it.

— **Moral or fanciful obligation.**

Cited in *Freeman v. Dodge*, 98 Me. 531, 66 L.R.A. 395, 57 Atl. 884; *Dodge v. Adams*, 19 Pick. 429; *Udipke v. Titus*, 13 N. J. Eq. 151; *Nine v. Starr*, 8 Or. 49; *Smith v. Tripp*, 14 R. I. 112; *Holley v. Adams*, 16 Vt. 206, 42 A. D. 508; *Frey v. Fond du Lac*, 24 Wis. 204; *Clements' Appeal*, 52 Conn. 464,—holding mere moral obligation not sufficient consideration to support promise unless it was once a legal obligation; *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 912, holding note given by one because he feels in honor bound to reimburse a loss incurred by payee through trust in broker recommended by the maker is without consideration; *Craft v. Rolland*, 37 Conn. 491, holding moral obligation which was once an equitable obligation which could at one time have been enforced against estate of promisor, good consideration for promise; *Stafford v. Bacon*, 1 Hill, 532, 37 A. D. 366, holding as to debt discharged by accord and satisfaction there remains no such moral obligation to pay balance as will support subsequent promise to that effect; *Harwood v. Johnson*, 20 Ill. 367; *French v. Benton*, 44 N. H. 28; *Finch v. Finch*, 22 Conn. 411,—on question of moral obligation as consideration for promise; *Allen v. Bryson*, 67 Iowa, 591, 56 A. R. 358, 25 N. W. 820, holding as to one person rendering services for another gratuitously, no obligation is incurred by the recipient which will support subsequent promise to pay for same; *Griswold v. Wright*, 61 Wis. 195, 21 N. W. 44, holding waiver by subcontractor of lien for materials, and the discharge of the principal contractor from liability therefor, constitute a sufficient consideration for promise by owner of building to pay for materials.

Cited in reference notes in 37 A. D. 371, on moral obligation as consideration for promise; 39 A. D. 639, on moral obligation or equitable duty as consideration for promise; 79 A. D. 457, as to when moral consideration will support contract.

Cited in notes in 21 A. D. 517; 12 L.R.A. 471; 53 L.R.A. 354, 361,—on moral obligation as a consideration for promise; 53 L.R.A. 355, on moral obligation as a consideration for promise to pay for past support of relative; 39 A. S. R. 737, on moral obligation as consideration for promise to pay after debt is released; 39 A. S. R. 739, on moral obligation as consideration for promise to pay debt barred by limitation; 3 L.R.A. (N.S.) 437, as to where moral obligation arising from relationship affords sufficient consideration to support promise to become responsible for another's debt; 34 A. R. 543, on revival of legal obligation by express promise.

— **Promise to pay or discharge unenforceable debt.**

Cited in *Montgomery v. Lampton*, 3 Met. (Ky.) 519, holding that where debtor has been discharged by provisions of a positive law, an express promise afterward to pay debt will be enforced; but where the discharge is fair, voluntary act of creditor, a subsequent promise will not be enforced; *Lang v. Johnson*, 24 N. H.

302, holding release of void contract no consideration for promise; *Wilson v. Russell*, 13 Md. 494, 71 A. D. 646; *Trumbull v. Tilton*, 21 N. H. 128; *Re Merri-man*, 44 Conn. 587, Fed. Cas. No. 9,479,—holding indebtedness discharged by bankruptcy is valid consideration for subsequent promise by debtor to pay original debt; *Porterfield v. Butler*, 47 Miss. 165, 12 A. R. 329, holding promise of a woman, when sole, to pay for a steamboat bought on credit by her while married, does not revive or create any obligation on her part; *Kent v. Rand*, 64 N. H. 46, 5 Atl. 760, holding promise of married woman made when common-law disability existed does not furnish a consideration for promise to pay the same debt, made after disability is removed; *North v. Forest*, 15 Conn. 400, holding discharge from contract invalid under statute of frauds, not a good consideration.

Cited in notes in 27 A. D. 287, on promise to pay debt discharged in bankruptcy; 43 A. R. 786, on effect of wife's new promise after cessation of coverture to pay debt contracted during coverture.

Distinguished in *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, holding promise to pay for antecedent value received by promisor from promisee, is binding, although there never was any obligation to pay which could be enforced.

— **Promise to pay for support previously furnished to parents or children.**

Cited in *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364, holding express promise to pay after supplies have been furnished or services rendered between husband and wife, and parent and child, cannot be enforced against promisor to prejudice of his creditors; *Lebanon v. Griffin*, 45 N. H. 558; *Dawson v. Dawson*, 12 Iowa, 512,—holding express promise by son to pay for past expenditures by third person for support of a parent is not binding; *Freeman v. Robinson*, 38 N. J. L. 383, 20 A. R. 399, holding promise to pay for goods previously furnished to promisor's son void because of original nonenforceability; *Levin v. Ritz*, 17 Misc. 737, 41 N. Y. Supp. 405, on question of liability incurred by promise of adult child to pay for past maintenance of parent; *Hargroves v. Freeman*, 12 Ga. 342, holding statutory liability of father to support bastard child constitutes a sufficient legal consideration to enforce the payment of a promissory note given for that purpose.

Obligation of children to support parent.

Cited in *East Hartford v. Pitkin*, 8 Conn. 393, holding statute requiring children to support indigent parents not retroactive; *Stone v. Stone*, 32 Conn. 142, holding statute relates solely to provision for future and not compensation for past support; *Condon v. Pomroy-Grace*, 73 Conn. 607, 53 L.R.A. 696, 48 Atl. 756, holding statute does not convert the moral obligation to support into an absolute legal duty, until court has found necessity for aid, the ability to aid, and has prescribed to what extent aid shall be furnished; *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589, holding statutory method of enforcing liability of a child for support of indigent parent is exclusive, and child can be held only in manner there provided.

Cited in note in 117 A. S. R. 128, 129, on statutory obligation of child to support parent.

Obligation of parent to support child.

Cited in *Brown v. Ramsay*, 29 N. J. L. 117, holding it ceases when child reaches his majority.

Authority of one to make himself creditor of another.

Cited in *Gurnee v. Bausemer*, 80 Va. 867, holding no man can make himself creditor of another by any act of his own.

18 AM. DEC. 86, BEARDSLEE v. FRENCH, 7 CONN. 125.**Necessity of definite location of highway.**

Cited in *State v. Leicester*, 33 Vt. 653, holding neglect of the authority establishing a road to prescribe its width, excuses town from liability for not opening and working the same.

Existence of highway by prescription.

Cited in *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499, holding highway may exist by prescription, and dedication can be founded upon mere user of the road by the public; *Bayard v. Standard Oil Co.* 38 Or. 438, 63 Pac. 614, holding use by public must be under claim of right, adversely, uninterruptedly, and substantially by way of a defined road, for statutory period of limitations.

Cited in note in 26 L.R.A. 454, on acquiring of title to highway by prescription.

Adverse possession or abandonment of highway.

Cited in *Webber v. Chapman*, 42 N. H. 326, 80 A. D. 111; *Weber v. Iowa City*, 119 Iowa, 633, 93 N. W. 637,—holding nonuser of street for statutory period, accompanied by actual and notorious possession of the land by individual under claim of right is presumptive abandonment; *Hartford v. New York & N. E. R. Co.* 59 Conn. 250, 22 Atl. 37, holding nonuser of highway by the public for many years is prima facie evidence of abandonment, but the abandonment must be voluntary and intentional; *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L.R.A. 828, 19 Atl. 902, holding statute relating to adverse possession of part of streets by buildings and fences being maintained thereon for more than forty years, has no application where act complained of consists in maintaining a dam, whereby water is caused to overflow highway; *Com. v. Moorehead*, 118 Pa. 344, 4 A. S. R. 599, 20 W. N. C. 485, 12 Atl. 424, 18 Pittsb. L. J. N. S. 295 (opinion of lower court), on question of adverse possession of highways; *Brownell v. Palmer*, 22 Conn. 107, on question of nonuser by public as evidence of release of the public right.

Cited in notes in 18 L.R.A. 541, on nonuser as extinguishing public easement; 14 A. S. R. 282, on effect of nonuser of street or highway; 26 L.R.A. 463, on effect of nonuser of road as abandonment; 12 E. R. C. 629, on abandonment of highway; 18 L.R.A. 147, on presumption of abandonment to vest title in owner of fee of highway; 26 L.R.A. 450, on presumption of abandonment of highway.

Distinguished in *Simmons v. Cornell*, 1 R. I. 519, holding no adverse title can be acquired by an inclosure which began as a public nuisance; *State v. Franklin Falls Co.* 49 N. H. 240, 6 A. R. 513, holding no right will be acquired against the state by obstruction of a public fish way, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right.

Disapproved in *Com. v. Moore*, 4 Kulp, 71, holding mere laches or the nonuser of public highway, or adverse possession of individual, or all combined, will not warrant the presumption of a grant to person encroaching upon or obstructing same, or estop the public from reasserting their rights; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 547,—holding title to highway cannot be acquired by prescription.

Right of public in public places.

Cited in *Campbell v. Kansas City*, 102 Mo. 326, 10 L.R.A. 593, 13 S. W. 997, holding land dedicated to city for cemetery, which was used as public park, reverts to donor.

Right of owner of land to remove encroachments.

Cited in *Lyman v. Hale*, 11 Conn. 177, 27 A. D. 728, holding owner of land has

right to remove branches of neighbor's trees extending over his land, but has no right to convert the branches or fruit to his own use; *Relyea v. Beaver*, 34 Barb. 547, holding action for trespass, under statute, may be maintained by one adjoining proprietors of lands, against another, to recover treble damages for cutting line trees.

Liability of highway officers.

Cited in note in 22 L.R.A. 830, on principles sustaining personal liability of highway officers for negligence.

18 AM. DEC. 89, READING v. WESTON, 7 CONN. 143, Later trials of same case in 7 Conn. 409, and 8 Conn. 117.

Supplying omission in deposition.

Cited in reference note in 30 A. D. 478, on right to supply by parol evidence, omission in deposition.

Admissibility of declarations of former owner.

Cited in *High v. Pancake*, 42 W. Va. 602, 26 S. E. 536, holding declaration of deceased owner admissible to prove title or possession.

Cited in reference notes in 77 A. D. 346, on admissibility of declarations of person in possession of land against his own title; 30 A. D. 595, on admissibility of declarations and admissions of person deceased made while in possession of land as to boundary.

Cited in note in 40 A. D. 240, on admissibility of declarations of former owner or possessor against those claiming under him.

Possession as evincive of title.

Cited in *Hubby v. Harris*, 68 Tex. 91, 3 S. W. 558, holding possession by mortgagor not usual accompaniment of mortgage and that it rebuts evidence thereof.

Delivery of deed.

Cited in note in 53 A. S. R. 538, on delivery of deed.

Who may rely on usury as defense.

Cited in reference note in 20 A. R. 759, on right of purchaser of premises subject to mortgage to plead usury as defense.

Cited in note in 28 A. R. 492, 493, on right of person other than borrower to set up usury as defense.

Absolute deed as mortgage.

Cited in *Reading v. Weston*, 8 Conn. 117, 20 A. D. 97, holding it inadmissible in court of law to show absolute deed was intended as security for a debt.

Cited in reference notes in 90 A. D. 351, on agreement to resell as conditional sale; 36 A. D. 43, as to when absolute deed is considered as mortgage; 36 A. D. 102, on effect of absolute deed with agreement to reconvey; 23 A. D. 727, on absolute deed and agreement to reconvey as a mortgage; 90 A. D. 351, on intention to secure indebtedness by conveyance or bill of sale as criterion of mortgage.

Cited in note in 18 E. R. C. 13, as to test whether transaction is mortgage or conditional sale.

18 AM. DEC. 92, PECK v. BOTSFORD, 7 CONN. 172.

Acknowledgment of debt to remove bar of limitations.

Cited in *De Forest v. Hunt*, 8 Conn. 179, holding unqualified and unconditional acknowledgment of a debt originally just and yet subsisting, removes bar of statute.

—By one joint debtor.

Cited in *Coit v. Tracy*, 8 Conn. 268, 20 A. D. 110, holding acknowledgment of debt by one joint debtor admissible against all to take case out of statute if otherwise sufficient; *Lane v. Doty*, 4 Barb. 530, holding survivor of joint contractors cannot revive debt by acknowledgment as against personal representatives of deceased.

Testamentary direction to pay debts as lifting bar of limitations.

Cited in *Collamore v. Wilder*, 19 Kan. 67, holding it does not revive the debt; *Weed v. Bishop*, 7 Conn. 128, as involving the same question to be later decided.

Cited in note in 102 A. S. R. 762, on effect of testamentary provisions regarding debt to suspend running or remove bar of limitations.

Right of personal representatives to bind estate by admissions.

Cited in *Pease v. Phelps*, 10 Conn. 62; *Isaacs v. Stevens*, 13 Conn. 499,—holding they cannot so bind estate; *Crandall v. Gallup*, 12 Conn. 365, holding admissions by administrator, in a bill in chancery, are not available to bind or effect the estate.

Cited in note in 65 A. S. R. 691, on extent to which executors and administrators may bind each other and the estate.

Waiver by personal representative of statute of limitations.

Cited in *Hanson v. Towle*, 19 Kan. 273; *Huntington v. Bobbitt*, 46 Miss. 528; *Henderson v. Ilsley*, 11 Smedes & M. 9, 49 A. D. 41; *Bloodgood v. Bruen*, 8 N. Y. 362; *Fritz v. Thomas*, 1 Whart. 66, 29 A. D. 39; *Seig v. Acord*, 21 Gratt. 365, 8 A. R. 605; *Patterson v. Cobb*, 4 Fla. 481,—holding executor or administrator has no authority to bind estate by promise to pay debt barred by statute; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51, holding he cannot waive bar of statute in respect to note of decedent held by himself; *Oakes v. Mitchell*, 15 Me. 360, holding mere expression of intention by administrator to pay debt barred by statute is not sufficient to prevent operation of statute; *Braxton v. Harrison*, 11 Gratt. 30; *Riser v. Snoddy*, 7 Ind. 442, 65 A. D. 740,—on question as to whether administrator can revive a debt of estate by promise; *Cayuga County Bank v. Bennett*, 5 Hill, 236, on whether admission of one of several executors is sufficient to take demand held against estates out of statute.

Cited in reference notes in 35 A. D. 681, on acknowledgment by executor of debt barred by statute; 49 A. D. 46, on effect of acknowledgment by administrator of debt barred by statute; 65 A. D. 120, on power of executor or administrator to revive debt due from decedent barred by limitations.

Cited in notes in 78 A. S. R. 190, on power of executors to waive statute of limitations; 2 E. R. C. 165, on right of personal representative to pay debts barred at time of debtor's death; 29 A. D. 42, on new promise or acknowledgment by administrator to take case out of statute of limitations; 52 A. S. R. 123, on liability of decedent's estate for outlawed debts acknowledged by administrator or executor.

Disapproved in *McCann v. Sloan*, 25 Md. 575; *Shreve v. Joyce*, 36 N. J. L. 44, 13 A. R. 417,—holding sole executor has power by a new promise to remove bar.

Waiver by administrator of timely presentation of claim.

Cited in *Winchell v. Sanger*, 73 Conn. 399, 66 L.R.A. 935, 47 Atl. 706, on question as whether administrator can so waive presentation of claim.

Theory of statute of limitations.

Cited in *Hart's Appeal*, 32 Conn. 520, holding lapse of time is regarded as furnishing presumptive evidence of payment rather than as in itself an arbitrary bar to unsatisfied claim.

18 AM. DEC. 99, STOW v. WYSE, 7 CONN. 214.

Necessity of following charter and by-laws in calling corporate meeting.

Cited in *State ex rel. Guerrero v. Pettineli*, 10 Nev. 141, holding under by-laws that the action of board of trustees was necessary to convene a legal meeting, and that president had no authority; *Duke v. Markham*, 105 N. C. 131, 18 A. S. R. 889, 10 S. E. 1017, holding assent of majority of stockholders, expressed elsewhere than at a meeting of stockholders, does not bind company; *Kuhl v. Meyer*, 42 Mo. App. 474, holding when constitution prescribes that meeting of a society shall be called in a certain manner meeting called otherwise, and neither attended, nor consented to, by all the members, is illegal.

Necessity of notice of corporate meetings.

Cited in *Doernbecher v. Columbia City Lumber Co.* 21 Or. 573, 28 A. S. R. 766, 28 Pac. 899; *Warner v. Mower*, 11 Vt. 385; *Whitehead v. Hamilton Rubber Co.* 52 N. J. Eq. 78, 27 Atl. 897,—holding notice necessary; *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 A. S. R. 60, 18 S. W. 759, holding mortgage of property by a majority of directors at meeting of which absent director had no notice is not binding unless it was impracticable to give notice and an emergency demanded immediate execution of the instrument; *People ex rel. Swinbourne v. Albany Medical College*, 26 Hun. 348; *Singer v. Salt Lake Cooper Mfg. Co.* 17 Utah, 143, 70 A. S. R. 773, 53 Pac. 1024; *Chouteau Ins. Co. v. Holmes* 68 Mo. 601, 30 A. R. 807,—holding where it is shown that special meeting of board of directors was held, and that a quorum attended, it will be presumed that due notice was given.

Cited in reference notes in 44 A. S. R. 460, on necessity for notice of corporate meetings; 39 A. D. 226, on acts done at corporation meeting of which notice was not given; 56 A. S. R. 196, on necessity of notice to validity of acts at corporate meeting; 32 A. S. R. 236, on validity of acts done at corporate meeting notice of which not properly given.

— Public corporations.

Cited in *London & N. Y. Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995, holding municipal corporation not bound by contract entered into by its mayor and aldermen at a special meeting, of which some absent members were not legally notified; *Paola & F. River R. Co. v. Anderson County*, 16 Kan. 302, holding personal notice of call for special session of county board must be served, if practicable, upon every member of county board; *Russell v. Wellington*, 157 Mass. 100, 31 N. E. 630, holding nothing but unanimous consent of whole body can give validity to proceedings of city council at a meeting which is not legally called.

— Manner and kind of notice.

Cited in *Pike County v. Rowland*, 94 Pa. 238, 9 W. N. C. 241, holding personal notice necessary unless otherwise provided by charter and by-laws; *Farwell v. Houghton Copper Works*, 8 Fed. 66, holding acts done at meeting where notice is not given according to charter and by-laws, unauthorized; *Wiggin v. First Freewill Baptist Church*, 8 Met. 301, holding meeting of a joint stock company must be called by personal notice to all the members unless some other provision is made in its charter or by-laws.

Distinguished in *Madison Ave. Baptist Church v. Baptist Church*, 1 Sweeney, 109, holding meeting of religious corporation held pursuant to notice from pulpit, valid.

Notice of directors' meetings.

Cited in reference notes in 28 A. S. R. 771; 70 A. S. R. 783,—on notice of meeting of corporate directors; 29 A. S. R. 67, on sufficiency of notice of directors' meeting; 3 A. S. R. 69, on presumptive notice of meeting of corporate directors; 3 A. S. R. 70, as to when, if ever, notice to corporate directors to attend special meeting may be omitted.

Validity of acts at irregular meeting of corporation or directors.

Cited in reference notes in 29 A. D. 452, on conclusiveness of acts of directors at meeting irregularly called; 46 A. D. 627, on acts done at corporate meetings not properly held.

Cited in note in 7 E. R. C. 352, on necessity of regular action by corporate members or directors in order to bind corporation.

Effect of by-laws as to third persons.

Cited in *Samuel v. Holladay*, Woolw. 400, Fed. Cas. No. 12,288, holding by-law adopted by board of directors of corporation, providing how special meetings of the board shall be called does not affect third persons dealing with corporation.

Power of officers of corporation to dispose of property.

Cited in *Hyde v. Larkin*, 35 Mo. App. 365, holding without provision of charter authorizing it, they have no such power; *West Point v. Bland*, 106 Va. 792, 56 S. E. 802, holding agent cannot dedicate the land of the corporation to a public use unless authorized by its board of directors; *Walworth County Bank v. Farmers' Loan & T. Co.* 14 Wis. 325, holding president of a railroad company had not authority, by virtue of his office merely, to make sale of its property; *Hast v. Piedmont & C. R. Co.* 52 W. Va. 396, 44 S. E. 155, on authority of general agent of corporation to convey its real estate; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237, holding president of corporation has no power in virtue of his office, to execute a bond and warrant of attorney for entry of judgment by confession against the corporation.

Cited in note in 23 A. D. 744, as to when authority to affix corporate seal does not exist.

—To pledge or mortgage.

Cited in *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 A. D. 203, holding superintendent and manager appointed by directors has no authority to pledge machinery used by company for security of a loan; *Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541, 23 A. D. 728, holding president and cashier of bank, as such, have no power to execute, in the name of the corporation, a mortgage or conveyance of real estate.

Distinguished in *Thayer v. Nehalem Mill Co.* 31 Or. 437, 51 Pac. 202, holding manager had authority to mortgage property of company held for commercial purposes, and not for carrying on its business.

Estoppel by deed or specialty.

Cited in *Foss v. Strachn*, 42 N. H. 40, holding grantor estopped at law and in equity by covenants in deed from setting up a homestead therein as against grantee, his heirs, or assigns; *Williams v. Robinson*, 16 Conn. 517, on question as to when mortgagor is estopped by his covenants; *West Winsted Sav. Bank*

& Bldg. Asso. v. Ford, 27 Conn. 282, 71 A. D. 66, holding mortgagor estopped from denying corporate existence of mortgagee; Linsley v. Brown, 13 Conn. 192, holding wife not estopped by her acknowledgment from claiming deed which was not legally executed by her was not her deed; Sprigg v. Bank of Mt. Pleasant, 10 Pet. 257, 9 L. ed 416, holding surety bound jointly and severally on a bond, although with no express admission on face of instrument that all are principals, cannot plead that he is surety only; Leonard v. Diamond, 31 Md. 536, on question of estoppel by deed.

—To deny title.

Cited in Van Husen v. Omaha Bridge & Terminal R. Co. 118 Iowa, 366, 92 N. W. 47, holding grantor estopped from claiming he had no interest in the land at the time of his conveyance; Smith v. Moodus Water Power Co. 35 Conn. 392, holding same as to lease containing covenants of ownership; Summerfield v. White, 54 W. Va. 311, 46 S. E. 154, holding deed without covenant of warranty estops grantor from asserting against grantee any title to the land he had or claimed, at the time of its execution; Chauvin v. Wagner, 18 Mo. 531, holding covenant of seisin will not estop heirs of grantor from asserting title not derived from him; Lee v. Payne, 4 Mich. 106, holding tenant estopped from denying landlord's title; Great Falls Co. v. Worster, 15 N. H. 412, holding grantee in deed poll is estopped to deny that grantor had such an estate as he undertook to convey; Byrne v. State, 50 Miss. 688, holding recitals in official bond estopped sureties from denying officer had any title to office.

—By recitals in deed or bond.

Cited in Morris v. Wheat, 8 App. D. C. 379, holding grantor and those in privity with him estopped from disputing deed itself, and every fact it recites, McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274, holding recitals in a deed which are of the essence of the contract binding on both parties; Miles v. Waggoner, 23 Pa. Super. Ct. 132, holding recital in deed that it was given for love and affection does not estop grantee from showing that real consideration was money equal to value of land; Rich v. Atwater, 16 Conn. 409, holding recital in a covenant, executed by one of the parties through misapprehension and mistake will not be regarded by court of equity as conclusive upon such party; Richardson v. Penny, 10 Okla. 32, 61 Pac. 584, holding obligors upon are bound by the recitals in the bond.

Cited in reference notes in 11 A. S. R. 173, on estoppel by deed; 22 A. D. 714; 51 A. D. 115; 56 A. D. 107; 66 A. S. 533,—on estoppel by recitals in deed; 78 A. D. 533, on estoppel of grantor and privies by recitals in deeds.

Cited in note in 11 E. R. C. 72, on estoppel by recitals in deed.

—Estoppel of privies.

Cited in Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Den ex dem. Lunsford v. Alexander, 20 N. C. (4 Dev. & B. L. 40) 166; Hill v. Hill, 4 Barb. 419,—holding all persons claiming under or through estopped person are legally bound by the estoppel of the deed.

Estoppel by recitals in judgment.

Cited in Hawbicker's Estate, 6 Pa. Co. Ct. 570, holding defendant estopped by recital in judgment "that it is given to secure payment of purchase money of real estate" from showing that part of judgment was given for individual debt.

Estoppel in pais.

Cited in reference note in 96 A. D. 168, on estoppel by one's own act or admission.

Notice of agent's limitations.

Cited in *Blum v. Robartson*, 24 Cal. 127, holding party dealing with an attorney in fact is bound to know at his peril the power of the agent, and to understand its legal effect.

Alteration of charter.

Cited in *Com. ex rel. Claghorn v. Cullen*, 13 Pa. 133, 53 A. D. 450, holding assent to alterations may be given by stockholders, but directors or trustees have no authority to alter charter.

18 AM. DEC. 105, STATE v. AVERY, 7 CONN. 266.**Liability of writer of libelous letter.**

Cited in *Warnock v. Mitchell*, 43 Fed. 428; *Fry v. McCord Bros.* 95 Tenn. 678, 33 S. W. 568,—holding writer of libelous letter, read by person libeled only, criminally but not civilly liable; *Com. v. Patocki*, 15 Pa. Dist. R. 831, holding it a criminal offense to send libelous matter by mail or by messenger to another person; *Mankins v. State*, 41 Tex. Crim. Rep. 662, 57 S. W. 950 (dissenting opinion), on whether sending libelous letter to another constitutes an offense; *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695, holding writer of libelous letter to person libeled civilly liable under statute.

Cited in reference notes in 24 A. D. 516, on sending of libelous letter to addressee as publication; 31 A. D. 561, on sending libelous letter to party libeled as publication; 52 A. D. 770, as to whether sending libelous letter to another is publication or not.

Cited in notes in 13 A. S. R. 628, on sending letters as publication in libel; 58 A. S. R. 603, on criminal libel by use of United States mail.

Libel as indictable offense.

Cited in *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding publication of libel indictable at common law.

Cited in reference note in 73 A. S. R. 914, on criminal libel.

Cited in notes in 13 L.R.A. 420, on incidents of libel; 11 L.R.A. 658, on indictment for verbal threats to extort money.

Solicitation to commit crime.

Cited in *Lamb v. State*, 67 Md. 524, 10 Atl. 298 (dissenting opinion), on solicitation of woman to take drugs to cause abortion as indictable offense; *Hill v. Spear*, 50 N. H. 253, 9 A. R. 205, holding that soliciting commission of indictable offense, indictable; *Com. v. Randolph*, 146 Pa. 83, 28 A. S. R. 782, 23 Atl. 388, holding soliciting and offering reward for commission of murder indictable at common law; *State v. Baller*, 26 W. Va. 99, 53 A. R. 66, holding soliciting witness to absent himself from public prosecution indictable offense; *Com. v. Hutchinson*, 6 Pa. Super. Ct. 405, 42 W. N. C. 137; *State v. Bowers*, 35 S. C. 262, 28 A. S. R. 847, 15 L.R.A. 199, 14 S. E. 488; *Com. v. Flagg*, 135 Mass. 545,—holding soliciting person to commit arson, although ineffectually, indictable offense; *State v. Sullivan*, 110 Mo. App. 75, 84 S. W. 105, holding solicitation of bribe misdemeanor under common law.

Cited in reference note in 40 A. S. R. 906, on effect of solicitation to commit offense.

Cited in notes in 40 A. R. 656; 3 L.R.A. 747, 748,—on solicitations to commit crime as attempt; 20 A. S. R. 744, as to whether solicitation is an attempt to commit a crime.

Distinguished in *State v. Bowler*, 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726, holding solicitation of bribe not a crime under laws of Kansas.

— Sexual crime.

Cited in *Reed v. Maley*, 115 Ky. 816, 62 L.R.A. 900, 74 S. W. 1079, 2 A. & E. Ann. Cas. 453 (dissenting opinion), on question of whether soliciting woman to have sexual intercourse is a crime.

Cited in note in 25 L.R.A. 438, on criminality of solicitation to sexual crimes.

Distinguished in *Smith v. Com.* 54 Pa. 209, 93 A. D. 686, 24 Phila. Leg. Int. 172, holding soliciting married woman to commit adultery not indictable.

Adultery as a crime.

Cited in reference note in 32 A. D. 404, on nonindictability at common law of adultery and fornication.

Cited in note in 32 A. D. 289, on punishability of adultery.

Attempts to commit crime.

Cited in *Farrell v. State*, 54 N. J. L. 421, 24 Atl. 725, holding attempt to commit statutory misdemeanor, misdemeanor at common law; *State v. Buller*, 8 Wash. 194, 40 A. S. R. 900, 25 L.R.A. 434, 35 Atl. 1093, holding solicitation not indictable as attempt to commit adultery.

18 AM. DEC. 108, *WYLIE v. LEWIS*, 7 CONN. 301.

Indorsements not by way of negotiation of note.

Cited in *Perkins v. Catlin*, 11 Conn. 213, 29 A. D. 282, holding contract which law implies from blank indorsement of a promissory note not negotiable is that the note is due and payable according to its tenor, that the maker shall be able to pay it when it comes to maturity, and that it is collectable by use of due diligence; *Ellis v. Brown*, 6 Barb. 282, on liability of indorser who is privy to original consideration.

Indorsement by other than payee.

Cited in reference notes in 38 A. D. 467, on effect of indorsement by one not payee; 38 A. D. 99, on effect of blank indorsement by one not a holder or payee; 56 A. D. 359, on liability on indorsement of negotiable paper by one not holder or payee.

Contract of guaranty.

Cited in *Redfield v. Haight*, 27 Conn. 31, holding the words "in consideration of \$1 to me in hand paid, I hereby guarantee the full and fair performance of the covenants and agreements mentioned in foregoing instrument" constituted contract of guaranty.

18 AM. DEC. 111, *PITKIN v. PITKIN*, 7 CONN. 307.

Liability of estate of testator for debts of continued business.

Cited in *Lucht v. Behrens*, 28 Ohio St. 231, 22 A. R. 378, holding general estate of testator not embarked in business cannot be subjected to the liabilities incurred in its prosecution in absence of clear and explicit authority conferred by the will; *Burwell v. Cawood*, 2 How. 560, 11 L. ed. 378; *Huber v. Wood*, 14 Pa. Co. Ct. 13,—holding clear and positive intention of testator to so charge general assets must appear; *McArdle v. West Philadelphia Title & T. Co.* 42 W. N. C. 236, 7 Pa. Super. Ct. 328; *Cook v. Rogers*, 3 Fed. 69,—holding under construction of will of deceased partner general assets of estate of decedent not liable for debts contracted after his death; *Roessler's Estate*, 5 Pa. Dist. R. 776, 19

Pa. Co. Ct. 161, holding direction to continue a business not a charge of the future debts thereof on the estate; *Steiner v. Steiner Land & Lumber Co.* 120 Ala. 128, 26 So. 494; *Davis v. Christian*, 15 Gratt. 11,—holding responsibility of his estate limited to the funds already embarked in the trade; *Roberts v. Hale*, 124 Iowa, 296, 99 N. W. 1075, 1 A. & E. Ann. Cas. 940, holding authorized continuation of business and of investment of entire assets for that purpose by trustee as he may see fit, makes property of estate used in the business by decedent, and after his death by trustee answerable for the debts incurred in the execution of the trust; *Tillotson v. Tillotson*, 34 Conn. 335, holding under provisions of will of deceased partner survivor had a right to continue the business for benefit of representatives of deceased partner in common with himself; *Laughlin v. Lorenz*, 48 Pa. 275, 86 A. D. 592, holding personal representatives of a deceased partner may carry on the business for, and bind his estate where a covenant to that effect existed in the articles of copartnership or he directed by will that it should be done; *Stanwood v. Owen*, 14 Gray, 195, holding stipulation in partnership articles that business may be carried on for one year by the survivor for mutual benefit of both parties, does not justify the allowance against estate of debt contracted by survivor with one who had notice of the death; *Laible v. Ferry*, 32 N. J. Eq. 791, on question of right of testator to restrict liability of his estate to amount embarked in business.

Cited in notes in 79 A. S. R. 715, on liability of deceased partner's estate; 79 A. S. R. 713, on continuation of partnership after death of one partner under direction in will; 86 A. D. 602, on carrying on of partnership by representative of deceased partner; 12 E. R. C. 45, 46, on executor's right to carry on business of testator.

Liability of trust fund for debts of trustee carrying on the business.

Cited in *Mason v. Pomeroy*, 151 Mass. 164, 7 L.R.A. 771, 24 S. E. 202; *Wells-Stone Mercantile Co. v. Aultman*, 9 N. D. 520, 84 N. W. 375,—on right of creditors to resort to trust fund for payment.

Preference of ordinary debts of decedent to post mortem charges.

Cited in *Morrow v. Morrow*, 2 Tenn. Ch. 549, holding debts created by testator in his lifetime entitled to preference to debts created after his death in carrying on a business under the provisions of his will even where the will directs that all the property the testator died possessed of shall be responsible for the debts thus incurred; *Willis v. Sharp*, 115 N. Y. 396, 5 L.R.A. 636, 22 N. E. 149, holding if business was carried on by executors with assent of original creditors they and the creditors of the business are entitled to share, *pro rata*, in the whole estate.

Liability of heirs and personal representatives of deceased partner.

Cited in *Stewart v. Robinson*, 115 N. Y. 328, 5 L.R.A. 410, 22 N. E. 160, holding they are not liable beyond amount invested in partnership business; *Filley v. Phelps*, 18 Conn. 294, holding heirs not liable; *Gibson v. Stevens*, 7 N. H. 352, on liability of executor or heir who undertakes to manage the business jointly with survivor.

Existence of partnership.

Cited in notes in 18 L.R.A.(N.S.) 1000, on net-profit rule as test of existence of partnership; 18 L.R.A.(N.S.) 1099, on creation of partnership liability by participation in profit after transfers; 18 L.R.A.(N.S.) 986, on distinction between partnerships *inter sese* and partnerships in respect to third persons.

Exclusiveness of jurisdiction of court of probate over estates of decedents.

Cited in *Way v. Way*, 42 Conn. 52, holding it has jurisdiction alone on the matter of assigning dower to widow; *Brush v. Button*, 36 Conn. 292, holding probate court the only place where executor's account can be settled; *State v. Blake*, 69 Conn. 64, 36 Atl. 1019, holding determination of court of probate as to persons entitled to take any portion of a testate estate lawfully in settlement before it, cannot be re-examined in superior court except by appeal; *Bailey v. Strong*, 8 Conn. 278; *Beach v. Norton*, 9 Conn. 182,—holding court of chancery will not take cognizance of matters properly cognizable by court of probate; *Cowles v. Whitman*, 10 Conn. 121, 25 A. D. 60, on question of exclusive jurisdiction of probate court or adjusting claims against estates.

Cited in reference notes in 72 A. D. 137, on exclusiveness of jurisdiction of probate court over distribution of estates of decedents; 44 A. D. 328, on appointment of administrator and jurisdiction of probate court over.

Equitable powers of probate courts.

Cited in *Ashmead's Appeal*, 27 Conn. 241, holding they have power to make equitable preferences between different classes of general creditors.

Effect of death of partner on firm.

Cited in *Filley v. Phelps*, 18 Conn. 294, holding it dissolves the partnership.

Cited in notes in 69 A. S. R. 414, on dissolution of partnership by death of partner; 79 A. S. R. 710, on continuation of partnership after death of one partner; 19 E. R. C. 777, on right of surviving partner to bind estate of deceased partner.

Accrual of demands against administrator.

Cited in *Caulfield v. Green*, 73 Conn. 321, 47 Atl. 334, holding them demandable upon grant of administration.

***Volenti non fit injuria*.**

Cited in *Lockwood v. Jones*, 7 Conn. 431, as applying the doctrine.

18 AM. DEC. 116, NORTON v. PETTIBONE, 7 CONN. 319.

Retroactive laws curative of contracts and conveyances.

Cited in *Booth v. Booth*, 7 Conn. 350, as holding curative act relative to certificate of sheriff sale constitutional; *Mechanics & W. M. Mut. Sav. Bank & Bldg. Asso. v. Allen*, 28 Conn. 97, holding act validating certain usurious contracts previously made and which under statute with regard to usury were void in part, constitutional; *Newman v. Samuels*, 17 Iowa, 528, holding as to purchaser who has paid for land, and put owner under moral obligation to convey, the legislature may cure a defective conveyance but cannot affect title of bona fide holder.

Cited in notes in 1 L.R.A. 358, on what is not an impairment of remedy on contract; 16 A. D. 519, on constitutionality of acts validating contracts and deeds of married women.

Admissibility of declarations against interest of predecessor in title.

Cited in *Hatch v. Dennis*, 10 Me. 244, holding in action on promissory note brought by indorsee against maker, declarations of payee, made before note was indorsed, admissible.

Cited in reference notes in 52 A. D. 164, on declarations as to title; 77 A. D.

345, on admissibility of declarations of person in possession of land against his own title; 24 A. D. 395; 28 A. D. 564,—on admissibility of declaration of vendor in possession against his vendee.

Cited in notes in 40 A. D. 240, on admissibility of declarations of former owner or possessor against those claiming under him; 95 A. D. 70, 72, on admissibility, as part of *res gestæ*, of declarations of persons in possession of property characterizing such possession; 42 A. D. 631, as to when declarations of vendor are evidence against vendee to show fraud.

Distinguished in *Fitch v. Chapman*, 10 Conn. 8, holding declarations of a person not a party, who is living and a competent witness in the cause though against his interest at the time they were made, are inadmissible.

—Against title to land.

Cited in *Rogers v. Moore*, 10 Conn. 13; *Deming v. Carrington*, 12 Conn. 1, 30 A. D. 591; *Gibblehouse v. Strong*, 3 Rawle, 437; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Potter v. Waite*, 55 Conn. 236, 10 Atl. 563,—holding declarations adverse to title, admissible; *Smith v. Martin*, 17 Conn. 399, holding same but that declarations of owner of land in favor of his title are not admissible for him, or for anyone claiming under him; *Walter v. Brown*, 115 Iowa, 360, 88 N. W. 832, holding declarations of grantee in possession that he knew of a prior unrecorded mortgage at the time he purchased admissible against his grantee; *Cook v. Knowles*, 38 Mich. 316, holding conversation tending to show that deed, dated some time before levy of the attachment, was not delivered until after, is admissible in an action of ejectment against a later grantee of declarant; *Reed v. Smith*, 14 Ala. 380; *Newell v. Roberts*, 13 Conn. 63; *Fall v. Fall*, 100 Me. 98, 60 Atl. 718; *Hines v. Soule*, 14 Vt. 99; *Roebke v. Andrews*, 26 Wis. 312 (dissenting opinion); *Ramsbottom v. Phelps*, 18 Conn. 278,—on question of admissibility of declarations of former owner.

Distinguished in *Carpenter v. Hollister*, 13 Vt. 552, holding admissions of grantor still living, made while holding the land and having title of record thereto, unless in relation to the extent and character of his possession cannot be admitted against grantee; *Robinson v. Clapp*, 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, holding declaration by vendor to vendee that a well not on the land to be conveyed “belonged to” and “would be sold” with such land, is irrelevant where the only question is as to the legal effect of the deed as written.

Declarations in respect to boundaries.

Cited in *Merwin v. Morris*, 71 Conn. 555, 42 Atl. 855, holding declarations of “ancient persons” admissible.

Cited in reference note in 30 A. D. 596, on admissibility of declarations and admissions of person deceased made while in possession of land as to boundary.

18 AM. DEC. 118, STATE v. LEACH, 7 CONN. 452.

Criminality of prison breach and escape.

Cited in *People v. Ah Teung*, 92 Cal. 421, 15 L.R.A. 190, 28 Pac. 577; *King v. State*, 42 Fla. 260, 28 So. 206,—holding to constitute a crime the custody must have been lawful.

Cited in reference note in 89 A. S. R. 373, on escape of prisoner.

Cited in note in 15 L.R.A. 191, on prison breach as offense where imprisonment is illegal and void.

Liability of justice of peace who exceeds his authority.

Cited in *Hoese v. Sherrill*, 16 Wend. 33 (dissenting opinion), on his liability as trespasser.

Cited in note in 21 A. D. 193, on requisites of process which will protect officer.

18 AM. DEC. 120, PERKINS v. PERKINS, 7 CONN. 553.**Prospective construction of statutes.**

Cited in *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 156, 42 L.R.A. 783, 24 So. 171; *Plumb v. Sawyer*, 21 Conn. 351; *Skinner v. Watson*, 35 Conn. 124; *Shay's Appeal*, 51 Conn. 162; *New Orleans v. Poydras Orphan Asylum*, 33 La. Ann. 850; *Fitch v. Elko County*, 8 Nev. 271; *Brewster v. McCall*, 15 Conn. 274,—holding statutes should not be construed retrospectively, unless by their express terms or otherwise, such appears to be the manifest intent of the legislature; *Slocum v. Fayette County*, 61 Iowa, 169, 16 N. W. 61, holding law limiting appeal from action of board of equalization applied to appeal had from board prior to enactment; *State v. Welch*, 65 Vt. 50, 25 Atl. 900 (dissenting opinion); *Rich v. Flanders*, 39 N. H. 304,—on retrospective construction of statutes.

Cited in reference note in 41 A. D. 275, as to when statute should not be construed so as to operate retrospectively.

Cited in notes in 12 L.R.A. 50, on construction of statutes as prospective or retrospective; 41 L. ed. U. S. 94, on retroactive laws and laws impairing vested rights.

Distinguished in *Hine v. Belden*, 27 Conn. 384, holding act providing proceedings brought for forfeiture of liquor in certain cases shall be proceedings in rem and not criminal proceedings applied to proceedings pending when act was passed.

Commencement of action.

Cited in reference notes in 22 A. D. 208, on what is commencement of an action; 34 A. S. R. 744, as to how and when actions are commenced.

When statute takes effect.

Cited in reference notes in 63 A. D. 463; 78 A. D. 691; 46 A. S. R. 117,—as to when statutes take effect.

Waiver of defective process or jurisdiction.

Cited in *Denton v. Danbury*, 48 Conn. 368, holding jurisdiction not conferred by law cannot be acquired by act or agreement of parties; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867, holding court of limited jurisdiction cannot exceed its powers even if parties make no objection; *Woodruff v. Bacon*, 34 Conn. 181, holding a process not void but only defective and that defendant had waived the objection.

Cited in reference notes in 62 A. S. R. 867, on waiver of objection to jurisdiction; 54 A. D. 449, on waiver of want of jurisdiction of defendant by his appearance and plea in bar.

Effect of judgment of court of limited jurisdiction.

Cited in *Raymond v. Bell*, 18 Conn. 81, holding that where court, having special and limited powers, has jurisdiction of the proceeding and this appears of record its acts will be presumed to be rightly done.

Time for objection to jurisdiction.

Cited in *Zonker v. Cowan*, 84 Ind. 395, holding jurisdiction of lower court over subject-matter of action may be raised in supreme court; *Bennett v. Chase*, 21 N. H. 570, holding on question when plea in abatement may be interposed.

18 AM. DEC. 128, MITCHELL v. MERRILL, 2 BLACKF. 87.**Necessity of demand to fix default on bond.**

Cited in *Midland R. Co. v. Eller*, 7 Ind. App. 216, 33 N. E. 265; *Midland R. Co. v. State*, 11 Ind. App. 433, 38 N. E. 57,—holding no demand necessary to default obligor in bond requiring delivery of property at a day certain.

Cited in note in 40 A. D. 313, on necessity of demand before bringing action.

Sufficiency and effect of tender.

Cited in *Cromwell v. Wilkinson*, 18 Ind. 365, on tender and refusal of goods sold as a transfer of title, rendering purchaser liable for price.

Cited in reference notes in 26 A. D. 546, on what constitutes a sufficient tender; 27 A. D. 178, as to when tender of personalty is valid; 26 A. D. 546, on effect of tender; 35 A. D. 495, on tender properly made as satisfaction of demand.

Cited in notes in 21 A. D. 166, on tender of specific articles; 77 A. D. 489, on effect of tender and refusal of chattels; 77 A. D. 488, on effect of tender as payment and discharge.

18 AM. DEC. 131, JAMISON v. HENDRICKS, 2 BLACKF. 94.**Sheriff's liability for levy on third person's property.**

Cited in reference notes in 19 A. D. 347, on levy by officer on stranger's property; 19 A. D. 305; 20 A. D. 223,—on sheriff levying on stranger's property as a trespasser; 25 A. D. 260, on liability in trover of officer attaching property of stranger to writ.

Cited in notes in 39 A. D. 512, on sheriff's liability for levying on stranger's goods; 95 A. S. R. 125, on remedies available against sheriffs, constables, and marshals for seizing property of third persons.

Liability of innocent purchaser.

Cited in reference note in 28 A. S. R. 332, on liability of innocent purchaser for conversion.

Demand as prerequisite to action.

Cited in reference note in 25 A. D. 400, as to when trover lies without demand and refusal.

Measure of damages in trover.

Cited in reference note in 28 A. D. 270, on measure of damages in trover.

18 AM. DEC. 133, DURHAM v. MUSSELMAN, 2 BLACKF. 96.**Proximate cause.**

Cited in *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, holding court should direct verdict for defendant, unless there is substantial evidence that defendant's negligence was proximate cause; *Southern P. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436 (dissenting opinion), on same point; *Krach v. Heilman*, 53 Ind. 517, holding intoxication not proximate cause of injury from tossing barrel to person lying down in wagon; *Smith v. Thomas*, 23 Ind. 69, holding loading of gun so it would "kick" not proximate

cause of injury to one who discharged it with full knowledge; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 38, 55 Fed. 949, holding misstatement by conductor of reason why train would not stop not proximate to injury of stock shipper who walked on top of train and was injured while relying on statement made.

Cited in note in 45 L.R.A. 91, on rule of proximate cause in acts for malicious torts.

— Unlawful acts.

Cited in *Noblesville Gas & Improv. Co. v. Teter*, 1 Ind. App. 322, 27 N. E. 635, holding gas company unlawfully failing to guard excavation in street liable for injury to cattle regardless of probability of the particular injury.

Cited in reference notes in 27 A. S. R. 285, on liability for wrongful act; 84 A. D. 547, on liability for consequences of unlawful act.

Cited in note in 57 A. D. 461, on liability of remote wrongdoer for damage caused by wrongful act or negligence.

Injury in negligent exercise of lawful right.

Cited in *Penso v. McCormick*, 125 Ind. 116, 21 A. S. R. 211, 9 L.R.A. 313, 25 N. E. 156, holding it negligent to suffer hot embers to be placed in an ash pile on defendant's land which was known to be frequented by children; *Brummit v. Furness*, 1 Ind. App. 401, 50 A. S. R. 215, 27 N. E. 656, holding that the setting of fire in stubble or dry peat land was *prima facie* negligent.

Cited in reference notes in 67 A. D. 412, on duty of one to so use his property as not to injure others; 37 A. S. R. 327, on extent of owner's right to use his own property.

Accidental injury.

Cited in reference note in 50 A. D. 627, on injuries occasioned by accident.

Duty as to animals running at large or in roadway.

Cited in *Young v. Harvey*, 16 Ind. 314, holding unguarded well in uninclosed lot, proximate cause of injury to horse lawfully at large and falling therein; *Sisk v. Crump*, 112 Ind. 504, 2 A. S. R. 213, 14 N. E. 381; *Loveland v. Gardner*, 79 Cal. 317, 4 L.R.A. 395, 21 Pac. 766,—holding injuries to animals from negligent maintenance of barbed-wire fence along road not excusable because fence was on one's own land; *Brown v. Cooper*, 10 Tex. Civ. App. 512, 31 S. W. 316, holding landowner building fence along highway wherein cattle were rightfully allowed to roam must use ordinary prudence for their protection; *Howe v. Young*, 16 Ind. 312, upholding complaint charging that reckless driving caused horse lawfully left at side of road to run away to a certain damage; *Hanna v. Terre Haute & I. R. Co.* 119 Ind. 316, 21 N. E. 903, holding railroad not liable in absence of wilfulness for killing of cattle negligently allowed to be on track; *Michigan S. & N. I. R. Co. v. Fisher*, 27 Ind. 96, holding property owner's duty not increased by fact that cattle are lawfully permitted to run at large.

Cited in note in 49 A. D. 261, on liability for killing or maiming trespassing animals.

Distinguished in *Clary v. Burlington & M. R. Co.* 14 Neb. 232, 15 N. W. 220, holding railroad not required to guard cuts away from public thoroughfare, to protect animals grazing nearby in violation of law.

Rights of trespassers.

Cited in *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121, holding engineer on switch track entitled to protection due to licensee by invitation; *Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 119 A. S. R.

503, 7 L.R.A.(N.S.) 597, 79 N. E. 186, holding owner of private way built so as to constitute quasi dedication or invitation to injured persons liable upon proof of lack of ordinary care; *Lary v. Cleveland*, C. C. & Q. R. Co. 78 Ind. 323, 41 A. R. 572, holding blowing down by storm of part of visibly ruinous but uninclosed building on mere intruder, not actionable.

Cited in note in 25 E. R. C. 113, on liability of landowner for injuries sustained by trespasser.

Right to suffer animals to go at large.

Cited in *Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596, on the lawfulness of permitting domestic animals to run at large.

18 AM. DEC. 136, CUPPS v. IRVIN, 2 BLACKF. 113.

Jurisdiction to remove cloud on title.

Cited in *Marot v. Germania Bldg. & Sav. Asso.* No. 2, 54 Ind. 37, holding equity jurisdiction to remove cloud obtains under statute in a modified form.

Bills *quia timet*.

Cited in *Day v. Patterson*, 18 Ind. 114, on the difference between a bill of peace and a bill *quia timet*.

Injunction against dispossession.

Cited in reference note in 25 A. S. R. 824, on right to enjoin dispossession of land.

18 AM. DEC. 138, EVILL v. CONWELL, 2 BLACKF. 133.

Elements of forcible entry or detainer.

Annotation cited in *Central Park Baptist Church v. Patterson*, 9 Misc. 452, 30 N. Y. Supp. 248, 24 N. Y. Civ. Proc. Rep. 79, holding gist of action is peaceful possession under color of right and forcible disturbance by defendant.

Cited in reference notes in 22 A. D. 496; 23 A. D. 446; 30 A. D. 396; 38 A. D. 152; 65 A. D. 737,—on forcible entry and detainer; 52 A. D. 458, as to when act of forcible entry is maintainable; 84 A. D. 680, on essential elements of forcible entry; 102 A. S. R. 749, on what is a forcible entry; 68 A. S. R. 846, on what is a forcible detainer; 92 A. S. R. 603, on entry by stealth or against will of person in possession as forcible entry.

Cited in notes in 19 A. S. R. 545, on right of owner of land to effect entry thereon; 121 A. S. R. 394, on character of force and of entry as forming ground for forcible entry and detainer; 121 A. S. R. 390, on unlawfulness of force in forcible entry and detainer.

—What constitutes “force.”

Cited in *Bell v. Longworth*, 6 Ind. 273, holding evidence sufficient to show forcible entry and detainer.

Annotation cited in *Smith v. Reeder*, 21 Or. 541, 15 L.R.A. 172, 28 Pac. 890, holding word “force” in statute means actual as distinguished from implied force; *Central Park Baptist Church v. Patterson*, 9 Misc. 452, 30 N. Y. Supp. 248, 24 N. Y. Civ. Proc. Rep. 79, holding it forcible, though no breach of peace is committed where large number of persons join in the entry; *Taylor v. Scott*, 10 Or. 483, holding it is forcible detainer only when acts or words show present purpose to use force to defeat present re-entry.

—Acts of agents or servants.

Cited in *Minturn v. Burr*, 16 Cal. 107 (same case on later appeal 20 Cal. 48),

holding proof that defendants themselves did not go into actual corporeal possession or personally take part will not defeat the action.

— Possession of plaintiff.

Cited in *Minturn v. Burr*, 16 Cal. 107, holding house locked up and waiting for tenant with key in possession of plaintiff in actual possession within statute.

Cited in note in 8 L.R.A.(N.S.)428, on right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession who forcibly dispossessed him.

— Evidence of title.

Cited in reference notes in 39 A. D. 465, on admissibility of evidence of title in action of forcible entry and detainer; 29 A. D. 687, on right to inquire into title in action of forcible entry.

Cited in note in 77 A. D. 552, as to when title may be given in evidence in actions of forcible entry and unlawful detainer.

18 AM. DEC. 149, LAMBERT v. SANDFORD, 2 BLACKF. 137.

Effect of voluntary dismissal as bar to new action.

Cited in *Martin v. McCarthy*, 3 Colo. App. 37, 32 Pac. 551, holding voluntary dismissal of intervention by assignee for creditors in suit by third person against assignor and sheriff, no bar to assignee's action against sheriff for value of goods seized.

Cited in reference note in 49 A. D. 503, on effect of *nolle prosequi* to whole declaration on right to another action.

Authority of attorney.

Cited in reference notes in 26 A. D. 168; 31 A. D. 704; 42 A. D. 656,—on authority of attorney at law.

— To terminate suit.

Cited in *Derwort v. Loomer*, 21 Conn. 245, holding authority to prosecute suit does not include compromise; *Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716, denying power to consent to decree under letter authorizing a dismissal.

Cited in note in 76 A. D. 258, on attorney's power to dismiss nonsuit, and restore action.

— As to retraxit.

Cited in *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568, holding it improper to enter a *retraxit* without personal consent of plaintiff; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238, denying such power under mere general authority; *Barnard v. Daggett*, 68 Ind. 305, upholding authority by statute to file *retraxit* of matters omitted from referee's report.

Reversal or new trial for insufficiency of evidence.

Cited in *Richardson v. Reed*, 35 Ind. 356, holding reversal improper where there was conflict and evidence would support the verdict; *Madison & I. R. Co. v. Taffe*, 37 Ind. 361, holding same unless evidence was documentary.

Cited in reference note in 90 A. D. 438, on verdict unsupported by evidence as ground for new trial.

Liability of accommodation party on negotiable paper.

Cited in *Farmers' & M. Bank v. Rathbone*, 26 Vt. 19, 58 A. D. 200, holding indorsee of bills before maturity without notice of their accommodation character entitled to hold parties liable as they appear on the paper; *Marsh v.*

Low, 55 Ind. 271, holding accommodation acceptor principal debtor and not surety for drawer; *Diversy v. Moor*, 22 Ill. 330, 74 A. D. 157, holding acceptor for accommodation not discharged by neglect to sue on request; *Washington Bank v. Krum*, 15 Iowa, 53, holding extension of existing debt no defense to accommodation indorser of note deposited as collateral and which was known to be for accommodation.

Cited in reference notes in 35 A. D. 226, as to when accommodation acceptor is discharged; 37 A. D. 544, on discharge of accommodation acceptor by indulgence to drawer; 74 A. D. 158, on discharge of accommodation acceptor by giving time to drawer; 58 A. D. 211, on accommodation acceptor's not being discharged by giving time to drawer; 37 A. D. 725, on release of surety or accommodation indorser or acceptor by neglect or indulgence as to debtor; 37 A. D. 178, on liability of accommodation indorsers as affected by holder's failure to sue; 61 A. D. 294, as to when time given to indorser of accommodation note does not release maker.

Cited in note in 51 A. D. 303, on rights and liabilities of accommodation indorsers, acceptors, and makers.

Distinguished in *State Bank v. Wymond*, 7 Blackf. 363, holding indorsee of bill discharges indorser by giving time to drawer for valuable consideration; *Walter v. Fister*, 4 Legal Gas. 204, holding accommodation maker and surety discharged by extension of time given to principal.

18 AM. DEC. 152, *CUTLER v. COX*, 2 BLACKF. 178.

Former recovery as bar.

Cited in *Griffin v. Wallace*, 66 Ind. 410, holding same material question must or might have been decided; *Ramsey v. Herndon*, 1 McLean, 450, Fed. Cas. No. 11,546, holding verdict and judgment a bar to suit on same cause of action, notwithstanding no evidence was offered; *Greenup v. Crooks*, 50 Ind. 410, holding decision as to priority of mortgage over mechanic's lien in suit for enforcement of latter conclusive in action to foreclose mortgage.

Cited in reference notes in 20 A. D. 580; 22 A. D. 621; 24 A. D. 502,—on *res judicata* as estoppel; 64 A. S. R. 853, on plea of former adjudication; 68 A. S. R. 101, on plea of former recovery or adjudication; 22 A. D. 183, on conclusiveness of judgment; 67 A. D. 243, on conclusiveness of former recovery against parties and privies; 24 A. D. 615; 26 A. D. 609,—as to when former judgment is a bar or estoppel.

Cited in note in 1 L.R.A. 573, on conclusiveness of judgments.

—Different forms of action.

Cited in *Baker v. State*, 109 Ind. 47, 9 N. E. 711, holding it unnecessary that former action was same in form; *Wales v. Lyon*, 2 Mich. 276, holding creditor who unsuccessfully oppose discharge of bankrupt, estopped on plea of discharge in later action to question it for fraud.

Cited in note in 48 A. D. 775, on effect of difference in form of action on covenants of plea of former recovery.

—Presumption and burden of proof as to identity.

Cited in *Hargus v. Goodman*, 12 Ind. 629, on prima facie identity and burden of disproving same.

Distinguished in *Landers v. George*, 40 Ind. 309, denying right in collateral proceeding to contradict record showing what was found and adjudged by court.

Demurrer as admission.

Cited in *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, holding averment in answer that causes of action are same is to be taken as true on demurrer where record does not show otherwise.

Remedies of defrauded warrantee.

Cited in *Mead v. Raymond*, 52 Mich. 14, 17 N. W. 221, upholding case for false warranty of horse; *Gatling v. Newell*, 9 Ind. 572, on right of action on warranty in fraudulent contract.

Cited in note in 56 A. D. 155, on form of action for breach of warranty in sales.

Pleading fraud.

Cited in reference note in 29 A. S. R. 485, on necessity for pleading fraud.

18 AM. DEC. 157, WHALEN v. LAYMAN, 2 BLACKF. 194.**Seduction as element of damages in suit for breach of promise.**

Cited in *King v. Kersey*, 2 Ind. 402, holding evidence of seduction admissible; *Sauer v. Schulenberg*, 33 Md. 288, 3 A. R. 174; *Coil v. Wallace*, 24 N. J. L. 291; *Wells v. Padgett*, 8 Barb. 323; *Tubbs v. Van Kleeck*, 12 Ill. 446,—holding seduction in consequence of promise, admissible; *Haymond v. Saucer*, 84 Ind. 3, on admissibility of seduction when pleaded.

Cited in notes in 37 A. R. 449, on action for breach of promise to marry; 26 A. D. 677; 44 A. D. 178,—on evidence of seduction in action for breach of promise.

Distinguished in *Espy v. Jones*, 37 Ala. 379, holding seduction prior to promise inadmissible; *Cates v. McKinney*, 48 Ind. 562, 17 A. R. 768, holding evidence of seduction inadmissible without express averment.

Criticized in *Wrynn v. Downey*, 27 R. I. 454, 114 A. S. R. 63, 4 L.R.A.(N.S.) 615, 63 Atl. 401, 8 A. & E. Ann. Cas. 912, holding evidence of seduction inadmissible; *Fidler v. McKinley*, 21 Ill. 308, on inadmissibility of evidence of seduction unless averred and even then *quare*.

Injuries included in seduction.

Cited in *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762, holding seduction resulting in pregnancy, and abortion committed by seducer, may be joined as one cause of action.

18 AM. DEC. 158, JACKSON v. CULLUM, 2 BLACKF. 228.**Best and secondary evidence.**

Cited in reference notes in 66 A. S. R. 615, on best and secondary evidence; 57 A. D. 300, on secondary evidence of writing; 22 A. D. 449; 71 A. D. 210,—on necessity of giving best evidence of which nature of case is capable.

—Secondary evidence of lost records or papers.

Cited in *Davies v. Pettit*, 11 Ark. 349; *Dabney v. Mitchell*, 54 Ala. 198,—holding contents provable by parol or any secondary evidence not showing the existence of better evidence; *People v. Dennis*, 4 Mich. 609, 69 A. D. 338, sustaining parol proof of contents of indictment upon proof of destruction; *Schwartz v. Osthimer*, 4 Ind. 109, sustaining parol proof of pleas after proof of filing and inability to find them by diligent search; *Vaughn v. Biggers*, 6 Ga. 188, holding same as to writ of execution; *Re Warfield*, 22 Cal. 51, 83 A. D. 49, holding same of contents of lost or destroyed probate record.

Cited in reference notes in 45 A. S. R. 793, on secondary evidence of lost instruments; 36 A. D. 145, on parol proof of lost judicial record.

Power of court as to lost records.

Cited in *Bowman v. McLaughlin*, 45 Miss. 461, holding circuit court has power to restore or substitute lost pleadings; *Frame v. Boyd*, 35 N. J. L. 457, holding court may order certified copy of lost return of road by survey or to be made and put on file in proper office.

18 AM. DEC. 159, RAY v. ROE, 2 BLACKF. 258.**Pendency of action as affecting title of purchaser.**

Cited in *Ferrier v. Buzick*, 6 Iowa, 258, holding purchaser of property actually in litigation buys at his peril, though he had no actual notice; *Camp v. Forrest*, 13 Ala. 114, holding pendency of action for land does not invalidate sale by one in possession, but only operates as notice of matters involved in suit; *Tilton v. Coffield*, 2 Colo. 392 (dissenting opinion), on charging purchasers of attached property with notice of every fact which record disclosed at time of purchase.

Cited in reference notes in 20 A. D. 381, on doctrine of *lis pendens*; 35 A. D. 155, on purchase *pendente lite*; 33 A. S. R. 49, on rights of purchaser of realty *pendente lite*; 96 A. D. 135, on pendency of action involving title to real property as notice to third persons.

Cited in notes in 45 A. R. 187, as to when vendee has constructive notice of defect in title of vendor; 14 A. D. 777, on necessity that property be particularly described to make doctrine of *lis pendens* applicable.

Distinguished in *Turner v. Babb*, 60 Mo. 342, holding purchaser with notice of *lis pendens* affected by lien for money judgments though only relief asked was divestiture of title.

— Of personal actions not involving specific property.

Cited in *McMahan v. Morrison*, 16 Ind. 172, 79 A. D. 418, holding suit on money demand not notice to purchaser of lot not involved in the litigation.

Purchase in fraudulent contemplation of judgment.

Cited in *Shean v. Shay*, 42 Ind. 375, 13 A. R. 366, holding grantees with notice of fraudulent intent cannot prevent subjection to judgment on ground that conveyance was before suit.

18 AM. DEC. 161, SANDERS v. MORRISON, 7 T. B. MON. 54.**Vesting of joint trust estate upon death of trustee.**

Cited in reference note in 121 A. S. R. 312, on grants to trustees as coming within statute discouraging joint tenancies.

Cited in note in 19 A. S. R. 276, on sales and conveyances by trustee.

Distinguished in *Augusta v. Perkins*, 3 B. Mon. 437, holding that title to land vested in trustees of a town vests in survivors in case of death of one of them.

Jus accrescendi in trust estates.

Cited in reference note in 36 A. D. 63, on destruction by statute of *jus accrescendi* as to trusts in Kentucky.

Amendment to bring in new parties.

Cited in *Van Epps v. Van Deusen*, 4 Paige, 64, 25 A. D. 516, holding that where defendant objects for want of proper parties, plaintiff may amend and bring in proper parties within reasonable time.

18 AM. DEC. 164, SPROULE v. WINANT, 7 T. B. MON. 195.**Measure of damages for breach of covenant.**

See *Brooks v. Black*, 68 Miss. 161, 24 A. S. R. 259, 11 L.R.A. 176, 8 So. 332, holding damages recoverable in action against remote covenantee, amount received by latter with interest, instead of amount paid by plaintiff.

18 AM. DEC. 167, SANDERS v. VANCE, 7 T. B. MON. 209.**Demand as prerequisite to action.**

Cited in reference note in 25 A. D. 400, as to when trover lies without demand and refusal.

Levy on mortgaged property.

Cited in reference notes in 61 A. D. 491, as to whether property covered by chattel mortgage is liable to execution or attachment against mortgagor; 36 A. D. 590, on mortgagee's right against officer seizing mortgaged property under *fi. fa.* against mortgagor.

Justification of levy on property in hands of fraudulent grantee.

Cited in *Mitchell v. Ashby*, 78 Ky. 254, holding that officer sued in trespass for selling property must produce the judgment upon which the writ issued.

Measure of damages in trover.

Cited in *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202; *Daniel v. Holland*, 4 J. J. Marsh. 18,—holding measure of damages to be the value of property at time of conversion, with interest to date of trial.

Cited in reference notes in 24 A. D. 39; 26 A. D. 370,—on measure of damages in trover.

Cited in note in 24 A. D. 71, on value at time of conversion and interest as measure of damages where value is enhanced by wrongdoer.

Admissibility of execution without proof of judgment.

Cited in note in 23 A. D. 299, on right to give execution in evidence without proof of judgment.

18 AM. DEC. 172, GENTRY v. HUTCHCRAFT, 7 T. B. MON. 241.**Supplying lost writ.**

Cited in *Fowler v. More*, 4 Ark. 570, holding that lost writ or other process may be supplied upon parol evidence of its contents; *Williams v. Thompson*, 80 Ky. 325, on same point.

Parol proof of lost record.

Cited in reference note in 36 A. D. 145, on parol proof of lost judicial record.

Amendment of record or pleading.

Cited in *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921, holding that amendment of record upon appeal can only be had upon application to trial court.

Cited in reference notes in 28 A. D. 578, on amendment of record pending appeal; 35 A. D. 735, on amendment of pleadings.

18 AM. DEC. 176, YOUNG v. WISEMAN, 7 T. B. MON. 270.**Bar of right of redemption from mortgage.**

Cited in *Fenwick v. Macey*, 1 Dana, 276 (dissenting opinion), on bar of right of redemption by lapse of time not being analogous to statute of limitations

Statute of limitations in case of trusts.

Cited in note in 8 L.R.A. 647, as to whether trusts are within statute of limitations.

18 AM. DEC. 178, McGOWAN v. MANIFEE, 7 T. B. MON. 314.**Actionable words.**

Cited in reference note in 20 A. D. 574, on actionable words.

Office of colloquium.

Cited in note in 26 A. D. 94, on definition and office of colloquium and innuendo, and distinction between them.

Pleading and proof of words, in suit for slander.

Cited in Taylor v. Moran, 4 Met. (Ky.) 127, holding that specific words must be set forth in petition and the substance of the words must be proved.

Construction of words in suit for slander.

Cited in Barr v. Gaines, 3 Dana, 258; Stallings v. Newman, 26 Ala. 300, 62 A. D. 723,—holding that words used should be construed according to their obvious meaning.

Cited in reference notes in 25 A. D. 515, as to sense in which words will be taken; 46 A. D. 381, on words being taken in plain and obvious meaning.

Cited in notes in 26 A. D. 95, on taking words in sense understood by parties hearing them in action for slander; 116 A. S. R. 808, on rule for construing language used to determine whether libelous *per se*.

18 AM. DEC. 181, GRAVES v. MOORE, 7 T. B. MON. 341.**Effect of canceled indorsements of payments on note.**

Cited in Gibbs v. Farmers' & M. State Bank, 123 Iowa, 736, 99 N. W. 703, on canceled indorsements of payments on note throwing burden of explaining them upon holder.

18 AM. DEC. 183, ALDRIDGE v. BIRNEY, 7 T. B. MON. 344.**Set-off in equity.**

Cited in reference note in 26 A. D. 711, on set-offs in equity.

Presumption as to instruments bearing same date.

Disapproved in Doe ex dem. Holman v. Crane, 16 Ala. 570, holding that two instruments bearing same date and between same parties, but on different subject-matters, are not presumed to be in consideration of each other.

18 AM. DEC. 186, HART v. HAMPTON, 7 T. B. MON. 381.**Rights of purchaser at execution sale in case of defects in title.**

See Goodbar v. Daniel, 88 Ala. 583, 16 A. S. R. 76, 7 So. 254, holding that purchaser at sheriff's sale will not be relieved from bid by fact that execution defendant had no title to the property sold.

18 AM. DEC. 187, MCGUIRE v. KOUNS, 7 T. B. MON. 386.**Partial records as evidence.**

Cited in Lynch v. United States, 71 C. C. A. 59, 138 Fed. 535, holding that records used in evidence must be produced entire; Haynes v. Cowen, 15 Kan. 637, holding that where record is divisible, any material portion thereof is admissible without the other parts; Lee v. Lee, 21 Mo. 531, 64 A. D. 247; Gibson v.

Robinson, 90 Ga. 756, 35 A. S. R. 250, 16 S. E. 969,—holding copy of judgment without further record admissible where its existence and contents are the issue; Jones v. Taylor, 7 Tex. 240, 56 A. D. 48, holding that decree authorizing conveyance is sufficient record to accompany administrator's deed.

Cited in reference notes in 64 A. D. 250, on admissibility of part of record in evidence; 44 A. D. 708, as to what purchaser under execution must show to recover in ejectment; 32 A. D. 683, as to whether writ of execution is evidence in justification of sale thereunder without proof of judgment on which it was issued.

Cited in note in 14 A. D. 187, on admissibility in evidence of judgment without judgment roll.

Recitals in sheriff's deed.

Cited in reference notes in 21 A. D. 404; 36 A. D. 102,—on recitals in sheriffs' deeds; 31 A. D. 437, on necessity of recitals in sheriff's deed; 38 A. D. 768, on recitals in sheriff's deeds as evidence; 51 A. D. 513, on effect of misrecital of writ in sheriff's deed.

18 AM. DEC. 189, TRIMBLE v. SPILLER, 7 T. B. MON. 394.

Measure of damages for injury.

Cited in reference notes in 28 A. S. R. 91, on injury to family as element of damage; 35 A. D. 634, as to when feelings of parent are considered in action for injury to child.

Cited in notes in 7 A. S. R. 536, on mental anguish as element of damages, 7 L.R.A.(N.S.) 519, on parent's mental anguish as element of damages at common law for personal tort to minor child.

Right to sue for loss of service of child.

Cited in Soper v. Igo, 121 Ky. 550, 123 A. S. R. 212, 1 L.R.A.(N.S.) 362, 89 S. W. 538, 11 A. & E. Ann. Cas. 1,171, on exclusive right of father to maintain action for loss of service of child.

18 AM. DEC. 190, BROWN v. WRIGHT, 7 T. B. MON. 396.

Release of surety.

Cited in Ross v. Clore, 3 Dana, 189, holding surety not released because of misconduct of principal in misappropriating funds intended for payment of the debt.

Cited in reference notes in 20 A. D. 570; 29 A. D. 225,—on what acts of creditor discharge surety; 19 A. D. 319, on release of surety by failure to sue; 37 A. D. 595, on discharge of surety by creditor's interference; 62 A. S. R. 926, on exoneration of surety by concealment of facts; 58 A. D. 771, on right of purchaser's surety to obtain relief on ground of fraud.

Cited in note in 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal.

—By novation of debt.

Cited in Walker v. Forbes, 31 Ala. 9, holding unpaid draft taken by creditor, not payment so as to release surety; First Nat. Bank v. Parsons, 45 W. Va. 688, 32 S. E. 271, holding that indulgence to principal without consideration, and not prejudicial to rights of surety, does not release surety.

Cited in reference notes in 26 A. D. 746, on novation; 28 A. D. 354, on discharge of surety by novation between principal and creditor.

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18 AM. DEC. 194, DIVINE v. HARVIE, 7 T. B. MON. 439.**—Suits against state officer.**

Cited in *Comer v. Bankhead*, 70 Ala. 498, holding state cannot be sued in its own courts without its consent; *Com. v. Haly*, 106 Ky. 716, 51 S. W. 430, holding that resolution authorizing suit against the state for certain claims is constitutional.

Cited in reference notes in 41 A. D. 575, on right to sue state in its own court; 10 A. S. R. 724, on right of the sovereign or state to sue and be sued; 63 A. D. 132, on sovereign's consent as prerequisite to suit against it; 24 A. D. 604, on necessity of consent of legislature to suit against state in her own courts.

Cited in note in 108 A. S. R. 831, on waiver and evasion of immunity of sovereign from suit.

—Suit against state officer.

Cited in *Nougues v. Douglass*, 7 Cal. 65, holding that suit against state officer for failure to do his duty is not a suit against the state; *Tate v. Salmon*, 79 Ky. 540, holding that suit cannot be maintained against state treasurer for recovery of fund not disposed of by law.

Cited in note in 23 A. D. 180, on right to make public officer a party as to money in his hands.

Garnishment of state or municipality.

Cited in *Moscow Hardware Co. v. Colson*, 158 Fed. 199, holding regents of University of Idaho not subject to garnishment; *Brown v. Gates*, 15 W. Va. 131, on state not being subject to garnishment; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896, holding county not subject to garnishment; *Schwartz v. Kyner*, 4 Walk. (Pa.) 185, 13 Pittsb. L. J. N. S. 495, 40 Phila. Leg. Int. 272, holding that money in hands of county commissioners is not subject to attachment; *Fortune v. St. Louis*, 23 Mo. 239, holding city not subject to garnishment.

Annotation cited in *Skelly v. Westminster School Dist.* 103 Cal. 652, 37 Pac. 643, holding school district not subject to garnishment.

Cited in reference notes in 59 A. D. 314; 63 A. D. 699; 10 A. S. R. 200; 35 A. S. R. 119; 53 A. S. R. 125,—on garnishment of municipal corporation; 70 A. D. 746, on counties not being liable to garnishment; 47 A. D. 142, on garnishment of state, counties, and cities; 55 A. D. 264; 96 A. S. R. 443,—on garnishment of United States, states, counties, cities, and other municipalities.

Cited in notes in 51 A. S. R. 114, on garnishment of municipalities; 63 L.R.A. 702, on equitable remedy to subject debt due from government or municipality to judgment after return of no property found.

—Salary of officer or employee.

Cited in *Pruitt v. Armstrong*, 56 Ala. 306, holding that salary of public official in the hands of disbursing officer is not subject to garnishment; *Dickinson v. Johnson*, 110 Ky. 236, 96 A. S. R. 434, 54 L.R.A. 566, 61 S. W. 267, on same point; *Keene v. Smith*, 44 Or. 525, 75 Pac. 1065, holding salary due state officer not subject to garnishment; *Heilbronner v. Posey*, 103 Ky. 462, 45 S. W. 505; *Wallace v. Lawyer*, 54 Ind. 501, 23 A. R. 661,—holding that salary of county officer in hands of county cannot be reached by proceedings supplementary to execution; *Webb v. MacCauley*, 4 Bush, 8, holding that creditor cannot attach fees of jailer in hands of sheriff; *Remmey v. Gedney*, 57 How. Pr. 217, note; *Baltimore v. Root*, 8 Md. 95, 63 A. D. 692,—holding salary of city official in hands of city not subject to attachment.

Cited in notes in 96 A. S. R. 449, on exemption of salaries of state and United States officers; 54 L.R.A. 573, on exemption of salary of officers of municipal corporations from claims of creditors.

Distinguished in *Rodman v. Musselman*, 12 Bush. 354, 23 A. R. 724; *Speed v. Brown*, 10 B. Mon. 108,—holding that salary due from city may be attached by creditor of city officer.

Mandamus to compel payment by public officer.

Cited in *Page v. Hardin*, 8 B. Mon. 648; *People ex rel. McCauley v. Brooks*, 16 Cal. 11,—holding that mandamus will lie to compel issuance of state warrants for payment of salaries; *Black v. State Auditor*, 26 Ark. 237, holding that mandamus will lie to compel head of state department to perform ministerial act imposed upon him by law.

Applicability of statutes where state is party.

- Cited in *Hendricks v. Posey*, 104 Ky. 8, 45 S. W. 525, on laws operating between individuals, not including the state under their rules unless expressly so enacted; *Washington County v. Clapp*, 83 Minn. 512, 86 N. W. 775 (dissenting opinion), on liens and set-offs permissible between individuals, not being applicable to states and their divisions.

Cited in note in 26 A. D. 36, on point that state is not bound by statute unless expressly named therein.

18 AM. DEC. 208, FOSTER v. FLETCHER, 7 T. B. MON. 534.

Right to growing crops.

Cited in reference notes in 50 A. D. 238, on right to growing crops on conveyance or lease of the land; 24 A. D. 341, on growing crops in possession of one person and land in possession of another.

Requisites to action of trespasser or trover.

Cited in reference notes in 25 A. D. 121, on requisites to action of trespass; 22 A. D. 41, on necessity of possession to maintain trespass *quare clausum fregit*; 39 A. S. R. 795, on necessity of possession for maintenance of action for trespass; 51 A. D. 646, on necessity for possession to maintain trespass *quare clausum fregit*; 31 A. D. 548, on necessity of possession to maintenance of trespass or trover.

18 AM. DEC. 211, JANUARY v. JANUARY, 7 T. B. MON. 542.

Impairment of obligation of contracts.

Cited in *Pickens v. Marlow*, 2 Smedes & M. 428 (dissenting opinion), on constitutionality of law providing for valuation of property before sale on execution.

Cited in reference notes in 33 A. D. 157; 54 A. D. 393,—on statutes impairing obligation of contracts; 30 A. D. 274, on statutes impairing vested rights or obligation of contracts; 24 A. D. 606, on constitutionality of statutes varying remedies.

Equity jurisdiction.

Cited in note in 10 A. S. R. 646, on remedies by sureties for recovery of contribution.

Deficiency judgment in foreclosure proceedings.

Cited in *Kloke v. Gardels*, 52 Neb. 117, 71 N. W. 955, on right of court to

enter personal judgment for deficiency in action foreclosing executory contract for sale of land.

Cited in reference note in 43 A. S. R. 839, on judgment for deficiency on foreclosure of mortgage.

18 AM. DEC. 213, ESTILL v. FOX, 7 T. B. MON. 552.

Pleading limitations as defense in penal actions.

Cited in *Atchison, T. & S. F. R. Co. v. Tanner*, 19 Colo. 559, 36 Pac. 541, holding that limitations need not be specially pleaded; *Boyd v. Randolph*, 91 Ky. 472, 16 S. W. 133; on same point.

18 AM. DEC. 216, NANTZ v. McPHERSON, 7 T. B. MON. 597.

Bona fide purchase.

Cited in *Deskins v. Big Sandy Co.* 121 Ky. 601, 89 S. W. 695, holding purchaser of equitable title not bona fide purchaser; *Sargent v. Eureka Spund Apparatus Co.* 46 Hun, 19; *Merritt v. Lambert, Hoffm.* Ch. 166; *Parker v. Foy*, 43 Miss. 260, 5 A. R. 484,—holding that defense of bona fide purchase is not available unless consideration is wholly paid; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521, holding that payment of consideration must be shown independently of recital in deed; *Funk v. Paul*, 64 Wis. 35, 54 A. R. 576, 24 N. W. 419, holding taking chattel mortgage for pre-existing debt not due, without new consideration, not bona fide purchase.

Cited in reference notes in 25 A. D. 532; 41 A. D. 268,—on who are bona fide holders; 52 A. D. 221, on necessity of denying want of notice by one relying on thereon as a defense; 42 A. D. 627, 628; 4 A. S. R. 417,—on necessity of payment of consideration before notice to constitute one a bona fide purchaser; 25 A. D. 108, on necessity of payment in full before notice to constitute one a bona fide purchaser.

—Notice challenging inquiry.

Cited in *Baker v. Bliss*, 39 N. Y. 70, holding defense not available if purchaser had knowledge to put him upon inquiry.

Distinguished in *Bourland v. Peoria County*, 16 Ill. 538, holding records and proceedings of county commissioners as to lands not such notice as to put purchaser upon inquiry.

Pleading bona fide purchase.

Cited in *Prickett v. Muck*, 74 Wis. 199, 42 N. W. 256; *Craft v. Russell*, 67 Ala. 9,—holding that plea must set up purchase of legal title, in good faith, without notice and for valuable consideration.

Cited in reference note in 24 A. D. 235, as to what plea of bona fide purchaser must aver.

Cited in note in 23 A. D. 186, on essentials required by one pleading that he is a bona fide purchaser without notice.

18 AM. DEC. 219, BLIGHT v. TOBIN, 7 T. B. MON. 612.

Validity of execution sale.

Cited in reference notes in 65 A. D. 95, on rights and duties of purchasers at execution sale; 74 A. D. 521, on rights of purchaser under voidable execution; 57 A. D. 151, as to how validity of sales under execution is defeated; 83 A. D. 112, on circumstances under which chancery will set aside execution sales.

Cited in note in 21 L.R.A. 50, on reimbursement of purchaser at void execution sale.

— To party or attorney generally.

Cited in *McLaury v. Miller*, 64 Tex. 381, holding sale at inadequate price to attorney of creditor should be set aside; *Guinan v. Donnell*, 201 Mo. 173, 98 S. W. 478, holding sale to purchaser in collusion with debtor's attorney fraudulent; *Forman v. Hunt*, 3 Dana, 614; *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512,—on purchase by attorney of creditor at execution sale, throwing doubt upon fairness of sale.

Cited in notes in 30 A. D. 326; 83 A. D. 227,—on purchase by attorney at execution sale.

Distinguished in *Douglass v. Blount*, 95 Tex. 369, 58 L.R.A. 699, 67 S. W. 484, holding purchase at execution sale by attorney for creditor valid in absence of circumstances showing fraud.

— Inadequacy of price.

Cited in *Allen v. Stephanes*, 18 Tex. 658; *Scott v. Scott*, 85 Ky. 385, 5 S. W. 423,—holding inadequacy of price not *per se* ground for annulling sale; *Whiting v. Taylor*, 8 Dana, 403, on inadequacy of consideration as ground for avoiding sale.

Cited in reference notes in 49 A. D. 673; 32 A. S. R. 218,—on inadequacy of price as ground for setting aside execution sale.

— Fraud or irregularities in sale.

Cited in *Lee v. Davis*, 16 Ala. 516; *Mobile Cotton Press & Bldg. Co. v. Moore*, 9 Port. (Ala.) 679,—holding that sheriff's sale will be set aside for mistake, irregularity, or fraud on part of sheriff, if prejudicial to parties to sale or to third person; *Myers v. Sanders*, 7 Dana, 507, holding that fraudulent acts of sheriff as to sale makes it voidable only.

Cited in reference notes in 61 A. D. 138, as to when purchaser at execution sale is affected by irregularities; 24 A. D. 268; 31 A. D. 704; 45 A. D. 341,—on effect on title of purchaser at execution sale of irregularities in conduct of sale.

Cited in notes in 21 L. ed. U. S. 466, as to whether purchaser at judicial sale is protected against irregularities in the proceedings or sale; 39 A. D. 573, on binding force upon purchaser without notice at execution sale of officer's irregular acts.

— Rights of bona fide purchaser.

Cited in *Blodgett v. Hitt*, 29 Wis. 169, holding bona fide purchaser at fraudulent sheriff's sale, entitled to be subrogated to rights of execution creditor; *Sydnor v. Roberts*, 13 Tex. 598, 65 A. D. 84; *Myers v. Sanders*, 7 Dana, 507,—holding that bona fide purchaser obtains good title though his vendor had title under fraudulent sale; *Jackson ex dem. Webb v. Roberts*, 11 Wend. 422, on same point; *Horan v. Wahrenberger*, 9 Tex. 313, 58 A. D. 145, on equity protecting rights under sales under void judgments; *Howard v. North*, 5 Tex. 290, 51 A. D. 769, on purchaser at fraudulent sale being treated as trustee.

Cited in reference note in 83 A. D. 122, on rights of vendee without notice of fraudulent purchase at judicial sale.

Cited in notes in 25 A. D. 614, on right of bona fide purchaser from fraudulent purchaser; 23 A. D. 614, on protection of bona fide purchaser from fraudulent purchaser at sheriff's sale; 30 A. D. 177, on rights of purchasers who by reason of void sales have paid off claims on real estate.

— Laches barring relief.

Cited in reference notes in 32 A. S. R. 218, on statute of limitations as applicable to setting aside execution sale for fraud; 26 A. S. R. 801, on laches as bar to relief from execution sale for insufficient consideration.

— Equitable jurisdiction.

Cited in *Allison v. Taylor*, 3 B. Mon. 363, on equitable jurisdiction in case of public sale under color of legal process; *Young v. Schroeder*, 10 Utah, 155, 37 Pac. 252; *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512,—holding that equity has power to set aside sale after expiration of statutory time of redemption.

Right to relief in equity against judgment.

Cited in notes in 15 A. D. 39, on control of equity over judgments at law; 54 A. S. R. 260, on mode of obtaining and granting equitable relief against judgment, decree, or other judicial determination.

Liability of firm for fraud of partner.

Cited in *Young v. Schroeder*, 10 Utah, 155, 37 Pac. 252; *Re Hardie*, 143 Fed. 607; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1,038,—holding firm liable for fraudulent representations by one partner in matter relating to partnership business.

Cited in reference note in 45 A. D. 145, on liability of partners for fraud or other tort of copartner.

Cited in notes in 51 L.R.A. 485, on liability of partnership for fraud of individual member in purchase of property; 67 A. S. R. 46, on liability of one partner for fraud and misrepresentation by other partner.

Right of redemption.

Cited in reference note in 42 A. D. 62, on right to redeem land sold on execution.

18 AM. DEC. 232, MAYOR v. MORGAN, 7 MART. N. S. 1.**Review of official action.**

Cited in reference notes in 25 A. S. R. 342, defining "ministerial act;" 30 A. D. 677, as to when prohibition lies.

Cited in note in 16 A. S. R. 223, on jurisdiction of law courts to review proceedings of bodies having power to judge of the election and qualifications of their members.

— By certiorari.

Cited in reference notes in 82 A. S. R. 355, as to when writ of certiorari will issue; 26 A. D. 72, on nature and uses of certiorari; 77 A. D. 497, as to what may be reviewed on certiorari; 40 A. S. R. 595, on issuance of certiorari to review judicial action; 39 A. S. R. 600, on review by certiorari of proceedings for removal of city officer; 98 A. D. 773, on certiorari to board of supervisors; 19 A. D. 326, on certiorari to review proceedings of governmental boards; 37 A. S. R. 529, on certiorari to review findings of board of health as to nuisance.

— By mandamus.

Cited in reference notes in 66 A. S. R. 556, on nature of writ of mandamus and its functions; 74 A. S. R. 544, on mandamus against legislature; 31 A. S. R. 294, on mandamus against legislative acts; 27 A. D. 75, on mandamus to compel levy of tax; 45 A. D. 359, on mandamus as remedy to try title to office; 52 A. D. 303, on mandamus as proper remedy to reinstate into office; 67 A. D. 553, on mandamus as proper remedy to compel official action.

Cited in note in 89 A. D. 732, on mandamus to compel performance of ministerial duties.

Right of legislature to delegate powers to municipalities.

Cited in *Hunsicker v. Briscoe*, 12 La. Ann. 169, holding legislature might delegate to police juries authority to pass ordinances as they might deem necessary, relative to roads and levees.

Cited in notes in 11 L.R.A. 582, on redelegation of delegated authority; 34 A. D. 632, on power of legislature to delegate authority to municipality to pass ordinance or by-laws; 1 L.R.A. 169, on power and authority of municipal corporations.

Liability of officer for execution of void process.

Cited in *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336, holding sheriff liable in damages for arresting one under writ void for want of jurisdiction; *Lafon v. Dufroeq*, 9 La. Ann. 350, holding same of constable; *State use of Hannibal & St. J. R. Co. v. Shacklett*, 37 Mo. 280, holding sureties on sheriff's bond liable for act of the sheriff in making a levy for the collection of taxes illegally assessed.

Cited in note in 21 A. D. 192, on requisites of process which will protect officer.

18 AM. DEC. 241, COLE v. HIS EXECUTORS, 7 MART. N. S. 41.

Right to question jurisdiction of court.

Cited in *Watts v. Frazer*, 5 La. 383, holding tutrix could not question jurisdiction of a probate judgment on a claim admitted in her account.

Community of husband and wife in property.

Cited in *Wheat v. Owens*, 15 Tex. 241, 65 A. D. 164; *Lizardi's Succession*, 7 Rob. (La.) 167,—as to when husband and wife have community interest in property.

— As dependent on matrimonial domicile.

Cited in *Wolfe v. Gilmer*, 7 La. Ann. 583, holding property acquired by husband in the state before his removal there did not belong to the community of acquits; *Dixon v. Dixon*, 4 La. 188, 23 A. D. 478, holding estate acquired after marriage subject to wife's interest although she had never resided in state; *Routh v. Routh*, 57 Tex. 589, holding a wife separated from husband through fault of her own acquired community rights in property afterwards acquired by husband in another state.

Conflict of laws as to property rights.

Cited in reference note in 43 A. D. 239, on what law governs administration of property of decedent.

— Of married woman.

Cited in reference note in 41 A. D. 348, on law governing rights of married persons on change of domicile after marriage.

Cited in notes in 57 L.R.A. 358, on conflict of laws as to matrimonial property when *lex domicilii* is opposed to *lex rei sitæ* or *lex fori*; 57 L.R.A. 367, on conflict of laws as to marriage property acquired after change of domicile; 96 A. D. 413, on homestead rights of nonresident widow; 85 A. S. R. 565, on conflict of laws as to community property; 34 A. S. R. 875, on estoppel of one spouse to claim share of community property.

Distinguished in *Newcomer v. Orem*, 2 Md. 297, 56 A. D. 717, holding law of matrimonial domicile governs as to rights in personal property.

Domicil of wife.

Cited in *Christie's Succession*, 20 La. Ann. 383, 96 A. D. 411, holding the domicil of the husband controlled that of wife.

Recognition given to laws of another state.

Cited in *Berthelot v. Fitch*, 44 La. Ann. 503, 10 So. 867, holding that immovable property in another state must be administered according to the laws of that state; *Williams v. Pope Mfg. Co.* 52 La. Ann. 1,417, 78 A. S. R. 390, 50 L.R.A. 816, 27 So. 851, holding that a married woman might maintain in her own name an action for trespass on her person committed in this state, she having a right to sue in her own name in the state of which she was a resident.

18 AM. DEC. 246, THOMPSON v. CHAUVEAU, 7 MART. N. S. 331.**Levy on real estate.**

Cited in reference note in 22 A. D. 727, on authority to levy on real estate under *feri facias*.

Intervention.

Cited in reference notes in 60 A. D. 200, on intervention; 70 A. S. R. 41, on rights of interveners.

18 AM. DEC. 248, WALKER v. DUNBAR, 7 MART. N. S. 586.**Rights of intervener to retard cause.**

Cited in *Mussina v. Goldthwaite*, 34 Tex. 125, 7 A. R. 281, on rights of intervener on trial of case in which interested.

Cited in reference notes in 60 A. D. 200, on intervention; 123 A. S. R. 295, on time within which application to intervene may be made.

Cited in note in 16 A. D. 179, on right of intervener to delay suit.

18 AM. DEC. 250, RINGGOLD v. RINGGOLD, 1 HARR. & G. 11.**Limitations on trustee's right to dispose of property.**

Cited in *Chapman v. Hughes*, 134 Cal. 641, holding authority to sell real estate did not give authority to exchange it; *Carr's Petition*, 16 R. I. 645, 27 A. S. R. 773, 19 Atl. 145, holding testamentary power of sale did not give power to make partition.

Cited in reference note in 93 A. D. 376, on authority of trustee to exchange the trust property.

Cited in note in 19 A. S. R. 273, on sales and conveyances by trustee.

Distinguished in *Valentine v. Wysor*, 123 Ind. 47, 7 L.R.A. 788, 23 N. E. 1076, holding power to sell real estate as necessary to settle estate supported conveyance to the surviving partner on consideration that he settle partnership debts.

Right of trustee to purchase trust property.

Cited in *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 A. D. 525, holding sale of trust property made indirectly for the benefit of trustee might be set aside.

Cited in reference notes in 30 A. D. 530, on trustee's right to purchase at his own sale; 25 A. D. 399, on invalidity of purchase by trustee at his own sale.

Liability of trustee on breach of trust.

Cited in *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560; *Gray v. Lynch*, 8 Gill, 403 (dissenting opinion),—on liability of trustee on breach of trust.

Cited in reference note in 52 A. D. 194, on liability of trustees who violate their trust.

Cited in note in 75 A. D. 450, on personal liability of guardians.

Liability for acts of cotrustees.

Cited in *Deaderick v. Cantrell*, 10 Yerg. 263, 31 A. D. 576, holding trustee liable for acts of cotrustee wasting funds received by them on the sale of trust property.

Cited in reference notes in 12 A. S. R. 772, on liability for acts of cotrustees; 31 A. D. 581, on liability of trustee failing to exercise proper degree of watchfulness over cotrustee's conduct.

Cited in note in 42 A. D. 289, on liability of trustees, executors, etc., for acts and defaults of cotrustees, coexecutors, etc.

Amount chargeable to trustee for loss of trust property.

Cited in *Ricketts v. Montgomery*, 15 Md. 46, holding on a sale of property where it was impossible to have a return of it, the trustee was liable for the full value at time of disposal; *Powell v. Jeffries*, 5 Ill. 387, holding party holding property for another accountable for the value of the property; *Prondzinaki v. Garbutt*, 10 N. D. 300, 86 N. W. 969, holding trustee liable for the full value of trust property, with interest; *Welbourn v. Kleinle*, 92 Md. 114, 48 Atl. 81, holding that a surviving partner purchasing the firm's assets was accountable for real value at time of purchase; *Dennis v. Dennis*, 15 Md. 73, on trustee's liability for funds received by him.

Power to relieve trustee from loss.

Cited in *Seeger v. Hunting*, 78 Md. 54, 26 Atl. 960, holding that where trustees unintentionally committed devastavit, equity had power to relieve them.

Interest chargeable to trustee.

Cited in *Glen v. Cockey*, 16 Md. 446, holding interest chargeable against trustee holding funds for a considerable time that should have been applied in settlement of debts; *Smith v. Darby*, 39 Md. 268, holding trustee chargeable with only simple interest where he failed to invest trust funds but did not use them himself; *Mades v. Miller*, 2 App. D. C. 455, holding executors chargeable with interest on a fund held over five years without investing it.

Cited in reference note in 45 A. D. 644, on liability for interest of trustee who mingles trust funds with his own.

Cited in notes in 99 A. D. 299, as to when executor or administrator should be charged with interest; 2 E. R. C. 175, on liability of personal representative for interest where balance is kept uninvested.

—Compound interest.

Cited in *Fall v. Simmons*, 6 Ga. 265, holding administrator who was grossly negligent in making returns on condition of estate liable for compound interest on balance on hand; *Diffenderfer v. Winder*, 3 Gill & J. 311 (reversing 2 Bland. Ch. [Md.] 166); *Hurd v. Goodrich*, 59 Ill. 450,—holding trustee chargeable with compound interest where he sold real estate and refused to account for proceeds; *Crowder v. Shackelford*, 35 Miss. 321, holding trustee liable to *cestui que trust* for profits of trust funds in his hands or compound interest in lieu thereof; *Hooper v. Hooper*, 81 Md. 155, 48 A. S. R. 496, 31 Atl. 508; *Cruce v. Cruce*, 81 Mo. 676; *Re Harland*, 5 Rawle, 323; *Lukens's Appeal*, 7 Watts & S. 48,—on when trustee chargeable with compound interest; *Hall's Case*, 2 Bland. Ch. 203, 17 A. D. 275, on propriety of charging compound interest on debts paid by third persons.

Cited in notes in 29 L.R.A. 624, on principle of allowance of compound interest against trustees, executors, etc.; 29 L.R.A. 640, 642, on allowance of compound interest against executors, trustees, etc., for nonperformance of trusts for accumulation; 29 L.R.A. 651, as to when allowance of compound interest against executors, trustees, etc., should commence.

Answer in equity as evidence.

Cited in *Schwarz v. Wendell*, Walk. Ch. (Mich.) 267; *Robinson v. Cathcart*, 3 Cranch, C. C. 377, Fed. Cas. No. 11,947 (affirming 2 Cranch, C. C. 590, Fed. Cas. No. 11,946),—holding answer must be responsive to allegations of bill to be admissible as evidence; *Davis v. Crockett*, 88 Md. 249, 41 Atl. 66, holding responsive answer under oath to the interrogatories propounded by the bill or as evidence for defendant; *Eaton's Appeal*, 66 Pa. 483, holding answer to be responsive must respond directly to allegations of bill to be admissible; *Devries v. Buchanan*, 10 Md. 210; *Dunham v. Gates*, Hoffm. Ch. 185; *Glenn v. Randall*, 2 Md. Ch. 220,—on when answer may be relied on as evidence.

—As to new matter.

Cited in *Parkes v. Gorton*, 3 R. I. 27, holding answer not admissible where the facts averred were distinct from those alleged in the bill even though part of the same transaction; *Hutchins v. Hope*, 12 Gill & J. 244, holding an agreement set up in an answer as a defense by way of avoidance not good without proof.

Right of trustees to compensation for services.

Cited in *Schwarz v. Wendell*, Walk. Ch. (Mich.) 267; *Shirley v. Shattuck*, 28 Miss. 13; *Boyd v. Hawkins*, 17 N. C. (2 Dev. Eq.) 329,—holding trustee entitled to a reasonable compensation for his services; *Bentley v. Shrieve*, 2 Md. Ch. 215, holding reasonable commission allowable to estate of deceased trustee, who died before completion of trust; *Abell v. Brady*, 79 Md. 94, 28 Atl. 817, holding commission of 5 per cent on the income paid over, reasonable where the estate was large and required the expenditure of considerable time and labor; *Hatton v. Weems*, 12 Gill & J. 83, allowing commissions on products of real estate and income of personal estate of *cestui que trust*; *Wagstaff v. Lowerre*, 23 Barb. 209, 3 Abb. Pr. 411, holding trustee entitled to commissions upon the real and personal estate held in trust; *Whyte v. Dimmock*, 55 Md. 452, on allowance of compensation to trustee.

Cited in note in 17 A. D. 269, on compensation of trustees.

Admissibility of evidence in construction of instrument.

Cited in *Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821, holding that evidence that a lessee had for a time paid rent in advance not admissible to show the true construction of the lease as to when rent was payable.

Pleading in bill in equity.

Cited in *Riverside Brick Co. v. Wheatley*, 92 Md. 410, 48 Atl. 715, holding that the decree must be in conformity with the bill; *Kunkel v. Markell*, 26 Md. 390, on the necessity of averment in a bill being stated with necessary clearness.

Cited in reference note in 31 A. S. R. 169, on restricting relief in equity to issue in pleadings.

Avoidance of release of interest in property.

Cited in *Leach v. Leach*, 65 Wis. 284, 26 N. W. 754, holding overreaching release by widow of her interest in husband's estate to his executors for a sum vastly inferior to its true value might be avoided by her.

Practical construction of instruments.

Cited in *Stockham v. Stockham*, 32 Md. 196; *Barnum v. Thurston*, 17 Md. 470,—holding instrument is to be construed not by what the parties did under it but from the nature of the transaction and probable results; *Hutchins v. Dixon*, 11 Md. 29, holding that deeds must interpret themselves without reference to the acts of the parties.

Liability for confusion of goods.

Cited in *Hesseltine v. Stockwell*, 30 Me. 237, 50 A. D. 627, holding forfeiture not proper where goods intermingled were of equal value.

Cited in notes in 54 A. D. 594, on effect of innocent or mistaken confusion of goods; 49 A. D. 735, on duties and liability of pledgees.

Costs on appeal.

Cited in reference note in 52 A. D. 291, on necessity of paying costs on appeal where decision is modified.

18 AM. DEC. 271, McCULLOH v. DASHIELL, 1 HARR. & G. 96.**Distribution of partnership and separate property between partnership and separate creditors.**

Cited in *Murrill v. Neill*, 8 How. 414, 12 L. ed. 1,135; *Black's Appeal*, 44 Pa. 503, 20 Phila. Leg. Int. 340,—holding on the distribution of partnership and separate property among partnership and separate creditors each class has priority upon its respective estate and must first resort to it for payment; *Poole v. Seney*, 66 Iowa, 502, 24 N. W. 27, on application of partnership assets to satisfaction of partnership debts; *Maennel v. Murdock*, 13 Md. 163; *Pott v. Schmucker*, 84 Md. 535, 57 A. S. R. 415, 35 L.R.A. 392, 36 Atl. 592; *Morris v. Morris*, 4 Gratt. 293; *Thayer v. Humphreys*, 91 Wis. 276, 51 A. S. R. 887, 30 L.R.A. 549, 64 N. W. 1007 (dissenting opinion); *Glenn v. Gill*, 2 Md. 1,—on distribution of joint and separate property.

Cited in reference notes in 25 A. D. 745, on liability of partnership property; 20 A. D. 266, on extent of liability of partner's separate estate for partnership debts; 77 A. D. 116, on rights of creditor of partnership against estate of deceased partner; 33 A. D. 617, as to when partnership assets will be applied to debt of individual partner; 67 A. S. R. 177, on rights of partnership creditors against separate property of individual partners; 67 A. S. R. 647, on effect of execution sale of partner's property under writ against firm; 54 A. D. 203, on equity regarding partnership debts as joint and several.

Cited in notes in 43 A. S. R. 365, on rights and remedies of partnership creditors; 43 A. S. R. 366, on proceedings at law against separate property of partner.

—Preference of individual creditors in separate estate.

Cited in *Arnold v. Hamer*, Freem. Ch. (Miss.) 509; *North River Bank v. Stewart* (*Stewart's Case*), 4 Bradf. 254, 4 Abb. Pr. 403; *Wilder v. Keeler*, 3 Paige, 167, 23 A. D. 781; *Rodgers v. Meranda*, 7 Ohio St. 179; *Smith v. Malory*, 24 Ala. 628,—holding partnership creditors not entitled to share *pari passu* with separate creditors in estate of deceased partner; *Van Wagner v. Chapman*, 29 Ala. 172, holding partnership creditors postponed to individual creditors in estate of deceased partner even though surviving partner insolvent; *Pohlman v. Graves*, 26 Ill. 405, holding on assignment of firm assets for benefit of creditors, firm creditors not entitled to pursue separate estate of partners; *Re Wilcox*, 94 Fed. 84, holding creditors of firm not entitled to be satisfied out

of individual insolvent partner's assets until after satisfaction of separate creditors, even though there are no partnership assets; *George v. Morrison*, 93 Md. 132, 48 Atl. 744, holding partnership of which insolvent debtor was member not entitled to payment of its claim out of his individual estate until after payment of individual creditors; *Very v. Clarke*, 177 Mass. 52, 83 A. S. R. 260, 58 N. E. 151, holding the insolvency of a firm did not entitle the creditors of an insolvent corporation to set off as against a claim by assignee of member of insolvent firm a claim against firm; *Re Johnson*, 2 Low. Dec. 129, Fed. Cas. No. 7,369, on right of joint creditors to share with separate creditors where no joint estate exists; *Ladd v. Griswold*, 9 Ill. 25, 46 A. D. 443, holding joint and separate creditors might pursue separate estate equally when no joint estate and no solvent partner.

Cited in reference note in 33 A. D. 762, as to when partner's separate property is liable for partnership debts.

Cited in note in 43 A. S. R. 368, on rights of partnership creditors to separate property of partner in equitable proceedings.

—Preference of firm creditors in firm estate.

Cited with special approval in *Dahlgren v. Duncan*, 7 Smedes & M. 280, opinion of lower court on first applying separate estate of partner to separate creditors, and joint estate to joint creditors.

Cited in *Egberts v. Wood*, 3 Paige, 517, 34 A. D. 236; *Bartlett v. Meyer-Schmidt Grocer Co.* 65 Ark. 290, 45 S. W. 1,065,—holding equity of firm creditors to be paid out of firm assets in preference to individual creditors not extinguished by assignment preferring creditors of latter class; *Tallicott v. Dudley*, 5 Ill. 427, holding partnership creditors entitled to preference over individual creditor of bankrupt, in assets of bankrupt firm.

Cited in note in 23 A. S. R. 868, on priorities between partnership creditors and individual creditors.

—Lien of individual judgment as junior to firm debt.

Cited in *Meech v. Allen*, 17 N. Y. 300, 72 A. D. 465; *Louden v. Ball*, 93 Ind. 232,—holding lien of judgment against a firm upon lands of individual member not displaced by lien of subsequent judgment against partner on individual debt so as to give priority to latter judgment; *Bowen v. Billings*, 13 Neb. 439, 14 N. W. 152, holding judgment against individual partner not a lien in equity as against firm creditors on land of firm held in partner's name.

Right of joint creditors at law to pursue separate estate and vice versa.

Cited in *Allen v. Wells*, 22 Pick. 450, 33 A. D. 757; *Cleghorn v. Insurance Bank*, 9 Ga. 319,—holding joint creditors while having recourse at law not postponed from sharing in separate estate as against separate creditors; *Evans v. Virgin*, 69 Wis. 153, 33 N. W. 569, holding separate property of insolvent partner liable to be seized by firm creditors under judgment against firm in action at law; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 49 A. D. 160, holding copartnership creditors might, upon a judgment against all members of a firm for a partnership debt, levy upon individual property of any; *Phillips v. Cook*, 24 Wend. 389, holding on execution against one of two partners sheriff might seize partnership assets to satisfy debt; *Niagara County Nat. Bank v. Lord*, 33 Hun, 557, on right at law of joint creditors to pursue separate estate; *Berry v. Harris*, 22 Md. 30, 85 A. D. 639, holding a separate creditor might at law attach partnership assets for the separate debt of individual partner; *Carlisle v. McAlester*, 3 Ind. Terr. 164, 53 S. W. 531, holding under an attachment

against one partner an officer could not take possession of partnership property to exclusion of possession of other partners.

Priority as between liens of creditors of firm and of members.

Cited in *Smith v. Smith Bros.* 87 Iowa, 93, 43 A. S. R. 359, 54 N. W. 73, holding bona fide prior mortgage by insolvent firm to secure pre-existing indebtedness contracted by the several partners before organization of firm superior to attachments of existing creditors of firm; *Barrett v. Furnish*, 21 Or. 17, 26 Pac. 861; *Fullam v. Abrahams*, 29 Kan. 725,—holding garnishment of debtor of insolvent member of insolvent firm by firm creditor good as against subsequent garnishment by individual creditor; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278, holding partnership creditors entitled to satisfaction out of partnership assets before individual creditors who had secured a prior attachment on the assets; *Re Sandusky*, 17 Nat. Bankr. Reg. 452, Fed. Cas. No. 12,308, holding lien obtained against individual partner's separate property upon judgment against firm before bankruptcy would not yield to equities of separate creditors of partner.

Administration of estates of insolvents.

Cited in *Fox v. Merfeld*, 81 Md. 80, 31 Atl. 583; *Carter v. Dennison*, 7 Gill, 157,—holding assets of insolvent's estate are administered according to equitable principles.

Equities of copartner in assets of insolvent partner.

Cited in *Payne v. Matthews*, 6 Paige, 19, 29 A. D. 738, holding solvent surviving partner paying debts of insolvent firms entitled to share *pro rata* in assets of deceased insolvent partner with his separate creditors; *Re McLean*, 15 Nat. Bankr. Reg. 333, Fed. Cas. No. 8,879, holding separate estate of insolvent partner not subject to claim of bankrupt copartner until after satisfaction of separate creditors.

Marshaling assets.

Cited in *Jackson v. Sloan*, 76 N. C. 306, holding a judgment creditor having a lien on land must ordinarily resort for satisfaction to the part remaining in hands of debtor before resorting to part sold.

18 AM. DEC. 283, BETTS v. UNION BANK, 1 HARR. & G. 175.

Parol evidence to vary terms of written instrument.

Cited in *Crowl v. Crowl*, 17 Md. 361; *Sewell v. Baxter*, 2 Md. Ch. 447,—holding parol inadmissible to vary terms of deed; *Rapelye v. Anderson*, 4 Hill, 472, on admissibility of parol evidence.

Disapproved in *McGehee v. Rump*, 37 Ala. 651, holding parol evidence admissible to show that instrument purporting to be bill of sale was contract of exchange.

—To show consideration for instrument.

Cited in *Mead v. Steger*, 5 Port. (Ala.) 498, holding it not admissible to show consideration different from that expressed in note; *Galbreath v. Cook*, 30 Ark. 417, holding same as to deed attacked by creditors for fraud; *Smith v. Davis*, 49 Md. 470, holding parol evidence admissible on part of party charged with fraud to show consideration was as recited; *Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453 (dissenting opinion), on admissibility of evidence to show consideration for deed impeached for fraud; *Re Young*, 3 Md. Ch. 461; *Elysville Mfg. Co. v. Okisko Co.* 1 Md. Ch. 392,—holding evidence of a different consideration inadmissible where the one recited in the deed was disproved; *Chris-*

topher v. Christopher, 64 Md. 583, 3 Atl. 296, holding evidence to show that consideration for deed was gift inadmissible where a money consideration was expressed in deed; Benscotter v. Green, 60 Md. 327, holding admissible to explain consideration in deed; Duveneck v. Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541, holding parol evidence admissible to show consideration expressed was actually paid.

Cited in reference notes in 20 A. D. 153; 26 A. D. 126,—on parol evidence as to consideration; 53 A. D. 269, on parol evidence to show real consideration of deed.

Cited in notes in 30 A. D. 116, on parol evidence as to consideration clause of deed; 20 L.R.A. 110, on parol evidence as to consideration for deed in action by creditor to set it aside; 14 E. R. C. 752, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed; 23 A. D. 526, on parol evidence to show want of consideration; 21 A. D. 674, on conclusiveness of consideration stated in deed.

Distinguished in Mayfield v. Kilgour, 31 Md. 240; Chapman v. Alcock, 10 Gill & J. 226,—holding evidence admissible to show that consideration expressed in a note attacked as fraudulent was true consideration; Glenn v. Randall, 2 Md. Ch. 220, holding evidence was admissible to show consideration expressed in a deed impeached for fraud was paid to grantor's creditors with his knowledge and consent.

Disapproved in Tolman v. Ward, 86 Me. 303, 41 A. S. R. 556, 29 Atl. 1,081, holding marriage might be given in evidence as the consideration for a deed expressed to be for a money consideration; Columbia Nat. Bank v. Baldwin, 64 Neb. 732, 90 N. W. 890, holding the grantee in a deed attacked by third parties as fraudulent might show a consideration different from that recited in the deed.

When antenuptial settlement fraudulent as to creditors.

Cited in Wilson v. Prewett, 3 Woods, 631, Fed. Cas. No. 17,828, holding antenuptial settlement not void as fraud on creditors unless both parties thereto concur in or have notice of the fraud.

Cited in notes in 1 L.R.A. 518, on antenuptial agreements; 90 A. S. R. 509, on validity of antenuptial settlement as against husband's creditors.

Admissibility of evidence to repel charge of fraud.

Cited in Anderson v. Tydings, 3 Md. Ch. 167, holding as to deed attacked for fraud, collateral evidence was admissible to rebut fraud.

Delivery of deed.

Cited in reference notes in 47 A. D. 540, on delivery of deed in Maryland; 21 A. D. 361, on what is a delivery of deed; 30 A. D. 89; 44 A. D. 707,—on necessity and sufficiency of delivery of deed.

Cited in note in 53 A. S. R. 538, on delivery of deed.

18 AM. DEC. 288, JOLLY v. BALTIMORE EQUITABLE SOC. 1 HARR. & G. 295.

Construction of insurance policy.

Cited in note in 14 E. R. C. 20, on rules of construction of contracts of insurance.

Implied right of insured to repair premises.

Cited in Townsend v. Northwestern Ins. Co. 18 N. Y. 168, holding the risk incident to the making of necessary repairs is assumed by insurers in the absence

of any stipulation to the contrary; *Wall v. East River Mut. Ins. Co.* 7 N. Y. 370, on right of insured to repair premises in absence of stipulation.

Avoidance of insurance by repairing premises.

Cited in *Allen v. Mutual F. Ins. Co.* 2 Md. 111, holding that alterations and improvements must create material increase of risk to defeat policy; *Garrebrant v. Continental Ins. Co.* (N. J.) 12 L.R.A.(N.S.) 443, 67 Atl. 90, holding use of gasoline torch in removing old paint where the work had continued for less than time allowed for repairs, did not avoid policy.

Cited in reference notes in 55 A. D. 369, on alteration of insured premises; 41 A. D. 497, on alterations or repairs in insured property as affecting risk.

Cited in note in 66 A. S. R. 699, on increase of hazard avoiding policy, by addition to or alteration of premises.

Avoidance of insurance by change of condition of property.

Cited in *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. 47, holding removal of insured goods to basement from first floor was not such a material increase of risk as to avoid policy.

Cited in notes in 66 A. S. R. 692, on what constitutes an increase of hazard avoiding fire insurance policy; 66 A. S. R. 697, on increase of hazard avoiding policy, as question for jury.

Risk and conditions assumed by failure of insurer to inquire.

Cited in *Dooly v. Hanover F. Ins. Co.* 16 Wash. 155, 58 A. S. R. 26, 47 Pac. 507, holding on oral application where no questions were asked about title, a condition in policy that insured be owner in fee was waived; *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1,061, on assumption of knowledge of conditions of risk by failure to inquire of insured; *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, holding failure to disclose insurance in mutual companies not a misrepresentation.

18 AM. DEC. 295, LAMMOTT v. GIST, 2 HARR. & G. 433.

Statute of frauds.

Cited in reference note in 41 A. D. 489, on construction of provision of statute of frauds requiring contracts not to be performed within the year to be in writing.

Cited in notes in 32 A. D. 155, on application of statute of frauds to surrender of lands; 93 A. D. 90, on what contracts are within statute of frauds because not to be performed within one year.

— Parol agreement between landlord and tenant.

Distinguished in *Lamar v. McNamee*, 10 Gill & J. 116, 32 A. D. 152, holding parol agreement whereby tenant gave up the unexpired term, being executed by tenant was enforceable.

18 AM. DEC. 297, CAUSTEN v. BURKE, 2 HARR. & G. 295.

Right to sue codebtor.

Cited in *Hamilton v. Conine*, 28 Md. 635, 92 A. D. 724, holding one tenant could not maintain action against cotenant for personal services rendered by him in making sale of common property; *Bailey & Storm v. Bancker*, 3 Hill, 188, 38 A. D. 625, holding a stockholder could not maintain an action against the others to recover for a debt due from the whole.

Cited in reference notes in 35 A. D. 136, on right to sue partner at law; 26 A. D. 413, on right to sue copartner for services rendered partnership; 25 A. D. 263, on *quantum meruit* under special contract.

Distinguished in Grigsby v. Nance, 3 Ala. 347, holding one partner might sue another on a note given by latter as contribution to capital of firm.

18 AM. DEC. 302, WATERS v. RILEY, 2 HARR. & G. 305.

Right to revive in equity remedy lost at law.

Cited in Pickersgill v. Lahens, 15 Wall. 140, 21 L. ed. 119, holding estate of surety being discharged by his death cannot be charged in equity; United States v. Archer, 1 Wall. Jr. 173, Fed. Cas. No. 14,464, holding same of obligation of surety discharged at law, in absence of fraud and accident; United States v. Price, 9 How. 83, 13 L. ed. 56, on surety's legal obligation not being extended by equity.

Cited in reference note in 32 A. D. 695, on refusal of equity to interfere where remedy at law is adequate.

Contribution between sureties.

Cited in reference notes in 26 A. D. 266; 27 A. D. 612; 32 A. D. 96,—on contribution between sureties; 40 A. D. 431, on right to contribution among cosureties.

Cited in note in 9 L.R.A. 411, on contribution between cosureties.

— Discharge of surety's estate by his death.

Cited in Helmer v. St. John, 8 Hun, 166, holding representative of deceased joint obligor not liable to contribution to surviving obligor; Kennedy v. Carpenter, 2 Whart. 344, holding representative of deceased one of two joint indorsers of subsequently dishonored note, not liable to holder.

Cited in reference notes in 56 A. D. 107, on suit against executors of deceased cosurety for contribution; 22 A. D. 220, on effect of surety's death on obligation of survivor; 77 A. D. 388, on liability of surety's personal representatives to cosurety for contribution.

Cited in notes in 10 A. S. R. 644, on right of surety to contribution from estate of deceased cosurety; 68 A. D. 764, on death of one cosurety as affecting his liability to contribution.

Distinguished in Keller's Estate, 1 Leg. Chron. 190, holding by statute estate of surety not discharged from debt in which he had no pecuniary interest.

Disapproved in Johnson v. Harvey, 84 N. Y. 363, 38 A. R. 515, holding death of cosurety does not relieve his estate from liability to contribute.

Surety's obligation on a bond.

Cited in State use of Howard County v. Hill, 88 Md. 111, 41 Atl. 61, holding obligation of surety on official bond strictly construed; United States v. Price, 9 How. 83, 13 L. ed. 56 (dissenting opinion); Olmsted v. Olmsted, 38 Conn. 309 (dissenting opinion),—on sureties' liability.

Obligation of bond variant from statutory form.

Cited in Sheppard v. Collins, 12 Iowa, 570, holding a bond not authorized by statute not invalid when it does not contravene public policy or the statute.

18 AM. DEC. 309, BERRY v. GRIFFITH, 2 HARR. & G. 337.

When sheriff may amend returns.

Cited in Jarboe v. Hall, 37 Md. 345, holding application to amend sheriff's return to fieri facias at next term subsequent to motion to set it aside not made

too late; *Main v. Lynch*, 54 Md. 658, holding return in attachment might be amended at any time during the trial and before the jury retired; *Tiffany v. Glover*, 3 G. Greene, 387 (dissenting opinion), on sheriff's right to amend return.

Cited in reference notes in 24 A. D. 39; 26 A. D. 689; 29 A. D. 499; 41 A. D. 363,—on amendments to returns of writs.

Cited in note in 13 A. D. 174, on right to amend returns to writs.

Duty of sheriff to amend return.

Disapproved in *Flynn v. Kalamazoo Circuit Judge*, 138 Mich. 126, 101 N. W. 222, 4 A. & E. Ann. Cas. 1140, denying right of court to compel sheriff to amend his return.

Necessity and sufficiency of levy to support sale.

Cited in *Waters v. Duvall*, 11 Gill & J. 37, 33 A. D. 693, holding that sheriff might not sell property on which he had not made a valid levy.

Cited in reference note in 20 A. D. 241, on sheriff's power to sell property not levied on.

Cited in notes in 33 A. D. 697, on necessity of levy to sustain sale; 21 L.R.A. 42, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy.

Sufficiency of sheriff's return.

Cited in *Duvall v. Waters*, 1 Bland, Ch. 569, 18 A. D. 350, holding on sale of lands under a fieri facias sheriff should in his return sufficiently describe the lands sold; *Textor v. Shipley*, 86 Md. 424, 38 Atl. 932, holding description in a levy on property sufficient if by it the property may be readily located.

Cited in reference notes in 37 A. D. 561, on sufficiency of sheriff's return of execution; 40 A. D. 656, on sufficiency of description in return of execution; 27 A. D. 524, on certainty of description in sheriff's levy, return, or deed.

Validity of sale of parcels in mass.

Cited in *Nesbitt v. Dallam*, 7 Gill & J. 494, 28 A. D. 236, holding sale in mass of several lots which were separate and distinct, prima facie void; *Dyer v. Boswell*, 39 Md. 465, holding sale of land for taxes void where no attempt was made to sell a portion capable of being sold separately and of sufficient value to pay the taxes; *Thomas v. Fewster*, 95 Md. 446, 52 Atl. 750, holding mortgage sale of land would be set aside where a very much larger sum would have been realized if the tract had been divided into lots.

Cited in reference note in 52 A. D. 645, on invalidity of sale of more than enough land to satisfy judgment.

Identity of property sold by sheriff.

Cited in *Wright v. Orrell*, 19 Md. 151, holding that a purchaser of property at a sheriff's sale might deduce his title from any part of the official proceedings of the sheriff identifying the land.

18 AM. DEC. 313, WOLF v. WOLF, 2 HARR. & G. 382.

Privilege against incriminating questions.

Cited in *Dennison v. Yost*, 61 Ind. 139, holding defendant not compelled to answer charges in a bill that would render him liable to criminal prosecution.

Cited in reference note in 75 A. D. 229, on duty of defendant in equity as to making discovery in answer to bill, which would subject him to criminal prosecution.

When a bill of discovery will lie.

Cited in *Heinz v. Twenty-Sixth German-American Bldg. Asso.* 95 Md. 160, 51 Atl. 951; *Parrott v. Chestertown Nat. Bank*, 88 Md. 515, 41 Atl. 1067,—holding bill of discovery lies to obtain information proper for the defense of a suit about to be brought against complainant; *Atlantic Ins. Co. v. Lunar*, 1 Sandf. Ch. 91, holding defendant at law might file a bill of discovery for the purpose of rebutting evidence necessary to plaintiff's action; *Frawley v. Cosgrove*, 83 Wis. 441, 53 N. W. 689, on when bill of discovery would lie.

Cited in reference notes in 22 A. D. 292, as to when discovery may be had; 32 A. D. 172, as to when party is entitled to discovery; 45 A. D. 307, on right to discovery in equity to aid action or defense at law.

Right to appeal from order overruling a demurrer.

Cited in *Chappell v. Funk*, 57 Md. 465, holding that an appeal would lie from an order overruling a demurrer; *Darcey v. Bayne*, 105 Md. 365, 10 L.R.A.(N.S.) 863, 66 Atl. 434, holding same as to demurrer to bill in equity.

18 AM. DEC. 316, HOYE v. PENN, 2 HARR. & G. 473.**Full liability of joint debtor.**

See *Binford v. Alston*, 15 N. C. (4 Dev. L.) 351, holding that where *scire facias* to revive judgment issues against three, and two only are summoned because the third is out of state and insolvent, execution may issue against the two.

18 AM. DEC. 317, OSGOOD v. LEWIS, 2 HARR. & G. 495.**Curing defects.**

Cited in reference note in 39 A. D. 368, on curing defect in declaration.

Cited in notes in 59 A. D. 320; 23 L. ed. U. S. 491,—on what defects are cured by verdict.

Immateriality of scienter in express warranty.

Cited in *Adler v. Robert Portner Brewing Co.* 65 Md. 27, 2 Atl. 918; *House v. Fort*, 4 Blackf. 293,—holding in suit on breach of express warranty, averments of fraud and deceit immaterial; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283, holding it unnecessary to allege or prove a *scienter* in action for the breach of an express warranty; *Munroe v. Pritchett*, 16 Ala. 785, 50 A. D. 203, holding in action for damages for false representation in sale of land not necessary to prove vendor was aware of falsity of representation.

What constitutes express warranty.

Cited in *Potomac S. B. Co. v. Harlan & H. Co.* 66 Md. 2, 4 Atl. 903; *Hawkins v. Caldwell*, 10 Ill. 36,—holding affirmation of quality of thing sold by seller at time of sale for purpose of inducing sale, and relied on by buyer, constitutes an express warranty; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Edwards v. Marcy*, 2 Allen, 486,—on when express warranty presumed.

Cited in reference notes in 34 A. D. 110, on what affirmations amount to a warranty; 58 A. D. 152, on warranty constituted by express affirmation of fact; 73 A. D. 181, on necessity of particular form of words to constitute warranty; 11 A. S. R. 879, on sufficiency of words to constitute warranty in contract of sale.

Cited in note in 6 L.R.A. 374, on what constitutes an express warranty on sale of goods.

—Naming or describing thing as warranty of it.

Cited in *Richmond Trading & Mfg. Co. v. Farquar*, 8 Blackf. 89 holding it an express warranty when quality of wool was marked on sacks and described in invoice as of certain quality; *Vaughan v. Matlock*, 23 Ark. 9, holding same where leased premises for purpose of securing a fireproof warehouse, were described in lease as fireproof; *Gunther v. Atwell*, 19 Md. 157, holding designation of tobacco sold as of a particular kind not warranty of quality; *Henshaw v. Robins*, 9 Met. 83, 43 A. D. 367, holding goods described or designated in bill of sale by name well understood are warranted to be what they are described to be; *Gould v. Stein*, 149 Mass. 570, 14 A. S. R. 455, 5 L.R.A. 213, 22 N. E. 47, holding sale of "Ceara scrap rubber, as per samples—of second quality" imported warranty of conformity to sample and of quality; *Ellis v. Riddick*, 34 Tex. Civ. App. 256, 78 S. W. 719, holding same of agreement that cane sold would be "sound, sweet, and merchantable;" *Hobart v. Young*, 63 Vt. 363, 12 L.R.A. 693, 21 Atl. 612, holding same of description of horse in bill of sale as "sound and kind" when the vendor had during negotiations declared the horse sound.

Cited in reference notes in 23 A. D. 101; 43 A. D. 372,—on description in bill of parcels as warranty.

Implied warranty of goods.

Cited in reference notes in 33 A. D. 441; 16 A. S. R. 758,—on warranties on sales of personalty; 13 A. D. 425; 23 A. D. 101,—on implied warranty in sale of chattels; 52 A. D. 343, on warranty as essential to recovery for defect of article purchased; 90 A. D. 426, on fraud or warranty as determining applicability of rule of *caveat emptor*.

Cited in notes in 5 A. D. 424, on implied warranty on sale of chattel; 23 E. R. C. 492, on implied warranty on sale of food for immediate consumption; 43 A. D. 680, on implication of warranty from sound price paid for goods; 102 A. S. R. 613, on implied warranty of quality on sale of goods by sample.

—As to kind or quality.

Cited in *Rice v. Forsyth*, 41 Md. 389, denying warranty on sale of chattels as to quality when parties have equal opportunity for inspection; *Horner v. Parkhurst*, 71 Md. 110, 17 Atl. 1027, holding same in absence of fraud or express warranty; *Bunch v. Weil*, 72 Ark. 343, 65 L.R.A. 80, 80 S. W. 582, holding filling of order for flour of certain quality, implied warranty of the quality; *Wolcott v. Mount*, 36 N. J. L. 262, 13 A. R. 438, holding same of garden seeds sold as of a certain kind and quality; *Queen City Glass Co. v. Pittsburgh Clay Pot Co.* 97 Md. 429, 55 Atl. 447, implying warranty of goods sold by manufacturer as reasonably fit for use contemplated.

Cited in notes in 11 L.R.A. 681, on implied contract on sale of chattel as of a particular kind or description; 54 A. D. 145, on implied warranty of quality in sale of goods; 22 L.R.A. 188, on implied warranty of fitness of property bought for special purpose in case of executed or executory contract; 22 L.R.A. 195, on effect of inspection on implied warranty of fitness of property bought for special purpose.

Distinguished in *Hart v. Wright*, 17 Wend. 267, holding general sale of merchandise for a sound price did not raise an implied warranty as to fitness for all purposes to which ordinarily applied.

—As to title.

Cited in *Heskett v. Borden Min. Co.* 10 Md. 179, holding on sale of personalty

there was implied warranty of title; *Rockwell v. Young*, 60 Md. 563, on implied warranty of title.

Liability of seller for latent defects.

Cited in *Farren v. Dameron*, 99 Md. 323, 105 A. S. R. 297, 58 Atl. 367, holding in absence of express warranty seller who is not the manufacturer is not liable for latent defects developed after inspection and acceptance by buyer; *Cornelius v. Molloy*, 7 Pa. 293, holding sale of metal as copper the vendor knowing it to be a composition rendered him liable; *Snowden v. Warder*, 3 Rawle, 101, holding evidence admissible to show that by usage on the sale of cotton, vendor was to answer to vendee for latent defects, although there be no warranty or fraud.

Explained in *Hyatt v. Boyle*, 5 Gill & J. 110, 25 A. D. 276, holding seller not liable for defects in goods on implied warranty of quality where the vendee had an opportunity to inspect and there was no express warranty.

Existence of warranty as jury question.

Cited in *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 406; *Borrekins v. Bevan*, 3 Rawle, 23, 23 A. D. 85; *Congar v. Chamberlain*, 14 Wis. 258; *Horn v. Buck*, 48 Md. 358,—holding in oral contracts question is for jury whether there had been warranty; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283, on when jury may decide question of warranty.

Actionable false representations.

Cited in *Stone v. Denny*, 4 Met. 151, holding false representations made under belief that they were true, not grounds for action.

Waiver of breach of contract by suing in tort.

Cited in *Memphis v. Brown*, 1 Flipp. 188, Fed. Cas. No. 9,415, on waiver of breach of contract.

18 AM. DEC. 327, JONES v. JONES, 1 BLAND, CH. 443.

Lien of state on property of debtor.

Cited in *Hodges v. Mulliken*, 1 Bland, Ch. 503, holding lien of the state commences with institution of the suit and not from date of judgment; *Ridgely v. Iglehart*, 3 Bland, Ch. 540, on the lien which the state may have.

Cited in reference notes in 45 A. S. R. 937, on devolution of King's preference upon state; 26 A. D. 575, on preference of debts due state in settlement of decedents' estates.

Cited in notes in 29 L.R.A. 243, on what priority of states in payment from assets of debtor is based; 29 L.R.A. 248, as to when priority of state in payment from assets of debtor attaches and how it is divested.

Lien of judgment.

Cited in reference notes in 23 A. D. 778, on lien of judgments; 19 A. D. 748; 22 A. D. 279; 84 A. D. 510,—on lien of judgment on realty; 29 A. D. 754, on judgment lien after revival of judgment.

— When attaches.

Cited in *Anderson v. Tuck*, 33 Md. 225, holding judgment a lien on real estate only from date of entry in docket; *McMahan v. Green*, 12 Ala. 71, 46 A. D. 242, on when judgment lien attaches.

Cited in reference notes in 41 A. D. 625; 47 A. D. 717; 89 A. D. 195,—as to when judgment liens attach.

Cited in note in 38 L.R.A. 250, on priority of judgment over conveyance made after beginning of term.

When lien of execution commences.

Cited in reference notes in 27 A. D. 277; 65 A. D. 503,—as to time from which execution lien binds property; 27 A. D. 103, 528, as to time from which execution binds personalty; 25 A. D. 154, on time when execution bound defendant's goods; 86 A. D. 783, as to whether execution creditor has lien upon personal property before levy.

Cited in notes in 24 A. D. 454; 11 E. R. C. 628,—as to when lien of writ of execution attaches.

Effect of death of debtor on lien of judgment or execution.

Cited in *Barber v. Peay*, 31 Ark. 392, holding a lien acquired on particular property of a debtor may be enforced after his death by a revival of the judgment.

Cited in reference notes in 52 A. D. 378, on effect of death of defendant on judgment lien; 62 A. S. R. 198, on judgment lien after death of defendant; 48 A. D. 706, on issuance of execution after death of defendant; 22 A. D. 329; 38 A. D. 465,—on effect of death of defendant after issuance or levy of writ; 56 A. D. 436, on effect on sheriff's power to levy or sell of death of judgment debtor before or after execution issued; 68 A. D. 186, on effect at common law of defendant's death after teste and before issuance of *fieri facias*.

Cited in notes in 89 A. D. 242, on judgment lien after defendant's death; 61 L.R.A. 385, on effect of death of sole judgment debtor after levy but before sale.

Priority between executions.

Cited in reference notes in 22 A. D. 328, on lien of execution and its priority; 34 A. D. 116, on priority in case of several executions.

What subject to levy.

Cited in reference notes in 28 A. D. 268, on property subject to attachment or execution; 39 A. D. 184, on right to levy upon money; 49 A. D. 233, on liability of lands to execution at common law; 18 A. D. 370, on right to seize lands at common law and sell under execution.

— Money or other property in custody of law.

Cited in *Hill v. La Crosse & M. R. Co.* 14 Wis. 291, 80 A. D. 783; *Hardy v. Tilton*, 68 Me. 195, 28 A. R. 34,—holding sheriff might not levy on money in his hands, collected on execution, although the latter was against the party for whom the money had been collected; *Tuck v. Manning*, 150 Mass. 211, 5 L.R.A. 666, 22 N. E. 1001, holding creditor who had acquired neither an assignment of, nor a lien upon, a fund paid into court for their debtor in a suit to which they were not parties, cannot intervene and obtain the money; *Brown v. Wallace*, 2 Bland, Ch. 585, on right to seize money in custody of law.

Cited in reference notes in 42 A. D. 362, on right to attach money in sheriff's hands; 24 A. D. 634, on right to levy on property in custody of law.

Cited in notes in 23 A. D. 180, on right to levy upon money in custody of law; 55 A. D. 264, as to whether money in officer's hands is subject to attachment.

— Equitable interest.

Cited in *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 A. D. 236, holding that an equitable interest in land was subject to levy and sale on execution.

Right to compel officer to bring money into court.

Cited in *Briggs v. Planters' Bank*, *Freem. Ch. (Miss.)* 574, holding court could not require sheriff to bring surplus money into court when his process directed its payment into another court.

Cited in reference notes in 92 A. S. R. 688, on compelling sheriff to bring

money raised on execution into court; 25 A. D. 509, on directing sheriff to bring into court for distribution money made on execution from another court.

Cited in note in 57 A. D. 420, as to when court may compel sheriff to bring into court money raised on execution.

Propriety of fieri facias to enforce judgment.

Cited in *Gill v. State*, 39 W. Va. 479, 45 A. S. R. 928, 26 L.R.A. 655, 20 S. E. 568, holding writ of fieri facias upon a judgment for a fine would run against the real estate of party convicted.

Conversion of land into personalty.

Cited in *Cooksey v. Bryan*, 2 App. D. C. 557, holding an intent on part of wife to convert realty into personalty, when in that case it would become property of husband, would not be presumed; *Williams's Case*, 3 Bland, Ch. 186, on when land may be changed into personalty.

Devolution of choses in action on death of husband.

Cited in *Hammond v. Hammond*, 2 Bland, Ch. 306, holding choses in action not reduced to possession during life passed to wife; *Iglehart v. Armiger*, 1 Bland, Ch. 519, holding proceeds of an estate allotted to husband during life, but not reduced to possession on his death, passed to his wife.

Private rights in property as respects the public.

Cited in *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535, on nature of private property in lands as respects the public.

18 AM. DEC. 344, FORNSHILL v. MURRAY, 1 BLAND, CH. 479.

Nature of marriage contract.

Cited in reference notes in 58 A. D. 63, on marriage as a civil contract; 19 A. S. R. 409, on what constitutes marriage.

Validity of marriage.

Cited in reference notes in 16 A. S. R. 572, on necessity of consent to valid marriage; 34 A. D. 687, on invalidation of marriage by want of consent.

Cited in note in 79 A. S. R. 370, on validity of marriage without consent or obtained by force or duress.

Evidence of marriage.

Cited in reference notes in 22 A. D. 163, on cohabitation as evidence of marriage; 26 A. D. 484, on cohabitation as presumptive evidence of marriage relation; 22 A. D. 72, on cohabitation and reputation as evidence of marriage; 79 A. S. R. 812, on cohabitation and reputation as marriage and as proof of marriage.

Cited in note in 48 A. D. 116, on evidence of marriage in criminal cases.

Legislative divorces.

Cited in reference notes in 49 A. D. 474, on legislative divorces in Maryland; 56 A. D. 732, on power of legislature to grant divorces.

Grant of alimony.

Cited in reference notes in 20 A. D. 423, on alimony and maintenance; 28 A. D. 55, 442; 42 A. S. R. 398,—on authority to grant alimony.

Cited in notes in 60 A. D. 666, on allowance of alimony without divorce; 77 A. S. R. 231, on right to maintain separate suit for maintenance independent of suit for divorce.

Jurisdiction of chancery to determine validity of marriage.

Cited in *Stebbins v. Anthony*, 5 Colo. 348, on when chancery courts may en-

quire into validity of marriages; *Ridgely v. Ridgely*, 79 Md. 298, 25 L.R.A. 800, 29 Atl. 597, holding equity had jurisdiction to annul marriages procured by fraud or coercion; *Winder v. Diffenderffer*, 2 Bland, Ch. 166, on jurisdiction of chancery courts.

Cited in note in 25 L.R.A. 801, on jurisdiction of chancery to decree nullity or dissolution of marriage.

Mode of questioning voidable marriage.

Cited in note in 44 A. D. 54, on mode of questioning voidable marriages.

Ground for setting aside marriage.

Cited in *Le Brun v. Le Brun*, 55 Md. 496, holding existing marriage is to be set aside only upon the strictest proof of its invalidity; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, holding strict proof required of antecedent marriage when it invalidates subsequent formal marriage.

Right to annul bigamous marriage after death of one of parties.

Cited in *Rawson v. Rawson*, 156 Mass. 578, 31 N. E. 653, holding libel for annulment of bigamous marriage could not be maintained after the death of one of the parties.

Law governing validity of marriage.

Cited in *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 A. R. 505, upholding marriage valid where made though void under domestic laws and though the party had contracted the marriage in another state to avoid such laws.

Cited in reference notes in 36 A. D. 166, on what law determines validity of marriage; 34 A. D. 164, as to when foreign marriages are valid; 34 A. S. R. 258, on validity of foreign marriages; 53 A. D. 167, on *lex loci contractus* as determining validity of marriage contract.

Cited in notes in 5 E. R. C. 829, on universal validity of marriage valid where celebrated; 79 A. S. R. 364, on *lex loci contractus* of marriage; 57 L.R.A. 156, on conflict of laws as to preliminaries and manner or form of solemnization of marriage.

Issue of fact from equity.

Cited in *Chase v. Winans*, 59 Md. 475, holding issue of fact from equity will be tried by jury when the proof before court is conflicting and contradictory; *Kennedy v. Kennedy*, 2 Ala. 571, holding it unnecessary in a suit to set aside a deed that the court direct the issues of fact to a jury; *Goodyear v. Providence Rubber Co.* 2 Cliff. 351, Fed. Cas. No. 5,583, holding it not indispensably necessary as in any case that any question in equity in a Federal court should be sent to a jury.

18 AM. DEC. 350, DUVALL v. WATERS, 1 BLAND, CH. 569.

What constitutes waste.

Cited in reference notes in 45 A. D. 210; 53 A. D. 624; 66 A. D. 452,—on what is waste; 66 A. D. 711, on necessity that act be prejudicial to inheritance to constitute waste.

Waste and trespass distinguished.

Cited in *Price v. Ward*, 25 Nev. 203, 46 L.R.A. 459, 58 Pac. 849, distinguishing between waste and trespass.

Right to injunction.

Cited in *State v. Northern C. R. Co.* 18 Md. 193, holding injunction proper to prevent railroad company from first satisfying junior mortgages; *Irwin v. Dix-*

ion, 9 How. 10, 13 L. ed. 25, refusing to sustain injunction restraining party from blockading highway when the right to raise the obstruction had not been settled at law; *Perry v. Parker*, 1 Woodb. & M. 280, Fed. Cas. No. 11,010, holding perpetual injunction would not be granted to restrain destruction of property while rights thereto remained unsettled.

— **To prevent waste.**

Cited in *Hill v. Bowie*, 1 Bland, Ch. 593, holding injunction lies to prevent waste pending action at law to determine title; *Hammond v. Hammond*, 2 Bland, Ch. 306, holding same as to lands held for sale for benefit of creditors; *Walker v. Fox*, 85 Tenn. 154, 2 S. W. 98, holding irresponsible and insolvent party would be enjoined from committing waste; *Brigham v. Overstreet*, 128 Ga. 447, 10 L.R.A. (N.S.) 452, 57 S. E. 484, 11 A. & E. Ann. Cas. 75, holding injunction proper to prevent tenant's removing futures.

Cited in reference notes in 23 A. D. 772; 26 A. D. 700; 44 A. D. 424; 84 A. D. 510,—on injunction against waste; 26 A. D. 561, on injunction against waste and private nuisances; 46 A. D. 664, as to when injunction lies to restrain waste.

Cited in note in 9 E. R. C. 494, on enjoining waste by tenant.

— **To prevent trespass.**

Cited in *Ashurst v. McKenzie*, 92 Ala. 484, 9 So. 262, holding defendant would not be perpetually enjoined from trespassing on land until he had a reasonable time in which to assert his title; *Brown v. Solary*, 37 Fla. 102, 19 So. 161, holding injunction would be granted against trespass by taking minerals from the land of unascertainable value; *Freer v. Davis*, 52 W. Va. 1, 94 A. S. R. 895, 59 L.R.A. 556, 43 S. E. 164, holding injunction would lie to prevent defendants taking oil from the land pending settlement of title, although no action had been commenced to try title; *Bracken v. Preston*, 1 Pinney (Wis.) 584, 44 A. D. 412, holding an injunction for trespass would not lie to prevent removal of minerals, where plaintiff could have no action at law for mesne profits.

Cited in reference notes in 23 A. D. 772; 24 A. D. 197; 68 A. D. 117,—on injunction against trespass; 26 A. D. 561, as to when injunction lies to restrain trespass.

Cited in notes in 21 A. D. 51, on injunction in case of trespass and nuisance; 11 A. D. 506, on plaintiff's title in injunction for trespass; 99 A. S. R. 734, on jurisdiction to enjoin trespass on realty; 22 L.R.A. 238, on injunction against trespass to cut timber, in order to prevent waste pending litigation.

Dissolution of injunction on denial of bill.

Cited in *Stewart v. Chew*, 3 Bland, Ch. 440, dissolving an injunction to prevent trespass, on defendants denying trespass, there being no defending trial of the right.

Cited in reference note in 29 A. D. 757, as to when dissolution of injunction against waste is authorized.

Disapproved in *Cox v. Douglass*, 20 W. Va. 175, holding an injunction would be dissolved at the hearing of a motion to dissolve on bill and sworn answer completely denying allegations of bill.

Fraudulent conveyances.

Cited in reference note in 28 A. D. 206, on validity of fraudulent conveyances as between parties.

Cited in notes in 17 A. D. 187, on mode of setting aside fraudulent sale; 93 A. D. 350, on applicability of judgment liens to lands fraudulently conveyed.

Liability of land to execution.

Cited in reference notes in 49 A. D. 233, on liability of lands to execution at common law; 45 A. S. R. 937, on executions against separate estate of married women.

Right to sell lands on execution.

Cited in *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 A. D. 236, on right to sell lands on execution.

Validity of judicial sale.

Cited in notes in 21 A. D. 403, on execution of sheriff's deed to pass title; 43 A. D. 531, on applicability of statute of frauds to sheriff's sales.

Sufficiency of return to writ.

Cited in reference notes in 37 A. D. 561, on sufficiency of sheriff's return of execution; 40 A. D. 656, on sufficiency of description in return of execution; 38 A. D. 768, on necessity for return of execution; 27 A. D. 524, on certainty of description in sheriff's levy, return, or deed.

Parol evidence to impeach validity of a deed.

Cited in *McDowell v. Goldsmith*, 6 Ind. 319, 61 A. D. 305, holding declarations of a grantor to effect that deed was made to defraud creditors are admissible as against grantee in action by creditors to set deed aside.

18 AM. DEC. 371, DEN. EX DEM. HARDENBERGH v. HARDENBERGH, 10 N. J. L. 42.**Estate created by conveyance to husband and wife.**

Cited in *Robinson v. Eagle*, 29 Ark. 202; *Vunk v. Raritan River R. Co.* 56 N. J. L. 395, 28 Atl. 593; *Noblitt v. Beebe*, 23 Or. 4, 35 Pac. 248; *McDermott v. French*, 15 N. J. Eq. 78,—holding conveyance to husband and wife creates estate in entirety, and survivor takes whole; *Stuckey v. Keefe*, 26 Pa. 397, holding conveyance to husband and wife "as tenants in common, and not as joint tenants," created estate in entirety; *Dias v. Glover*, Hoffm. Ch. 71, holding same and wife could not alien without joinder of husband; *Cole Mfg. Co. v. Collier*, 95 Tenn. 5, 49 A. S. R. 921, 30 L.R.A. 315, 31 S. W. 1000, holding fee in estate in entirety is not altered but attaching limitations to fee of wife in case of survivorship; *Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 A. D. 439, holding conveyance to husband and wife does not create a joint tenancy, but each spouse holds in severalty.

Cited in reference notes in 10 A. S. R. 99; 26 A. S. R. 272; 31 A. S. R. 428; 32 A. S. R. 704; 35 A. S. R. 598; 54 A. S. R. 271; 72 A. S. R. 575; 84 A. S. R. 437; 87 A. S. R. 279; 96 A. S. R. 506; 102 A. S. R. 340; 105 A. S. R. 625; 109 A. S. R. 665; 115 A. S. R. 676; 118 A. S. R. 695; 123 A. S. R. 509,—on tenancies by the entirety; 26 A. S. R. 479, no creation of tenancy by entirety; 36 A. S. R. 67, as to when tenancy by entirety arises; 55 A. S. R. 594, on cotenancy of husband and wife; 41 A. S. R. 429, as to when husband and wife are cotenants; 41 A. S. R. 430, as to when husband and wife are joint tenants; 10 A. S. R. 99, as to how estate by entirety arises and effect of statutes; 36 A. S. R. 67; 96 A. S. R. 506,—on tenancy by the entirety in personal property; 24 A. D. 341, on tenancy by entirety in crops raised on land held by tenants by entirety.

Cited in notes in 18 A. D. 383; 30 L.R.A. 315,—as to where and to what extent entirety estate exists; 30 L.R.A. 324, on creation of entirety estates in limitations in peculiar form; 38 A. S. R. 435, on tenancy by entirety in personal

property; 84 A. S. R. 442, on effect of married women's statutes on estates by the entireties.

— **Effect of statute declaring joint estates, estates in common.**

Cited in *McDermott v. French*, 15 N. J. Eq. 78; *Thomas v. De Baum*, 14 N. J. Eq. 37; *Bevins v. Cline*, 21 Ind. 37,—holding statute declaring conveyance to two or more as joint tenants shall be in common, did not affect conveyance to husband and wife; *Pray v. Stebbins*, 141 Mass. 219, 55 A. R. 462, 4 N. E. 824, on effect on tenancy in entirety of statute declaring estate to two or more persons shall be estates in common and not joint estates; *McCallister v. Folden*, 110 Ky. 732, 62 S. W. 538, holding under statute providing in conveyance to husband and wife no right of survivorship shall exist unless expressly provided for, a conveyance to husband and wife for their natural lives was express provision for survivorship.

— **Conveyance to husband and wife and others.**

Cited in *Fullager v. Stockdale*, 138 Mich. 363, 101 N. W. 576, holding conveyance to husband and wife and to two heirs of latter created estate in entirety to one third in husband and wife.

Cited in reference notes in 42 A. D. 519, on conveyances to husband and wife; 44 A. D. 121, on creation of estate by entirety by conveyance to husband and wife; 49 A. S. R. 925; 88 A. D. 696,—on conveyance to husband and wife vesting in them estate by entireties; 51 A. S. R. 372, on estate created by devise or grant to husband and wife.

Cited in notes in 2 L.R.A. 434, 435, on estate created by conveyance to husband and wife; 27 A. D. 514, on creation of tenancy of the entirety on conveyance to husband and wife.

— **Conveyance to couple before marriage.**

Cited in *Holt v. Wilson*, 75 Ala. 58, holding land held by man and woman as tenants in common under marriage contract, held by them in same relation after marriage, though rights of husband vest after marriage.

Nature and incidents of estate by entirety.

Cited in reference note in 31 A. D. 62, on nature of estate taken under conveyance to husband and wife.

Cited in note in 18 A. D. 450, on nature of tenancy of husband and wife in land conveyed to them.

— **Incidents of possession.**

Cited in *Banzer v. Banzer*, 10 Misc. 24, 30 N. Y. Supp. 803, holding partition could not be had; *Fowles v. Hayden*, 130 Mich. 47, 89 N. W. 571, holding wife alone cannot maintain action for trespass; *Humberd v. Collings*, 20 Ind. App. 93, 50 N. E. 314, holding on assessment and judgment for construction of road against lands of husband and wife separately, they being tenants in entirety, release of judgment against husband released wife; *Corinth v. Emery*, 63 Vt. 505, 25 A. S. R. 780, 22 Atl. 618, holding ejectment would not lie against wife on levy and sale on judgment against husband, the lands of the wife being exempt from execution for sole debt of husband under statute, also citing annotation.

— **Alienability and survivorship.**

Cited in *Myers v. Reed*, 9 Sawy. 132, 17 Fed. 401; *Den ex dem. Wyckoff v. Gardner*, 20 N. J. L. 556, 45 A. D. 388,—holding neither can dispose of any part without assent of other; *Branch v. Polk*, 61 Ark. 388, 54 A. S. R. 266, 30 L.R.A. 324, 33 S. W. 424, holding right of survivorship not affected by separate

conveyance of other; *Chandler v. Cheney*, 37 Ind. 391, holding mortgage by husband alone of the estate held in entirety void; *Moss v. McCall*, 12 Ala. 630, 46 A. D. 272, on right of husband in estate in entirety to mortgage, same on condition that he survive wife; *Howell v. Folsom*, 38 Or. 184, 84 A. S. R. 785, 63 Pac. 116, holding under statute giving wife same rights as husband over individual property, mortgage by wife of estate in entirety valid although husband does not join; *Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 A. D. 439, on effect on rights of wife by common recovery against husband, in estate in entirety.

Cited in reference notes in 10 A. S. R. 100, on power to alien estates by entireties; 10 A. S. R. 99, on rights of survivor in estates by entireties.

Distinguished in *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508, holding under statute abolishing estate in entirety, right of survivorship did not exist, and rights of heirs not affected by conveyance by husband after death of wife, and citing annotation also on this point.

— Husband's power over.

Cited in reference notes in 70 A. D. 275, on husband's control over joint property; 43 A. S. R. 769, on power of husband over estate by entireties; 26 A. S. R. 566, on power of one party to encumber or sell estate by entirety.

Cited in note in 12 L.R.A. 615, on right of husband to control estate by the entirety.

— Rights of husband's creditors as to.

Cited in *Dickey v. Converse*, 117 Mich. 449, 72 A. S. R. 568, 76 N. W. 80, holding crops grown on land held in entirety, not subject to execution against husband; *Fogleman v. Shively*, 4 Ind. App. 197, 51 A. S. R. 213, 30 N. E. 909, holding as to proceeds of land held in entirety in hands of agent before any division is made, interest of husband while in hands of agent is subject to garnishment.

Cited in reference notes in 51 A. S. R. 221, on execution against estate by entireties; 102 A. S. R. 257, on liability of estate by entireties for husband's debts; 72 A. S. R. 575, on liability to execution of crops raised on land held by entireties.

— Effect of divorce.

Cited in notes in 36 A. S. R. 125; 13 L.R.A. 326,—on effect of divorce on estate by entirety.

18 AM. DEC. 389, GULICK v. WARD, 10 N. J. L. 87.

Contracts obnoxious to public policy or law.

Cited in *Church v. Muir*, 33 N. J. L. 318, holding executory contract for purpose of protecting debtor against just claims of creditors, unenforceable; *Bach v. Smith*, 2 Wash. Terr. 145, 3 Pac. 831, holding same where statute requires sale of liquor to be made by licensed dealer only, contract for sale by one not licensed; *Montclair Military Academy v. North Jersey Street R. Co.* 65 N. J. L. 328, 47 Atl. 890, holding contract upon consideration, by property owner to give his consent to construction by railroad company of street railway, not void; *Holt v. Bancroft*, 30 Ala. 193, holding deed of trust preferring special creditor not enforceable a general assignment being made eight days later and statute declaring that preferences given shall inure to benefit of all creditors; *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, on unenforceability of contract against public policy.

Cited in reference notes in 27 A. D. 267, on action on illegal contract; 40 A. D. 524, on contracts deemed void as against public policy; 35 A. S. R. 806, on contracts in contravention of statute; 25 A. D. 79, on sufficiency of act forbidden by law as consideration for promise; 37 A. D. 404, on validity of contracts designed to defraud government; 42 A. D. 230, on unenforceability of contracts against the spirit of the law, or which are forbidden under a penalty.

Cited in notes in 12 L.R.A. 120, as to what contracts are not binding on makers; 51 A. D. 343, on validity of contract originating in transaction forbidden by statute under penalty; 66 A. D. 513, 514, on contracts for services void as against public policy.

— Contracts to influence or control official action or affect public welfare.

Cited in *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264, holding contract to exert influence in opposition public enterprise, void; *Smith v. Applegate*, 23 N. J. L. 352, holding note given freeholder over whose land public road was to run, for withdrawing his opposition thereto, illegal and void; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 224, 6 L.R.A. 601, 44 N. W. 17, holding agreement between railroads whereby one would refrain from applying for land grant and assist the other to obtain it in consideration of sharing benefits of the grant, void; *Harris v. Roof*, 10 Barb. 489; *Trist v. Child* (*Burke v. Child*), 21 Wall. 441, 22 L. ed. 623, 7 Legal Gaz. 185,—holding contract for lobby services to procure passage of bill for payment of money, void; *Frost v. Belmont*, 6 Allen, 152, holding contract to secure passage of act of legislation by secret and sinister influence, void.

Cited in note in 66 A. D. 510, on invalidity of contracts to secure appointment to office or place of trust.

Distinguished in *Wakefield v. Van Tassell*, 202 Ill. 41, 95 A. S. R. 207, 65 L.R.A. 511, 66 N. E. 830, holding condition in deed that grantee would not erect a building on premises for handling of grain, and would not handle grain thereon, not void as against public policy.

— Contracts suppressive of competition.

Cited in *De Baun v. Brand*, 60 N. J. L. 283, 37 Atl. 726, holding agreement to pay legacy if legatee would refrain from bidding at sale of testator's property under order of court, void; *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. 635, holding agreement to pay money to another for the withdrawal of bid on property about to be sold by administrator under order of court, unlawful; *Woodruff v. Berry*, 40 Ark. 251, holding combination to allow one to submit bid and to divide profits, illegal if made with intention to stifle or limit competition; *Towle v. Leavitt*, 23 N. H. 360, 55 A. D. 195, on tainting of sale with fraud by employment of one to puff bids and act as by bidder.

Cited in reference note in 44 A. D. 731, on combinations and agreements to prevent competition at public auction.

Cited in note in 96 A. D. 270, on effect of combinations tending to stifle competition at auctions; 20 L.R.A. 547, on effect of preventing or checking bids on validity of sale at auction.

Limited in *Phippen v. Stickney*, 3 Met. 384, holding agreement between two that one will permit other to purchase at auction both to participate in benefits not illegal where not made to prevent competition, but with view to enable both to become purchasers, each taking part only of property.

Qualified in *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787, holding association formed of residents of a community for the purpose of bidding in a town site,

and buying the same at auction in actual competition, is, in absence of fraud, not illegal.

—Agreements stifling bids for public contracts.

Cited in *People v. Stephens*, 71 N. Y. 527, holding combination to allow one to bid without competition, in response to proposal of government to contract with lowest bidder, illegal; *Noyes v. Day*, 14 Vt. 384, holding note in consideration of forbearance to bid at public auction for support of town paupers, void; *Coverly v. Terminal Warehouse Co.* 70 App. Div. 82, 75 N. Y. Supp. 145, holding same of agreement that if one party would refrain from bidding at public auction, other party would pay him bonus; *Kennedy v. Murdick*, 5 Harr. (Del.) 458; *Swan v. Chorpennig*, 20 Cal. 182,—holding agreement to withdraw bid made in response to offer of government to award contract for carrying mail to lowest bidder, void; *McGehee v. Lindsay*, 6 Ala. 16, holding agreement between commissioner and successful bidder for public work, giving former interest in contract made between bidder and public board of which commissioner was member, void as against public policy; *Hoffman v. McMullen*, 45 L.R.A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372, holding agreement among bidders for public work to pool interests, obtain work at highest price and divide profits, illegal, and accounting thereon not allowable; *People v. Lord*, 6 Hun, 390, holding same of similar agreement but state could maintain action for damages sustained by such fraudulent acts; *Atcheson v. Mallon*, 43 N. Y. 147, 3 A. R. 678, holding agreement between bidders that successful bidder should share equally with other in profits and losses, void as against public policy; *Boyle v. Adams*, 50 Minn. 255, 17 L.R.A. 96, 52 N. W. 860, holding agreement to withdraw offer for purchase of timber on state lands void, even though proposals were for purchase at private sale.

Cited in reference note in 61 A. D. 350, on invalidity of agreement to prevent competition in bidding for government contracts.

Cited in note in 2 A. D. 138, on validity of agreements stifling bidding.

—Combination to fix prices.

Cited in *Marsh v. Russell*, 2 Lans. 340, holding agreement to furnish recruits for not less than sum fixed, and division of profits and losses in anticipation of government call for troops, void as against public policy, being designed to prevent competition; *Stanton v. Allen*, 5 Denio, 434, 49 A. D. 282, holding combination of all the transportation lines on a canal to fix a uniform rate, not to haul for less and to divide profits, illegal; *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 A. S. R. 793, 21 L.R.A. 617, 26 Atl. 978, holding same of agreement between owners of newspapers for division of profits and alteration in public printing, under statute authorizing awarding of contract to paper having larger circulation; *McMullan v. Hoffman*, 69 Fed. 509, holding secret agreement to submit bids for public work in concert, but apparently in competition, for purpose of obtaining highest price possible and to divide profits, illegal.

Distinguished in *Marsh v. Russell*, 66 N. Y. 288, holding agreement between partners that neither would furnish recruits for war at less than certain fixed sum, not void as against public policy.

18 AM. DEC. 404, STATE v. GUILD, 10 N. J. L. 163.

Admissibility of involuntary confession.

Cited in *People v. Wolcott*, 51 Mich. 612, 17 N. W. 78, holding confession induced by promise of favor or threats of violence not admissible; *State v. Due*, 27 N. H. 256, holding confession obtained by influence of hope or fear should be

rejected; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408, holding confession made to one in authority after repeated admonitions not to talk unless prisoner so desired, and warning as to effect of so doing, is voluntary and admissible; *Smith v. Com.* 10 Gratt. 734, rejecting confession made to justice of the peace, although not acting as such at time, under hope and inducement of immunity; *Love v. State*, 22 Ark. 336, holding burden is on prosecution to show confession was freely and voluntarily made.

Cited in reference note in 62 A. D. 562, as to how confessions of accused are to be regarded by jury.

Cited in notes in 23 A. D. 128; 28 L. ed. U. S. 263,—as to when confessions of accused are admissible against him; 6 A. S. R. 246, as to when confessions are inadmissible; 18 L.R.A.(N.S.) 860, 865, on necessity of entire removal of inducement to render confession voluntary; 18 L.R.A.(N.S.) 791, on irritation of accused as determining voluntariness of confession.

— **Voluntary repetition of involuntary confession.**

Cited in *People v. Johnson*, 41 Cal. 452, rejecting confession made to arresting officer under promise of favor, and repeated two days later to committing magistrate; *Bullock v. State*, 65 N. J. L. 557, 86 A. S. R. 668, 47 Atl. 62, holding confession made to officer at night under advice that it will be easier for prisoner and in morning following repeated to another officer ignorant of first, and after warning, is voluntary and admissible.

Cited in note in 6 A. S. R. 250, on admissibility of confession subsequent to one induced by improper influence.

— **Presumption as to voluntariness of second confession.**

Cited in *State v. Wintzingerode*, 9 Or. 153, holding repetition inadmissible where original confession was given under promise of favor, the day before same inducements being still in force, and no warning given; *Peter v. State*, 4 Smedes & M. 31, holding same though there is a long lapse of time between prior and subsequent confessions, but no evidence of warning or of circumstances tending to show removal of fear which induced prior confession; *Bob v. State*, 32 Ala. 560, holding same where slave in prison was induced to make confession under inducement that he would be sold and not hung, and after mistrial prisoner was kept in prison and his confession given in evidence; *State v. Hash*, 12 La. Ann. 895, holding fact that subsequent confession was made without threat or inducement of favor ten days after prior confession removed presumption that subsequent confession was given under influence of first; *State v. Fisher*, 51 N. C. (6 Jones, L.) 478, holding that where confession is extorted by officer by undue influence, confession made next day to friend without any suggestion of influence admissible; *State v. Brooks*, 30 N. J. L. 356, holding same of confession to committing magistrate, after caution that prisoner need not do so, and without threat or promise, made three days after a confession induced by illegal means; *Smith v. State*, 74 Ark. 397, 85 S. W. 1123, holding same where confession obtained by officer after chastisement was repeated next day to sheriff freely and voluntarily prisoner having been told he would not be chastised except for disturbance, and having expressed desire to punish accomplice; *Love v. State*, 22 Ark. 336, on circumstances tending to overcome presumption that subsequent confession was free from illegal influence which induced a prior confession.

Cited in note in 18 L.R.A.(N.S.) 858, on presumption as to voluntariness of subsequent confession.

— **Presumption as to voluntariness of confession after threats or promises.**

Cited in *Barnes v. State*, 36 Tex. 356, holding that where prisoner was threatened with death and later taken from jail by same persons, evidently for purpose of repeating threat, and without warning induced to make confession, such confession inadmissible; *Mose v. State*, 36 Ala. 211, holding refusal by master to extend further assistance to accused slave, expression of belief of guilt and desire for punishment, after whipping slave to induce confession, overcame presumption that confession made several weeks later while in custody to third person was influenced by means first exerted.

Cited in reference notes in 22 A. D. 456, on inadmissibility of confessions induced by hope or fear; 61 A. D. 730, on inadmissibility of confession induced by delusive hope of immunity from punishment.

Sufficiency of uncorroborated confession to sustain conviction.

Cited in *United States v. Williams*, 1 Cliff. 5, Fed. Cas. No. 16,707, holding confession admissible, although there be not full proof, independent of confession, of *corpus delicti*; *Martin v. State*, 90 Ala. 602, 24 A. S. R. 844, 8 So. 858, holding child under fourteen may be convicted on his confession alone, if clearly established, and *corpus delicti* be otherwise proved, and it also be fully proved that capacity to commit crime existed; *Stringfellow v. State*, 26 Miss. 157, 59 A. D. 247, holding it insufficient in capital cases where *corpus delicti* is not established by independent testimony; *People v. Lane*, 49 Mich. 340, 13 N. W. 622, holding same in prosecution for attempt to murder; *Bergen v. People*, 17 Ill. 426, 65 A. D. 672, holding same in prosecution for incest of confession out of court unsupported by corroborating facts and circumstances.

Cited in note in 68 L.R.A. 52, on necessity of proof of *corpus delicti* to corroborate confession.

Disapproved in *Robinson v. State*, 12 Mo. 592; *Matthews v. State*, 55 Ala. 187, 28 A. R. 698,—holding in felony, extra-judicial confession uncorroborated by independent proof of *corpus delicti*, insufficient to sustain conviction.

Sufficiency of confession to convict.

Cited in reference note in 65 A. D. 676, as to when confessions of prisoner are insufficient to convict.

Cited in note in 78 A. D. 254, on burden of proof and confessions as proof of *corpus delicti*.

What are circumstances corroborating confession.

Cited in reference note in 65 A. D. 676, on "corroborating circumstances" as used with reference to confession.

Credibility of confession.

Cited in *Brister v. State*, 26 Ala. 107, holding credibility and effect of confession for jury; *Young v. State*, 68 Ala. 569, holding facts and circumstances surrounding confession must be considered by jury in determining its credibility.

Confessions by infants.

Cited in reference note in 24 A. S. R. 849, on effect of infant's confession as justifying conviction of murder.

Cited in notes in 70 A. D. 498; 36 L.R.A. 209,—on confessions by infants.

Criminal liability of child under fourteen.

Cited in *Godfrey v. State*, 31 Ala. 323, 70 A. D. 494, holding presumption of criminal incapacity in boy of eleven years may be overcome by plainly manifest intelligent design and malice in execution of act; *Rickert v. Stephens*, 133 Pa. 538, 19 Atl. 410, on presumption as to judgment and discretion of child under fourteen years of age.

Cited in reference note in 37 A. D. 242, on criminal liability of infants.

Cited in notes in 70 A. D. 499, on infant's punishment for crime; 36 L.R.A. 201, on presumption as to liability of children for murder.

Right of court to pass judgment on verdict returned at prior term.

Cited in *Parker v. State*, 51 Miss. 535, on propriety of rendering judgment at one term on verdict returned at preceding term of court.

Right of prisoner to be present in court.

Cited in *Donnelly v. State*, 26 N. J. L. 463, on necessity of presence of prisoner upon argument of writ of error to reverse conviction in criminal case.

18 AM. DEC. 417, DEN. EX DEM. ABER v. CLARK, 10 N. J. L. 217.

Conclusiveness of inquisition of lunacy, as to third persons.

Cited in *Yauger v. Skinner*, 14 N. J. Eq. 389, holding inquisition competent, but not conclusive, evidence of lunacy against person claiming title under alleged lunatic; *Field v. Lucas*, 21 Ga. 447, 68 A. D. 465, holding inquisition of lunacy prima facie but not conclusive evidence to show lunatic was incapable of contracting; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, holding adjudication on inquisition not conclusive on third persons not parties to proceeding, though notified as next of kin; *Grimes v. Shaw*, 2 Tex. Civ. App. 20, 21 S. W. 718, holding as to third persons, judgment of lunacy is only prima facie evidence thereof.

Cited in notes in 22 A. D. 658; 28 A. D. 647,—on conclusiveness of inquisition of lunacy; 19 L.R.A. 493, on conclusiveness in other proceedings of finding made in an inquisition to establish insanity.

Inquisition of lunacy as evidence.

Cited in reference notes in 47 A. D. 474, on inquisition of lunacy as evidence; 36 A. D. 580; 75 A. D. 219,—on effect of inquisition as evidence; 26 A. D. 130, on inquisition of lunacy as prima facie evidence only.

Cited in note in 18 A. D. 422, on admissibility of inquisition of lunacy.

Procedure to impugn inquisition of lunacy.

Cited in *Re Lindsley*, 46 N. J. Eq. 358, 19 Atl. 726, holding leave to traverse an inquisition of lunacy not a matter of right but matter resting within discretion of chancellor.

Liability for obligations of ancestors.

Cited in note in 21 L.R.A. 89, on liability of heirs for obligations of ancestor.

18 AM. DEC. 423, STORY v. ELLIOT, 8 COW. 27.

Validity of acts performed on Sunday or holiday.

Cited in *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531, holding execution of note not void in absence of statute; *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313, holding running of trains not unlawful unless prohibited by statute; *Weidman v. Marsh*, 4 Clark (Pa.) 401, upholding execution of will where testator was or had good reason to believe himself in danger of immediate death.

Cited in reference notes in 27 A. D. 119, as to when acts done on Sunday are valid; 39 A. D. 339, as to when contracts made on Sunday are void; 31 A. D. 465, on validity of contracts made on Sunday.

Cited in note in 38 A. R. 167, on subscription for church expenses on Sunday as violating the Sunday law.

—Awards.

Cited in *Isaacs v. Beth Hamedash Soc.* 1 Hilt. 469, holding award signed on Sunday pursuant to hearing on that day but delivered on Monday, valid, all parties and witnesses being Jews.

Cited in reference note in 24 A. D. 467, on validity of award made on Sunday.

— Judicial acts.

Cited in *People ex rel. Donohue v. Walton*, 35 Misc. 320, 71 N. Y. Supp. 85, 15 N. Y. Crim. Rep. 512, holding conviction and warrant of commitment void both at common law and under Code; *Pulling v. People*, 8 Barb. 384, holding submission of cause to jury at three o'clock in morning void under statute forbidding business except the receiving of verdict; *State v. Green*, 37 Mo. 466, holding statute forbidding business except receiving verdict or discharging jury renders instructions given ten minutes after midnight, void; *People ex rel. Price v. Warden*, 73 App. Div. 174, 76 N. Y. Supp. 728, holding magistrates courts in New York city may exercise their ordinary functions by virtue of statute; *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038, denying power to discharge jury when not enumerated among exceptions to act forbidding transaction of business by courts; *Stinson v. State*, 5 Tex. App. 31, on whether statute prohibits judgment on information filed on Sunday.

Cited in reference note in 27 A. D. 667, on judicial acts done on Sunday.

Cited in notes in 48 A. D. 393; 3 L.R.A. 658,—on Sunday as nonjudicial day; 3 A. R. 372, on limitations on judicial action on Sunday; 12 A. D. 290, on effect of judicial acts on Sunday.

Distinguished in *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L.R.A. 626, 54 Atl. 147, holding trial of charges against member of beneficial society valid in absence of express statute; *Maxson v. Annas*, 1 Denio, 204, holding act prohibiting "service and execution" of writs, warrants, judgments, etc., on Saturday as to Seventh Day Baptists does not affect judgment rendered on that day.

— Entry of verdicts and judgments.

Cited in *Shearman v. State*, 1 Tex. App. 215, 28 A. R. 402, holding entry of judgment, void; *Re Worthington*, 18 Nat. Bankr. Reg. 388, Fed. Cas. No. 18,052, holding docketing of judgment on day declared a holiday by statute, void; *Hemens v. Bentley*, 32 Mich. 89, holding rendition of judgment on holiday equivalent by statute to Sunday, void; *Davis v. Fish*, 1 G. Greene, 406, 48 A. D. 387, holding both the receiving of verdict and entry of judgment thereon, void; *Hodge v. State*, 29 Fla. 500, 10 So. 556; *Com. v. Marra*, 8 Phila. 440, 26 Phila. Leg. Int. 388, 1 Legal Gaz. 172, 3 Brewst. (Pa.) 402; *Stone v. United States*, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778,—holding the receiving and recording of general verdict not a nullity; *Reid v. State*, 53 Ala. 402, 25 A. R. 627, holding lawful to receive verdict and adjourn, the case having gone to jury on week day; *Baxter v. People*, 8 Ill. 368, holding verdict received on Sunday valid while judgment entered thereon is void; *Keating v. Serrell*, 5 Daly, 278, on nullity under statute of entry of judgment unless it be on verdict received on same day.

— Ministerial acts of procedure.

Cited in *State v. California Min. Co.* 13 Nev. 203, holding execution of undertaking on appeal, valid.

Cited in reference note in 38 A. S. R. 747, on validity of ministerial acts performed on holidays.

— Service of writs and notices.

Cited in *Kiger v. Coats*, 18 Ind. 153, 81 A. D. 351, holding giving of notice of award, valid; *Morris v. Shew*, 29 Kan. 661, holding service of process of attachment void; *Matthews v. Ansley*, 31 Ala. 20, holding service of process of attachment, valid; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074, Am. Dec. Vol. III.—36.

holding service of proposed statement on motion for new trial either on legal holiday or Sunday, not invalid; *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, holding summons not servable either at common law or under statute excepting in instances there specified; *Harrison v. Wallis*, 44 Misc. 492, 90 N. Y. Supp. 44, holding service of process void at common law, though valid under New Mexico statute before sunrise or after sunset; *People v. Dewey*, 23 Misc. 287, 50 N. Y. Supp. 1013, holding service of writ of habeas corpus void both at common law and under statutes of Texas and New York; *Dumars v. Denver*, 16 Colo. App. 375, 65 Pac. 580, on sufficiency to sustain assessment, of Sunday publication of ordinance authorizing sewer.

— **Under statutes prohibiting Sunday contracts.**

Cited in *Miller v. Roessler*, 4 E. D. Smith, 234; *Batesford v. Every*, 44 Barb. 618,—holding private sale not void either at common law or under statute against “exposing to sale” any wares, merchandise, etc.; *Boynton v. Page*, 13 Wend. 425, holding same statute extends only to public exposure sales, and does not affect private transfers; *Towle v. Larrabee*, 26 Me. 464, holding statute forbidding labor or business excepting works of necessity or charity renders note given for chattels void; *Adams v. Hamell*, 2 Dougl. (Mich.) 73, 43 A. D. 455, holding same, though otherwise at common law; *Smith v. Wilcox*, 24 N. Y. 353, 82 A. D. 302, holding similar statute renders contract for publication of advertisement in Sunday newspaper void; *Merritt v. Earle*, 31 Barb. 38, holding statute does not prohibit execution on Sunday of contract to transport property, though voyage is and does commence on Sunday evening; *Sayles v. Willman*, 10 R. I. 465, holding sale of horses by horseman invalid, though capable of ratification under statute providing penalty for exercise of one’s ordinary calling.

Computation of time including Sunday.

Cited in *Ex parte Juneman*, 28 Tex. App. 486, 13 S. W. 783; *Harper v. State*, 43 Tex. 431,—holding word “weeks” in statute limiting time of term excludes the seventh day; *Neal v. Crew*, 12 Ga. 93, holding Sunday not countable as one of the four days on which appeals may be entered; *Bacon v. State*, 22 Fla. 46, holding bill of exceptions may be settled on succeeding day where last day in order was Sunday; *People ex rel. Pugsley v. Luther*, 1 Wend. 42, holding not permissible to redeem on next day where last day of long period was Sunday; *Campbell v. International Life Assur. Soc.* 4 Bosw. 298, holding performance on Monday valid where day for fulfilling agreement falls on Sunday either through accident or mutual error; *Porter v. Pierce*, 120 N. Y. 217, 7 L.R.A. 847, 24 N. E. 281 (affirming 43 Hun, 1), and holding Sunday is not to be figured in twenty-four hours allowed creditor by statute to redeem from a prior redeeming creditor.

Validity of Sunday laws.

Cited in *State v. Powell*, 58 Ohio St. 324, 41 L.R.A. 854, 50 N. E. 900, holding statute, prohibiting anyone from “any baseball playing,” valid; *Lindemuller v. People*, 21 How. Pr. 156, 33 Barb. 548, holding statute prohibiting certain exhibitions and plays, valid; *Ex parte Andrews*, 18 Cal. 678, holding act prohibiting all persons, with certain exceptions, from conducting their business on Sunday, valid.

Cited in note in 49 A. D. 622, on constitutionality of Sunday laws under the police power.

Construction of Sunday statutes.

Cited in *Brunnett v. Clark*, 1 Sheldon, 500, holding such statutes liberally construed so as to prohibit every species of labor contravening object of enactment.

18 AM. DEC. 427, LEWIS v. PAYN, 8 COW. 71, Reaffirmed on later appeal in 4 Wend. 423.

Alteration of instruments.

Cited in reference notes in 23 A. D. 264; 29 A. D. 330; 46 A. D. 167,—on alteration of instruments; 22 A. D. 95; 23 A. D. 677; 28 A. D. 622; 40 A. D. 139,—on effect of alteration of instrument; 65 A. D. 129, on effect of immaterial alterations and those made by stranger.

Cited in notes in 10 A. R. 239, on effect of alteration of instrument by stranger; 86 A. S. R. 85, on necessity that alterations of written instruments be material; 86 A. S. R. 118, on effect of alteration of instrument in duplicate on rights of parties; 86 A. S. R. 125, on rights of parties of altered instrument which was an executed contract or conveyance.

—Of lease.

Cited in *Boston Block Co. v. Buffington*, 39 Minn. 385, 40 N. W. 361; *Jones v. Hoard*, 59 Ark. 42, 43 A. S. R. 17, 26 S. W. 193,—holding that alternative of duplicate copy of lease by lessee will not vitiate contract, inasmuch as it may be proved by copy retained by lessor; *Smith v. McGowan*, 3 Barb. 404, 1 N. Y. Code Rep. 27, holding that title of lessor would not be revested by fraudulent alteration of assignment of lease by lessee, or even by a forgery of the lease itself; *Bliss v. McIntyre*, 18 Vt. 466, 46 A. D. 165, holding erasure and changes of covenants in lease by lessee after execution and delivery, material alteration, avoiding lessee's rights thereunder and estops him from maintaining any action upon contract original evidence of which he has by his own act destroyed.

Cited in reference note in 43 A. S. R. 19, on alteration of lease executed in duplicate.

—Of deed.

Cited in *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 53 A. S. R. 80, 16 So. 440, holding alteration of deed by erasure of words, "numerals reserved" after the execution and delivery of deed, not such an alteration as to avoid the conveyance, even though it does operate to render deed void as original evidence of title; *Lee v. Alexander*, 9 B. Mon. 25, 48 A. D. 412, holding that alteration or mutilation of deed by stranger will not, as to original parties, render it void; *Chessman v. Whittemore*, 23 Pick. 231, holding that alteration of deed, though rendering it void as evidence, will not operate to divest grantee of estate granted; *Woods v. Hilderbrand*, 46 Mo. 284, 2 A. R. 513, holding that notwithstanding fraudulent alteration of deed by grantee, title to land will not revert in grantor, though in some instances it would operate to estop grantee from bringing any action founded on altered deed; *Jackson ex dem. Collier v. Jacoby*, 9 Cow. 125, holding that in absence of corroborative evidence mere addition of letter "s" to word lot in description of property conveyed in deed is not such material alteration as to avoid deed; *Jackson ex dem. Gould v. Gould*, 7 Wend. 364, holding erasure and subsequent writing in of word "junior" in description of party to deed not sufficient alteration to divest estate conveyed; *Moir v. Brown*, 14 Barb. 39, holding that annexation of schedule of personal property to recorded deed of general assignment made for benefit of creditors, is such material alteration as to render it void for purposes of evidence; *Withers v. Atkinson*, 1 Watts, 236, holding that alteration of deed destroys its efficacy as to one altering it, but does not operate to destroy estate granted; *Arnold v. Jones*, 2 R. I. 345, sustaining general proposition that any

material alteration of deed after execution by one claiming benefit thereunder or by his privity, effectually vitiates the instrument and estops him from bringing any action upon it; *Watrous v. McGrew*, 16 Tex. 506, holding alteration of *testimonia* not of itself sufficient to impair legality of title to estate claimed and evidenced by copy of original instrument containing grant, and description of land; *Yeager v. Musgrave*, 28 W. Va. 90, holding that material alteration of deed or other written instrument by one an entire stranger thereto will not render it void as to original parties.

— Of mortgage.

Cited in *Waring v. Smyth*, 2 Barb. Ch. 119, 47 A. D. 290, holding change by obligee and mortgagee in bond and mortgage making it payable on demand, instead of five years after date, an alteration, rendering it void as to mortgagors; *Marcy v. Dunlap*, 5 Lans. 365, holding addition or change, after delivery, of description of premises covered by mortgage to conform to record description, such material alteration as to estop mortgagee from maintaining any action thereon; *Robertson v. Hay*, 91 Pa. 242, 6 W. N. C. 546, holding change after execution and delivery of mortgage with reference to specific legislative act, which had previously been repealed, not of that material character sufficient to avoid mortgage, nor affect rights of an assignee who was not party to alteration.

— Of bond.

Cited in *Walla Walla County v. Ping*, 1 Wash. Terr. 340, holding that alteration of surety bond, by insertion of amount of penalty in case of violations of obligation upon which bond is conditioned, after its delivery, renders it void as to sureties.

— Of negotiable paper.

Cited in *Chappell v. Spencer*, 23 Barb. 584, holding addition by payee of his name under that of the makers of promissory notes, but marked "security" to be an alteration sufficient to vitiate the instrument.

— Of contracts generally.

Cited in *Hayes v. Wagner*, 89 Ill. App. 390, discussing right of one claiming under contract which was executed in duplicate, one copy of which was subsequently materially altered, to resort to the unchanged duplicate copy as original evidence of contract; *Adams v. Frye*, 3 Met. 103, holding that fraudulent procurement of signature of person not present at execution as attesting witness to bond, with a view to gaining improper advantage will discharge obligor; *Ruby v. Talbott*, 5 N. M. 251, 3 L.R.A. 724, 21 Pac. 72, holding that a material alteration by a stranger will not render an instrument void, if it can be shown by evidence what the instrument was before it was altered; *Fullerton v. Sturges*, 4 Ohio St. 529, holding that alteration of written instrument in order to be an effective destruction of its validity, must have been made by one entitled to some benefit thereunder, or one having some adverse interest.

Distinguished in effect in *Northern R. Co. v. Miller*, 10 Barb. 260, holding stockholder's contract of subscription not rendered inoperative by authorized change in charter by legislature.

Time of alteration as question for jury.

Cited in *Little v. Herndon*, 10 Wall. 26, 19 L. ed. 878, holding it is question for jury whether erasure in instrument admitted in evidence was made before its execution.

Burden of proof as to alteration.

Cited in *Sow v. Merrill*, Burnett (Wis.) 185, 1 Pinney (Wis.) 340, holding

it to be duty of one claiming alteration of promissory note or other negotiable instrument to prove it by preponderance of evidence, failing in which proper for jury to find for defendant.

Cited in note in 13 L.R.A. 313, on necessity that party producing instrument account for alterations.

Effect of cancellation of deed.

Cited in *King v. Crocheron*, 14 Ala. 822, holding that words "I hereby cancel and relinquish the within deed to . . . and authorize the same to be transferred upon record" although sufficient cancellation is insufficient to revest title in grantor; *Wilson v. Hill*, 13 N. J. Eq. 143, holding that mere cancellation of deed of conveyance will not operate to divest grantee of estate which has vested, even when cancellation is done by consent of all parties; *Rowan v. Lytle*, 11 Wend. 616, holding that voluntary cancellation of deed of conveyance does not terminate an estate created by it, owing to necessity of conforming to statute of fraud in all matters affecting right, title or interest in land, save in exceptional cases; *Galbreath v. Templeton*, 20 Tex. 45, holding that cancellation of deed in consideration of execution of matters which turned out to be void and did not operate to divest grantee of estate acquired under original deed; *Parker v. Kane*, 4 Wis. 1, 65 A. D. 283, holding that cancellation and destruction of deed of conveyance of real property by consent of grantee and grantor cannot operate to reinvest grantee with title.

Cited in note in 18 L.R.A.(N.S.) 1170, on effect of destruction or cancellation, or redelivery to grantor for that purpose, of delivered, but unrecorded deed.

Effect of surrender of instrument.

Cited in *Suydam v. Beals*, 4 McLean, 12, Fed. Cas. No. 13,653, holding surrender or cancellation of lease for term of years not effective to divest estate unless evidenced by formal deed properly executed in conformity with statute of frauds; *Strawn v. Norris*, 21 Ark. 80, holding that surrender or destruction of recorded deed will not operate as reinvestment of estate in grantor.

Duplicates in evidence as original documents.

Cited in *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 118 A. S. R. 626, 12 L.R.A.(N.S.) 343, 112 N. W. 252, holding different carbon copies of a writing duplicate originals so that either may be proved without accounting for the other; *Martin v. Martin*, 1 Misc. 181, 20 N. Y. Supp. 685, 48 N. Y. S. R. 690, holding one of several copies of written instrument executed simultaneously, admissible as original in evidence.

Cited in reference note in 118 A. S. R. 628, on question where instrument is executed in duplicate one of which is delivered to each party, whether both are originals.

Assignability of estate by will.

Cited in *Cody v. Quarterman*, 12 Ga. 386, holding that an estate by will, under statute of frauds is assignable.

Power of agent to make contract under seal.

Distinguished in *Hanford v. McNail*, 9 Wend. 54, holding that agent not authorized by deed, cannot make contract under seal for his principal.

18 AM. DEC. 432, CUNNINGHAM v. BUCKLIN, 8 COW. 178.

Immunity of officers from liability.

Cited in notes in 23 A. D. 383, on liability of officers for acting in excess of authority; 43 A. D. 724, on liability of public officer for misconduct in office.

— Of officers exercising official discretion.

Cited in *Easton v. Calendar*, 11 Wend. 90, holding school trustees not liable for error in figuring tax or omitting names of all taxable parties without proof of bad faith; *Morris Twp. v. Carey*, 27 N. J. L. 377, holding school trustees not liable for error or fraud in making out list of children in district for purposes of revenue; *Weaver v. Devendorf*, 3 Denio, 117, holding tax assessor not liable to suit for refusal of exemption though act was wilful and corrupt; *Waldron v. Berry*, 51 N. H. 136, holding highway commissioners not liable for discretionary performance of duty without proof of malice or fraud; *Pike v. Megoun*, 44 Mo. 491, holding registering officer of election not liable for judicial act without proof of wilfulness or corruption; *Gordon v. Farrar*, 2 Dougl. (Mich.) 411, holding inspectors of election not liable in case for improperly refusing a vote.

— Of judicial officers generally.

Cited in *Landt v. Hiltz*, 19 Barb. 283, holding erroneous order of arrest by judicial officer with jurisdiction, a protection to parties, their attorney, and to the officer himself; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673, on exemption of judicial officers from civil suit for error, though intentional, provided there was jurisdiction.

Cited in reference notes in 22 A. D. 550, on liability of judicial officers; 6 A. D. 360, on exemption from liability of officer acting judicially; 97 A. S. R. 867, on liability of judges of courts of superior or general jurisdiction; 67 A. S. R. 894, on liability of judges to civil action; 25 A. R. 701, on civil liability of judge for judicial acts; 90 A. D. 727, on liability for negligence of officers invested with judicial powers; 40 A. D. 135, on liability of judicial officers for misconduct.

Cited in notes in 24 A. D. 50, on judicial liability; 15 E. R. C. 48, on civil liability of judge for his judicial acts; 14 L.R.A. 139, on civil liability of judicial officer for acts of judicial nature; 14 L.R.A. 145, on civil liability of judge for acts done through malice or impure motives; 21 A. D. 222, on liability of justice issuing warrant without jurisdiction.

— Of judges or officers of court not of record.

Cited in *Irion v. Lewis*, 56 Ala. 190, holding corrupt official misconduct by justice of peace not actionable civilly though punishable criminally; *Pratt v. Gardner*, 2 Cush. 63, 48 A. D. 652, holding justice of peace not liable civilly if he had jurisdiction; *Jordan v. Hanson*, 49 N. H. 199, 6 A. R. 508, holding justice of peace not liable for erroneous refusal of appeal; *Houghton v. Swarthout*, 1 Denio, 589, holding justice of peace liable for ministerial error in return to common pleas upon appeal; *Craig v. Burnett*, 32 Ala. 728, holding town councilmen liable for imprisoning before necessary judicial ascertainment of violation of ordinance; *Wilcox v. Williamson*, 61 Miss. 310, holding mayor, convicting one under pleadings and facts which could not possibly give jurisdiction, liable to suit, and citing annotation on this point; *Ayers v. Russell*, 50 Hun, 282, 3 N. Y. Supp. 383 (dissenting opinion), on exemption from civil suit of physicians exercising judicial duty in committing insane, provided there was jurisdiction.

What powers are judicial.

Cited in *Striker v. Kelly*, 7 Hill, 9, holding power given court to appoint and confirm acts of assessors of street improvement, judicial and compatible with other duties.

Conclusiveness of judicial decision in special or limited jurisdiction.

Cited in *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52, holding judgment of limited court ordering sale of ward's estate conclusive upon proof of jurisdiction; *Stell v. Glass*, 1 Ga. 475, holding order of court of ordinary as to investment of ward's funds not subject to collateral attack where there was jurisdiction and no fraud; *Fleming v. Johnson*, 26 Ark. 421, holding title under guardian or administrator's sale cannot be collaterally attacked except for patent error or want of jurisdiction; *Furman v. Walter*, 13 How. Pr. 348, holding sufficiency of attachment issuing in action already commenced with jurisdiction not subject to collateral attack; *Larr v. State*, 45 Ind. 364, holding record of justice of peace cannot be contradicted by a pleading; *Hard v. Shipman*, 6 Barb. 621, holding docket of justice with jurisdiction conclusive of facts recited, in subsequent action on judgment; *Clark v. Holmes*, 1 Dougl. (Mich.) 390, on contradiction in collateral action of a justice's record or minutes to show want of jurisdiction; *Peck v. Holcombe*, 3 Port. (Ala.) 329, holding declaration of vacancy in tax collector's office by county judge pursuant to statute conclusive until reversed; *Foster v. Van Wyck*, 2 Abb. App. Dec. 167, 4 Abb. Pr. N. S. 469, 41 How. Pr. 493, holding erroneous tax assessment by officers with jurisdiction, voidable, but not void.

— Of discharge in insolvency.

Cited in *Betts v. Bagley*, 12 Pick. 572, holding discharge evidence of all facts necessary to validity upon proof of officer's authority and jurisdiction; *Stanton v. Ellis*, 12 N. Y. 575, 64 A. D. 512, holding discharge of insolvent may be attacked in collateral action for want of jurisdiction.

Cited in reference note in 53 A. D. 88, as to when discharge in bankruptcy is deemed conclusive.

Jurisdiction of insolvent.

Cited in *Re Clark*, 3 Denio, 167, holding irregularity in publishing notice does not divest jurisdiction once acquired by officer.

18 AM. DEC. 441, WAITE v. LEGGETT, 8 COW. 195.**Relief against mistake.**

Cited in *Rider v. Powell*, 28 N. Y. 310, holding equity will correct mistake in bond though there was no mutuality or fraud.

Recovery of payments of money by mistake.

Cited in *Morton v. Ludlow*, 1 Edw. Ch. 639, holding ignorance of law will not give a right of recovery, if facts were known; *Billings v. McCoy Bros.* 5 Neb. 187, holding it unnecessary that mistake should be caused by wrongful act of defendant; *Davis v. Kling*, 77 Hun, 598, 28 N. Y. Supp. 1026, holding money paid under mistake of expectant fact recoverable; *Livermore v. Peru*, 55 Me. 469, holding money paid to another town under mistake as to liability for support of pauper under known facts not recoverable; *Duncan v. Berlin*, 5 Robt. 457, 4 Abb. Pr. N. S. 34 (dissenting opinion), on necessity of full knowledge of all facts to constitute a voluntary payment so as to defeat a recovery; *Mathews v. Kansas*, 80 Mo. 231, holding payment of tax on wrong land through mistake of payer not recoverable; *Lesster v. New York*, 33 App. Div. 350, 53 N. Y. Supp. 934, holding money paid for taxes without knowledge of condemnation by city, recoverable.

Cited in reference notes in 43 A. D. 617, on recovery back of money voluntarily paid; 33 A. S. R. 689, on right to recover voluntary payments: 45 A. D. 171.

on right to recover money paid under mistake of fact; 27 A. D. 489, on recovery back of money paid under mistake or in ignorance of essential fact.

Cited in notes in 19 A. D. 515, on recovery back of money paid by mistake; 52 A. D. 759, on recovery on count for money had and received of money obtained by fraud or other tort, or by duress or by mistake; 94 A. S. R. 415, on knowledge of facts as affecting duress.

Distinguished in *Holden v. Davis*, 57 Miss. 769, holding payment of unaccepted draft in mistake for accepted one not recoverable, the paid draft being in consequence not protested.

— **Mistake in computation.**

Cited in *Boyer v. Pack*, 2 Denio, 107, holding money paid on incorrect computation of interest, recoverable.

— **Mistake of facts chargeable to notice of payer.**

Cited in *Grimes v. Blake*, 16 Ind. 160; *Douglas County v. Keller*, 43 Neb. 635, 62 N. W. 60; *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. 452, 3 A. R. 718; *Allen v. New York*, 4 E. D. Smith, 404; *City Nat. Bank v. Peed*, 2 Va. Dec. 623, 32 S. E. 34; *Rutherford v. McIvor*, 21 Ala. 750,—holding means of knowledge not tantamount to actual knowledge so as to defeat recovery; *Koontz v. Booneville Cent. Nat. Bank*, 51 Mo. 275, holding money paid on another drawee's draft through failure to use ordinary care, recoverable.

— **Payments on avoidable instrument or obligation.**

Cited in *Columbus Ins. Co. v. Walsh*, 18 Mo. 229, holding loss paid in ignorance of subsequent insurance which avoided policy, recoverable; *Lake v. Artisans' Bank*, 3 Abb. App. Dec. 107, 3 Abb. Pr. N. S. 209, 3 Keyes, 276, holding same of money paid by indorser erroneously supposing he had been charged by demand and notice; *Southwick v. First Nat. Bank*, 20 Hun, 349, holding same of money paid in taking up draft under mistaken belief that proceeds had been used in taking up another draft; *Lott v. Swezey*, 29 Barb. 87, holding same of money paid on judgment binding at time but subsequently reversed; *Chapman v. Brooklyn*, 40 N. Y. 372,—holding same of money paid on consideration which has wholly failed.

— **Remedies for recovery.**

Cited in *Harway v. New York*, 1 Hun, 628, 4 Thomp. & C. 167, holding money obtained by oppression, imposition or deceit may be set off in assumpsit by virtue of statute.

Recovery of over charges.

Cited in *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434, holding excessive charges paid railroad under duress *per minas*, recoverable.

18 AM. DEC. 443, DE MOTT v. HAGERMAN, 8 COW. 220.

Letting on shares as common tenancy.

Cited in *Smyth v. Tankersley*, 20 Ala. 212, 56 A. D. 193, holding tenancy in common created by a letting to be paid for in a portion of specific products; *Armstrong v. Bicknell*, 2 Lans. 216, holding same of agreement to work farm on shares for single crop; *Morrill v. Mackman*, 24 Mich. 279, 9 A. R. 124, on same point; *Russell v. Russell*, 32 How. Pr. 400, holding letting of farm on shares for one year makes parties tenants in common, and not landlord and tenant; *Banta v. Merchant*, 173 N. Y. 292, 66 N. E. 13, holding same of agreement to sow crop on land and divide with owner; *Taylor v. Bradley*, 39 N. Y. 129, 100

A. D. 415, 4 Abb. App. Dec. 363, holding same though letting is for more than a single year; *Putnam v. Wise*, 1 Hill, 235, 37 A. D. 309, holding same where contract under seal for occupancy of one or possibly two years in consideration of one half of all grain raised; *Fiero v. Hubbell*, 2 Barb. 633, holding same as to a working of farm on shares with no reservation of fixed quantity of products; *Delaney v. Root*, 99 Mass. 546, 97 A. D. 52, holding same of oral contract providing for equal division of crop, the owner furnishing land, part of seed, and part of labor; *McNealy v. State*, 17 Fla. 198, holding same of agreement to cultivate land upon shares, each furnishing portion of material for making crop; *Vaughn v. Wandler*, 63 How. Pr. 378, holding agreement to work farm and operate dairy upon shares for one year, not a lease; *Caswell v. Districh*, 15 Wend. 379, holding same of agreement to sow different kinds of grain and yield a portion to landlord; *Wright v. Mosher*, 18 How. Pr. 454, holding certain agreement for working of farm dividing profits, and sharing expenses, creates tenancy in common in both farm and products; *Henderson v. Allen*, 23 Cal. 519, holding letting of mine on shares makes parties tenants in common, and not landlord and tenant; *Dinehart v. Wilson*, 15 Barb. 595, holding provision for division of specific products of land creates cotenancy regardless of the form of the contract.

Cited in reference note in 69 A. D. 507, on rights and relations of parties when land is let on shares.

Cited in notes in 23 A. D. 531, on relation arising from letting of land for share of crops; 37 A. D. 322, on duration of cotenancy created by agreement to work land on shares.

— **Common tenancy in crops produced.**

Cited in *Burdick v. Washburn*, 36 How. Pr. 468, 53 Barb. 397, holding agreement to work farm and deliver owner one half of products creates cotenancy in hay, though it was not expressly mentioned; *Moulton v. Robinson*, 27 N. H. 550, holding crops reserved in lease in lieu of rent remain property of landlord.

Cited in reference note in 35 A. D. 124, on ownership of crop where land is let on shares.

Cited in notes in 37 A. D. 317, on agreement for cultivation of land on shares as creating cotenancy in crops; 32 L.R.A. 423, on title by accession to crops, fruit, and timber wrongfully severed; 32 L. R. A. 428, on title by accession to crops, fruit and timber severed and converted with wrongful intent.

Rights in products of the soil.

Cited in note in 23 L.R.A. 468, on sale or mortgage of crops raised on shares.

— **Rights of disseisor.**

Cited in *Anderson v. Hapler*, 34 Ill. 436, 85 A. D. 318, holding owner cannot replevin wood severed from land in adverse possession; *Stockwell v. Phelps*, 34 N. Y. 363, 90 A. D. 710, holding replevin maintainable for hay severed only when trespass would lie.

Distinguished in *Harris v. Frink*, 49 N. Y. 24, 10 A. R. 318, holding mere exclusion of purchaser who sowed crop, by vendor or his agent, will not divest purchaser's title to crop so as to bar replevin.

Criticized in *Rowell v. Klein*, 44 Ind. 290, 15 A. R. 235, holding replevin maintainable for severance of crops wherever trespass would lie.

— **Rights of trespasser or disseisor.**

Cited in *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411, 43 A. R. 228. 13

N. W. 191, holding trespasser who sowed and gathered crops gets title thereto as against owner of land; *Lieberman v. Clark* (Wheeler v. Clark), 114 Tenn. 117, 69 L.R.A. 732, 85 S. W. 258, holding adverse possessor can maintain replevin for timber severed by one claiming under deed executed after such possession was taken.

Right to maintain replevin, etc.

Cited in reference notes in 52 A. D. 159, as to when replevin lies; 20 A. D. 606, on right to maintain replevin; 36 A. D. 202, on replevin by disseisee against disseisor for grain removed; 85 A. D. 327, on replevin or trover by owner of freehold for property wrongfully severed where defendant is in possession under claim of title; 24 A. D. 342, on right to recover, in replevin, crops growing on land of which one has been disseised; 46 A. D. 157, on trespass *quare clausum fregit* in favor of disseisee against disseisor.

Cited in note in 89 A. D. 429, 430, on right to try title in replevin and trover.

Possession as predicate for trespass, etc.

Cited in *Bracken v. Preston*, 1 Pinney (Wis.) 584, 44 A. D. 412, on inability to recover for continuance of trespass until possession of land is obtained.

Cited in notes in 85 A. D. 325, on re-entry on land by owner and maintenance of trespass *quare clausum* against adverse occupant; 69 L.R.A. 735, on nature of adverse possession of land as affecting right to maintain replevin by or against the person in possession for things severed.

Right to mesne profits.

Cited in note in 85 A. D. 324, on recovery of intermediate damages after regaining possession by ejectment or re-entry.

18 AM. DEC. 445, DOE EX DEM. DE PEYSTER v. HOWLAND, 8 COW. 277.

Tenancy by entirety.

Cited in *Robinson v. Eagle*, 29 Ark. 202, holding husband and wife take by entirety and not as tenants in common under statute; *Barber v. Harris*, 15 Wend. 615, which holds deed to husband and wife conveys to them by entirety, and husband having absolute control can mortgage their interest for, at least, his life; *Joos v. Fey*, 30 N. Y. S. R. 147, 9 N. Y. Supp. 275, which holds husband and wife take as tenants by entirety although conveyance is to them as "joint tenants"; *Miller v. Miller*, 9 Abb. Pr. N. S. 444, holding husband and wife take by entirety in conveyance to them subsequent to married women's acts enabling woman to take land to her sole use from any person other than her husband; *Wright v. Saddler*, 20 N. Y. 320, holding statute that every estate "granted . . . to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be a joint tenancy," does not apply to conveyance to husband and wife; *Re Simmon*, 4 Clark (Pa.) 204, holding devise to a "daughter . . . with her husband" creates an estate by entirety in the husband and wife with survivorship in husband; *Gibson v. Zimmerman*, 12 Mo. 385, 51 A. D. 168; *Brownson v. Hull*, 16 Vt. 309, 42 A. D. 517,—holding husband and wife take estate by entirety notwithstanding statute providing conveyance to two or more persons creates tenancy in common.

Cited in reference notes in 31 A. D. 62, on nature of estate taken under conveyance to husband and wife; 44 A. D. 121, on creation of estate by entirety by conveyance to husband and wife.

Cited in notes in 12 L.R.A. 514, defining tenancy by the entirety; 2 L.R.A.

434, 435, on estate created by conveyance to husband and wife; 27 A. D. 514, on creation of tenancy of the entirety on conveyance to husband and wife; 30 L.R.A. 320, on creation of entirety estates by limitation to husband and wife without specifying how they are to take; 13 L.R.A. 326, on court's attitude towards estates by entirety.

Husband and wife as parties in ejectment.

Cited in *Jackson ex dem. Hopkins v. Leek*, 19 Wend. 339, holding wife need not join with husband in action of ejectment for lands conveyed to herself and husband.

Conveyance by husband or wife.

Cited in *Davis v. Clark*, 26 Ind. 424, 89 A. D. 471, discussing question whether husband could convey use and possession of lands belonging to himself and wife by entirety; *Pursley v. Hayes*, 22 Iowa, 11, 92 A. D. 350, declaring valid deed of wife's property executed by husband during coverture, and signed, acknowledged, and delivered by wife after his death; *Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 A. D. 439, holding husband alone may demise property held in fee by himself and wife; *Meeker v. Wright*, 11 Hun, 533, holding deed from husband to wife, both being owners, without wife joining as grantor, void; *Bram v. Bram*, 34 Hun, 487, which holds deed executed by wife alone of property of which she and her husband are seized, conveys no present interest; *Zornitlein v. Bram*, 63 How. Pr. 240, holding grantee of wife alone of land owned by husband and wife may maintain partition; *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318, which holds husband cannot alone convey his interest in land held by entirety, and it remains subject to execution sale on judgment against him on death of wife.

Cited in reference notes in 22 A. D. 102, as to when deed of married woman is void; 23 A. D. 777, as to when conveyances by married women are void; 76 A. D. 418, on necessity that conveyance by married women be executed in mode prescribed by statute; 55 A. D. 413, as to when deed of married woman is void for want of proper acknowledgment; 52 A. D. 519, on invalidity of deed of married woman not acknowledged in statutory mode; 21 A. D. 256, on married women's conveyances which are not acknowledged pursuant to statute.

Validity of mortgage executed by husband alone.

Cited in *Chandler v. Cheney*, 37 Ind. 391, declaring void a mortgage executed by husband alone upon land held by entirety.

Lease of land owned by husband and wife.

Cited in *Thackeray v. Cheeseman*, 18 N. J. L. 1, holding tenant under married woman and husband, with agreement for exchange of property, but without deed, not entitled to six months' notice to quit; *Torrey v. Torrey*, 14 N. Y. 430, holding lease by husband of land owned by him and his wife expired by death of husband within term of lease.

Judgments against married women.

Cited in *Cary v. Dixon*, 51 Miss. 593, holding judgment against *feme covert* void unless record shows it to be, within special cases, authorized by law; *Gardener v. Furey*, 50 Hun, 82, 4 N. Y. Supp. 512, declaring wife cannot confess judgment so as to bind real estate of which she and her husband are tenants by entirety.

Rights of husband's creditors.

Cited in *Cook v. Kennerly*, 12 Ala. 42, which holds antenuptial contract con-

veying to trustee slaves for use of husband and wife with remainder to children does not create separate estate in wife to relieve property from husband's debts; *Pollard v. Merrill*, 15 Ala. 169, holding that a deed to trustees of slaves and horses to the separate use of husband and wife does not create a separate estate in wife relieving them from liability for husband's debts; *Hall v. Stephens*, 65 Mo. 670, 27 A. R. 302, holding execution sale against interest of husband in land owned by him and wife passes that interest subject to right of survivorship of wife.

Distinguished in *Moss v. McCall*, 12 Ala. 637, 46 A. D. 272, which holds deed of slave, property of wife, to trustees for use of husband and wife with right of survivorship, remainder over to children, does not create separate estate in wife to exclusion of husband's creditors.

Acknowledgment by married woman. — Necessity of.

Cited in *McDaniel v. Grace*, 15 Ark. 465, which holds deed executed by husband under power of attorney from wife, but not acknowledged, void as to her; *Martin v. Dwelly*, 6 Wend. 9, 21 A. D. 245, which holds deed of lands of married woman without acknowledgment as statute required a nullity; *Dodge v. Hollinshead*, 6 Minn. 51, Gil. 1, 80 A. D. 433, holding acknowledgment by wife necessary to mortgage of her property although signed by her; *Van Nostrand v. Wright*, Hill & D. Supp. 260, declaring deed by administrator who was wife of grantee, without acknowledgment as wife, void.

— Sufficiency of.

Cited in *Dewey v. Campau*, 4 Mich. 565, declaring invalid a deed of Indian and his squaw because in certificate of acknowledgment the squaw "stated" instead of "acknowledged," and it does not appear that it was taken separately as well as apart from husband.

Effect of subsequent acknowledgment.

Cited in *Osterhout v. Shoemaker*, 3 Hill, 513, discussing question of void deed made effectual by subsequent acknowledgment; *Breitling v. Chester*, 88 Tex. 586, 32 S. W. 527; *Montgomery v. Hornberger*, 16 Tex. Civ. App. 28, 40 S. W. 628,—holding subsequent acknowledgment of deed void for want of acknowledgment may operate as a new grant.

Construction of devise.

Cited in *Kent v. Armstrong*, 6 N. J. Eq. 637, which holds devise in fee with proviso that if devisee "die without heirs and intestate" property to vest in others, creates life estate with testamentary power of disposition; *Taggart v. Murray*, 53 N. Y. 233, which holds life estate devised by will is not enlarged to fee by giving power of testamentary disposition to devisee.

Distinguished and disapproved in *Armstrong v. Kent*, 21 N. J. L. 509, which holds absolute devise with proviso for limitation over if devisee "die without heirs and intestate" carries absolute property to first taker.

Relation back of act to antecedent transaction.

Cited in *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276, holding policy of insurance relates back to its date though not executed and delivered until subsequent thereto, if such was the agreement of the parties; *Condon v. Galbraith*, 106 Tenn. 14, 58 S. W. 916, holding list of lands sold for taxes cannot be authenticated by requisite certificate of clerk *nunc pro tunc* to validate tax title.

Cited in reference note in 44 A. D. 708, on relation of sheriff's deed to time when party is entitled thereto.

Cited in notes in 15 A. D. 246, on relation as a fiction of law; 15 A. D. 248,

on nonapplication of doctrine of relation to void act; 22 A. D. 711, on relation back of sheriff's deed to day of sale.

18 AM. DEC. 451, PEOPLE v. MANNING, 8 COW. 297.

Excuses for nonperformance of contracts.

Cited in Griffith v. Blackwater Boom & Lumber Co. 55 W. Va. 604, 69 L.R.A. 124, 48 S. E. 442, holding corporation dissolved before completion of contract with contractor in its employ liable for actual expenses incurred; Hillyard v. Mutual Ben. L. Ins. Co. 35 N. J. L. 415, holding war between governments of assurer and insurer excuses nonpayment of premium; Price v. Hartshorn, 44 Barb. 655, holding carrier not liable for goods thrown overboard to save ship in tempest, in absence of special contract; Carpenter v. Stevens, 12 Wend. 589, holding liability on replevin bond to return animal, excused by its death without negligence, prior to judgment.

Cited in reference note in 71 A. D. 156, as to whether act of God excuses performance of contract.

Cited in notes in 40 L. ed. U. S. 518, on what will excuse nonperformance of contract; 70 A. S. R. 832, on impossibility of performance of condition in contract; 1 E. R. C. 350, on *vis major* or inevitable accident as excusing performance of contract; 31 A. D. 140, on act of God, of the law, or of the obligee, excusing nonperformance of contract; 59 A. S. R. 281, on full performance of entire contract.

—Disabling illness or death.

Cited in Baldwin v. New York L. Ins. & Trust Co. 3 Bosw. 530, holding illness while absent by permission of insurer resulting in death and inability to return within time required, no forfeiture of policy; Wolfe v. Howes, 20 N. Y. 197, 75 A. D. 388 (affirming 24 Barb. 174), holding work done under contract not completed because of sickness recoverable on *quantum meruit*; Spalding v. Rosa, 71 N. Y. 40, 27 A. R. 7, holding theatrical proprietor excused from nonperformance of booking contract, upon proof of sickness of principal star; Sauner v. Phoenix Ins. Co. 41 Mo. App. 480, on excusableness of default in paying fire insurance premium by reason of death of insured.

Cited in notes in 37 A. R. 52, on sickness excusing nonperformance of bond; 4 L.R.A.(N.S.) 899, on insanity or illness as act of God.

—Act of third person.

Cited in Wilkinson v. First Nat. F. Ins. Co. 72 N. Y. 499, 28 A. R. 166, holding failure to bring action on policy until barred not excusable because payment was enjoined at suit of third person.

—Effect of absolute covenant.

Cited in Ames v. Belden, 17 Barb. 513, on inability to plead act of God in excuse of express covenant when compensation in damages may be awarded.

Excuses for nonappearance under bail or recognizance.

Cited in People v. McCoy, 39 Barb. 73, on inexcusableness of nonappearance unless caused by act of God, or of the law, or of the obligee; Lang v. People, 14 Mich. 439, on prevention of performance by act of God or obligee as a defense in action on recognizance; People use of Masterson v. Hathaway, 206 Ill. 42, 68 N. E. 1053, holding order directing discharge from arrest of a debtor who has taken benefit of insolvent law releases bail bond, though it is reversed on appeal.

Cited in reference note in 26 A. D. 181, as to when nonperformance of condition in bond is excused.

Cited in note in 99 A. D. 216, on act of God, of law, or of obligee, as excuse for failure of surety or bail to produce principal.

—Death or disability of principal.

Cited in *People v. Tubbs*, 37 N. Y. 586, holding inability of principal to appear on account of sickness a good defense in an action on recognizance; *Scully v. Kirkpatrick*, 79 Pa. 324, 21 A. R. 62, 33 Phila. Leg. Int. 184, holding surety in action on bond may prove sickness of principal and appearance as soon thereafter as possible; *Chase v. People*, 2 Colo. 481, holding forfeiture against principal cognizor should be set aside upon proof of sickness resulting in inability to attend; *Mather v. People*, 12 Ill. 9, holding death of principal in any recognizance subsequent to forfeiture, but before judgment on scire facias, excuses sureties; *Blake v. Niles*, 13 N. H. 459, 38 A. D. 506, holding death of principal obligor discharges bond to take poor debtor's oath within a year; *State v. Traphagen*, 45 N. J. L. 134, holding equity has discretion to relieve bail on recognizance in criminal case upon proof of inability to produce principal after default before death intervened.

—Arrest or legal detention of principal.

Cited in *People v. Bartlett*, 3 Hill, 570, holding arrest and imprisonment in another county preventing appearance a good defense to action on recognizance; *People v. Cushney*, 44 Barb. 118; *People v. Cook*, 30 How. Pr. 110,—holding non-appearance excused by fact of subsequent enlistment of principal in Army and prevention of appearance by officer in command; *Caldwell v. Com.* 14 Gratt. 698, holding surety excused by proof that principal was imprisoned in penitentiary at day called for appearance; *Steelman v. Mattix*, 38 N. J. L. 247, 20 A. R. 389, holding incarceration in county jail awaiting removal to penitentiary does not excuse performance of bond to deliver one's self to sheriff.

18 AM. DEC. 454, BRIGGS v. PENNIMAN, 8 COW. 387.

Dissolution of corporation as respects creditors.

Cited in *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, holding abandonment of business and insolvency entitles creditors to enforce their remedies; *Berthold v. Holladay-Klotz Land & Lumber Co.* 91 Mo. App. 233, holding sufferance of acts destroying the object of creation enables creditor to pursue equitable remedies; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497, holding sale of property and franchises of railroad at foreclosure sale allows administration of assets; *Combes v. Keyes* (*Combes v. Milwaukee & M. R. Co.*) 89 Wis. 297, 46 A. S. R. 839, 27 L.R.A. 369, 62 N. W. 89, holding railroad without property or election of officers for twenty-six years, dissolved so as not to be subject to suit; *State v. Real Estate Bank*, 5 Ark. 595, 41 A. D. 109, holding no forfeiture of charter by suspension of specie payments where its only effect by terms of charter was to cause notes to bear interest; *Re Independence Ins. Co.* *Holmes*, 103, Fed. Cas. No. 7,017, holding decree of state court, appointing receiver, enjoining prosecution of business and declaring a dissolution, no bar to bankruptcy proceedings; *Dewey v. St. Albans Trust Co.* 56 Vt. 476, 48 A. R. 803, holding appointment of receiver for bank insufficient as dissolution within statute allowing preferences among depositors in such a contingency; *Parsons v. Eureka Powder Works*, 48 N. H. 66, holding corporation subject to suit on note, though it had executed assignment for creditors and failed to elect officers for many years; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 86 Tex. 143, 22 L.R.A. 802, 24 S. W. 16, on insolvency and cessation of busi-

ness as a dissolution within statute declaring trust for creditors upon such a contingency.

— **Necessity of judicial or legislative declaration.**

Cited in *Ferry v. Turner*, 55 Mo. 418; *Gibbs v. Davis*, 27 Fla. 531, 8 So. 633,—holding dissolution as condition precedent to statutory liability need not be by legislative enactment or judicial decision.

— **Right to sue stockholders.**

Cited in *State Sav. Asso. v. Kellogg*, 52 Mo. 583, holding adjudication of bankruptcy under national act authorizes suit by creditors to fix liability of stockholders; *Re Jackson Marine Ins. Co.* 4 Sandf. Ch. 559, holding stockholders' liability enforceable upon substantial relinquishment of ordinary business, notwithstanding election of officers; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120, holding general assignment and abandonment of business allows enforcement of stockholder's liability; *Bradt v. Benedict*, 17 N. Y. 93, holding stockholders' liability not enforceable upon insolvency and suspension without proof of loss of all power to resume or continue; *Donnelly v. Hodgson*, 14 Mo. App. 548, holding proof that bank had ceased to receive deposits that it lacked means, and did not intend to resume business will not allow enforcement of stockholders' liability.

Distinguished in *Huguenot Nat. Bank v. Studwell*, 6 Daly, 13, holding appointment of receiver and sequestration of property no bar to creditor's action against trustees to recover a statutory penalty.

Dissolution of corporation.

Cited in reference notes in 30 A. D. 497; 42 A. D. 109,—on dissolution of corporation; 26 A. D. 115, on what constitutes dissolution of corporation; 41 A. D. 120, on dissolving of corporation by suffering act destructive of object of incorporation.

— **For nonuser.**

Cited in *University of Maryland v. Williams*, 9 Gill & J. 365, 31 A. D. 72, holding mere nonuser or misuser insufficient to justify the granting of same franchises to others; *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895, holding stockholder cannot maintain action in his own name to dissolve corporation on ground of nonuser or misuser; *Webster v. Turner*, 12 Hun, 264, holding franchises surrendered by sale of entire property accompanied by resolution of dissolution, so as to bar suit to compel carrying on of business, by a participating shareholder; *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 357, on enforcement of rights against defunct corporation without judicial dissolution thereof.

Cited in reference notes in 53 A. D. 110, on effect of nonuser as dissolving corporation; 35 A. D. 636, on forfeiture of corporate franchises by misuser or nonuser.

Cited in note in 8 L.R.A. 499, on forfeiture and dissolution of corporation for misuser of franchise.

Distinguished in *Atchafalaya Bank v. Dawson*, 13 La. 497, holding cause of forfeiture will not prevent bank from maintaining suit on discounted paper; *Bank of Niagara v. Johnson*, 8 Wend. 645, holding receiver may sue director for penalty in name of bank though it has suspended ordinary business; *Kelsey v. Pfaunder Process Fermentation Co.* 45 Hun, 10, 19 Abb. N. C. 427, holding sale to avoid litigation of property and patents to new company in consideration of stock therein will not authorize judgment of dissolution.

Proceedings for dissolution of corporation.

Cited in reference note in 21 A. D. 51, on equity jurisdiction in case of forfeiture of corporate rights by nonuser.

Cited in note in 8 A. S. R. 195, on necessity for direct proceedings by state to forfeit corporate franchises.

Liability of stockholders.

Cited in *Spence v. Shapard*, 57 Ala. 598, holding bill to enforce stockholders' liability maintainable under Alabama act upon dissolution without proof of insolvency or previous suit; *Hollingshead v. Woodward*, 107 N. Y. 96, 13 N. E. 621, holding one "ceases to be a stockholder" within an act limiting actions, upon a surrender of corporate rights and appointment of receiver.

Cited in reference notes in 28 A. D. 516, on liability of subscribers to corporate stock; 74 A. D. 541, on stockholder's liability for debts due from him to corporation.

Cited in notes in 23 A. D. 60, on liability of stockholders on their subscriptions; 40 A. D. 249; 40 L. ed. U. S. 752,—on individual liability of stockholders for corporate debts; 43 A. D. 695, on stockholders' liability in equity for corporate debts; 3 A. S. R. 838, on stockholders' liability for corporate debts as limited to extent or amount of stock.

Distinguished in *Toucey v. Bowen*, 1 Biss. 81, Fed. Cas. No. 14,107, holding stockholder cannot be sued under Indiana banking act on bank notes without proof of insolvency and that fund on deposit with state has been exhausted.

— Construction of liability statutes.

Cited in *Matthews v. Albert*, 24 Md. 527; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 A. D. 742; *Zang v. Wyant*, 25 Colo. 551, 71 A. S. R. 145, 56 Pac. 565,—holding liability for creditors fixed by statute additional to liability of stockholder to corporation; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 A. S. R. 888, 31 S. E. 673, holding words "to the amount of their respective share or shares of stock" mean additional to the loss in the corporate property; *Lewis v. St. Charles Co.* 5 Mo. App. 225, holding same as to words "to amount of stock, and no more"; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 5 So. 120; *Pettibone v. McGraw*, 6 Mich. 441; *Root v. Sinnock*, 120 Ill. 350, 60 A. R. 558, 11 N. E. 339 (affirming 24 Ill. App. 538),—holding words "to amount of stock" mean additional to amount owed or paid to corporation; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199, 8 Abb. Pr. 192, holding constitution extends liability to an amount equal and additional to the stock held; *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225, holding same under New York act; *Lane v. Morris*, 8 Ga. 468, holding charter liability of shareholder to redeem bank notes independent of liability of bank thereon; *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. 454, holding double liability under Illinois statute is for creditors, and not in favor of corporation, and is not recoverable by receiver.

Contributory liability between stockholders.

Cited in *Re Hollister Bank*, 27 N. Y. 393, 84 A. D. 292, holding statute renders shareholders in bank severally liable for a ratable amount, regardless of solvency of any other shareholder; *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315, holding statute does not render stockholders' liability to creditors ratable or proportional according to solvency of others; *Aspinwall v. Torrance*, 1 Lans. 381, holding stockholders compelled to pay debts of corporation may sue other shareholders for contribution.

Set-off by stockholder.

Cited in *Webber v. Leighton*, 8 Mo. App. 502; *Jerman v. Benton*, 79 Mo. 148; *Cahill v. Original Big Gun Beneficial & Pleasure Asso.* 94 Md. 353, 89 A. S. R. 434, 50 Atl. 1044,—holding stockholder may set off debt due him from corporation in action to enforce statutory liability; *Remington v. King*, 11 Abb. Pr. 278, holding advances to, or liabilities incurred for, corporation can be offset; *Tallmadge v. Fishkill Iron Co.* 4 Barb. 382, holding same as to directors in action to enforce their statutory liability; *Christensen v. Colby*, 43 Hun, 362, holding judgment against corporation may be offset in action for single stockholder's liability; *Richards v. Kinsley*, 14 Daly, 334, 14 N. Y. S. R. 701, holding liability for signing false report not subject to set-off but otherwise as to ordinary statutory liability; *Garrison v. Howe*, 17 N. Y. 458, holding action to enforce stockholders' liability not maintainable upon proof of payment already made on debts to amount of stock; *Agate v. Sands*, 8 Daly, 66, on whether mere advance without proof that money was used in paying debts can be offset.

Cited in note in 3 A. S. R. 871, on stockholder's right to set off debt due him from corporation in action to enforce his statutory liability for corporate debts.

Distinguished in *Briggs v. Cornwell*, 9 Daly, 436, holding that party had not shown himself entitled to set-off; *Cheever v. Gilbert Elev. R. Co.* 11 Jones & S. 478, denying right to set off by officer who misappropriated funds which corporation sues to recover.

Answer in chancery as evidence.

Cited in *Mason v. Crosby*, 3 Woodb. & M. 258, Fed. Cas. No. 9,236; *Hanson v. Patterson*, 17 Ala. 738; *Dunham v. Gates*, Hoffm. Ch. 185; *Griggs v. Woodruff*, 14 Ala. 9,—holding unresponsive allegations in answer not evidence; *Bel lows v. Stone*, 18 N. H. 465, holding matter of affirmation evidence if it be in relation to a particular upon which bill requires an answer.

Assets as fund for creditors.

Cited in *Ohio Life Ins. & T. Co. v. Merchant's Ins. & T. Co.* 11 Humph. 1, 53 A. D. 742, holding capital stock a trust fund for creditors to be used only in accordance with provisions of charter; *Wheeler v. Millar*, 90 N. Y. 353, holding unpaid subscriptions assets in equity for payment of debts; *Hightower v. Thornton*. 8 Ga. 486, 52 A. D. 412, holding amount of shares subscribed a fund in equity for creditors; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Winans v. McKean R. & Nav. Co.* 6 Blatchf. 215, Fed. Cas. No. 17,862,—holding capital stock both paid and unpaid a fund in equity for creditors; *Gratz v. Redd*, 4 B. Mon. 178, holding capital stock fraudulently misapplied may be pursued in equity into hands of purchaser with notice, as a fund for creditors; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919, holding unpaid subscriptions enforceable as fund for creditors without proof of a call or assessment; *Marr v. Bank of West Tennessee*, 4 Coldw. 471, holding assets of insolvent corporation a fund in equity for all creditors, notwithstanding diligence of any particular one; *Haskins v. Harding*, 2 Dill. 99, Fed. Cas. No. 6,196, on unpaid capital stock as fund in equity for creditors in absence of statute.

Cited in reference note in 100 A. D. 551, on unpaid stock as part of assets of insolvent corporation.

Cited in notes in 5 L.R.A. 650, on unpaid subscriptions to corporate stock as part of assets; 7 L.R.A. 707, on capital stock of corporation as trust fund.

Distinguished in *Ft. Edward & Ft. M. Pl. Road Co. v. Payne*, 17 Barb. 567, denying that there is an implied promise by stockholder to pay calls on shares.

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Equity jurisdiction to enforce rights and liabilities of stockholders.

Cited in *Mann v. Pentz*, 2 Sandf. Ch. 257, holding receiver may sue a single stockholder in equity on unpaid subscription; *United Glass Co. v. Vary*, 79 Hun, 103, 29 N. Y. Supp. 636, holding equity has jurisdiction to enforce shareholders' liability to prevent a multiplicity of suits; *Eames v. Doris*, 102 Ill. 350, holding equity has jurisdiction to enforce statutory personal liability of stockholders as a fund for creditors; *Bogardus v. Rosendale Mfg. Co.* 4 Sandf. 89, holding creditor with demand unestablished at law cannot maintain bill for discovery of stockholders without proof of insolvency; *Stang's Appeal*, 10 W. N. C. 409, holding equity will entertain creditors' suit to enforce liability of a number of stockholders though all are not parties; *Terry v. Calnan*, 4 S. C. 508, holding action by single creditor to enforce statutory liability of a number of shareholder's equitable so as to require all other creditors as parties; *Sands v. Kimbark*, 39 Barb. 108, on jurisdiction of equity in creditors' suit to enforce liability on members of mutual insurance company; *Weeks v. Love*, 50 N. Y. 568, on jurisdiction of equity to take account and enforce liability of stockholders upon insolvency; *Empire City Bank's Case*, 8 Abb. Pr. 192, 18 N. Y. 199, on jurisdiction of equity to administer the affairs of insolvent corporations; *Walker v. Crain*, 17 Barb. 119, on right of stockholder being sued separately at law by two creditors, or any other stockholder, to have administration in equity.

Cited in notes in 3 A. S. R. 856, on method of enforcing statutory liability of stockholders for corporate debts; 43 A. D. 702, on equitable remedy to compel payment of corporate debts by stockholders; 3 A. S. R. 811, on equitable jurisdiction to compel payment of unpaid subscriptions or to make call for benefit of corporate creditors.

— Election of legal or equitable remedies.

Cited in *Pfohl v. Simpson*, 50 How. Pr. 341; *Mathez v. Neidig*, 72 N. Y. 100,— holding creditor has his election to sue stockholder at law or bring action in equity for an accounting between all parties; *Ladd v. Cartwright*, 7 Or. 329, holding remedy of creditor against shareholder for individual liability is in equity, where all rights can be adjusted in one action; *Farmers Loan & T. Co. v. Funk*, 49 Neb. 353, 68 N. W. 520, holding statute giving liability of stockholder to creditor does not allow action at law in his own name; *Marsh v. Kaye*, 168 N. Y. 196, 61 N. E. 177 (dissenting opinion), on right of creditor to sue stockholder either at law or in equity.

— Form of decree.

Cited in *Cushman v. Shepard*, 4 Barb. 113, holding decree in suit by creditor must direct reference to ascertain amount of debts, names of stockholders, and their possible advancements.

18 AM. DEC. 463, LA FROMBOIS v. JACKSON, 8 COW. 589.**What constitutes adverse possession.**

Cited in *Clark v. Wood*, 34 N. H. 447, holding claim of right essential; *Miller v. Platt*, 5 Duer, 272, holding it necessary that there be an intent to hold and a claim of title; *Woodward v. McReynolds*, 1 Chand. (Wis.) 244, 2 Pinney (Wis.) 268, holding fact of possession and intention of occupant, the only tests; *People ex rel. Cooper v. Fields*, 1 Lans. 222, holding mere possession without claim of right, however long continued, insufficient; *Miner v. New York*, 5 Jones & S. 171, holding there must be an actual entry, accompanied by claim of hostile title, continued for twenty years; *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No.

2,133; *Bradstreet v. Clarke*, 12 Wend. 602,—holding intention and fact of possession without regard to existence of a legal title, the only tests; *Spalding v. Grigg*, 4 Ga. 75, holding mere naked possession, commenced under permission, insufficient; *Badger v. Lyon*, 7 Ala. 564, holding mere trespass without claim or color of title insufficient; *Link v. Doerfer*, 42 Wis. 391, 24 A. R. 417, holding possession of mere intruder becomes adverse upon the recording of tax deed to himself; *Davis v. Bowmar*, 55 Miss. 671, holding entry under parol gift, though permissive and friendly in ordinary sense, is hostile and adverse to legal title; *English v. Doe*, 7 Ga. 387, on necessity of color of title or claim of right.

Cited in reference notes in 27 A. D. 401, on adverse possession; 26 A. D. 102, on requisites to obtain title by adverse possession; 36 A. D. 683, on claim of title in adverse possession; 50 A. D. 114, on sufficiency of entry under color of title to constitute adverse possession; 58 A. D. 553, on entry under color of title, being sufficient to constitute adverse possession; 47 A. D. 465, on evidence of adverse holding; 4 A. S. R. 584, on length of time required to bar title by adverse possession.

Cited in notes in 28 A. S. R. 451, on adverse possession; 15 L.R.A. (N.S.) 1209, on claim of right as essential element in adverse possession; 4 L.R.A. 641, on necessity of occupation being open and notorious to operate as disseisin by adverse possession.

Distinguished in *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 A. R. 479, denying right to easement by twenty years' permissive user.

— Good faith or intent of claimant.

Cited in *Davis v. Furlow*, 27 Md. 536, holding intention to claim adversely essential so as to make disseisin by mistake, ineffectual; *Whitney v. Powell*, 2 Pinney (Wis.) 115, 1 Chand. (Wis.) 52, holding good faith on part of occupant essential; *Humbert v. Trinity Church*, 24 Wend. 587, holding neither fraud nor knowledge on part of occupant as to weakness of title will excuse inactivity of owner; *Livingston v. Peru Iron Co.* 9 Wend. 511, holding deed fraudulently obtained not available as foundation of adverse possession; *Hall v. McCormick*, 7 Tex. 269, on whether a fraudulent deed can be the foundation of an adverse possession.

Disapproved in *Lewis v. Upton*, 90 App. Div. 453, 86 N. Y. Supp. 397 (dissenting opinion), on adverseness of possession under a fraudulent deed.

— Necessity of paper title.

Cited in *Poor v. Horton*, 15 Barb. 485, holding it only necessary that the holding be in good faith, under claim and color of title, and exclusive of any other right; *McClellan v. Kellogg*, 17 Ill. 498, holding it necessary that land be claimed openly and exclusively, though not under a writing; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Clapp v. Bromagham*, 9 Cow. 530,—holding possession under claim of title with or without a valid deed, adverse; *Horne v. Carter*, 20 Fla. 45, holding deed or other writing unnecessary where there is actual possession with oral claim of exclusive right; *Sanford v. Cloud*, 17 Fla. 557, holding entry and continued adverse possession under claim of title, though not under paper writing, sufficient; *Tennessee Coal, I. & R. Co. v. Linn*, 123 Ala. 112, 82 A. S. R. 108, 26 So. 245, holding adverse possession upon entry under parol contract of sale limited to *possessio pedis*.

Cited in reference note in 26 A. D. 103, on necessity of color or claim of title.

Cited in notes in 15 L.R.A. (N.S.) 1226, on necessity of color of title in the abstract; 15 L.R.A. (N.S.) 1237, on necessity of color of title by purchasers; 88 A. S. R. 705, on necessity of valid instrument to color of title.

Explained in *Jackson ex dem. Constantine v. Warford*, 7 Wend. 62, holding possession under claim of right but without written conveyance, coextensive with actual occupancy only.

— Sufficiency of color of title.

Cited in *Wood v. Conrad*, 2 S. D. 334, 50 N. W. 95, holding it necessary that conveyance be good in form, contain a description of property, profess to convey title, and be duly executed; *Jackson ex dem. Gillet v. Hill*, 5 Wend. 532, holding that bringing of ejectment is not sufficient to give color of title to a subsequent possession; *Sands v. Hughes*, 53 N. Y. 287, holding entry under color of title adverse however groundless the title; *Hanna v. Renfro*, 32 Miss. 125, holding deed sufficient however defective it may be or however unfounded the title; *Welborn v. Anderson*, 37 Miss. 155, holding adverse possession under a void claim or color of title will bar legal title; *Moody v. Fleming*, 4 Ga. 115, 48 A. D. 210, holding possession under void grant may ripen into title; *Hoopees v. Auburn Waterworks Co.* 37 Hun, 568, holding deed, proper in form but defective in title, sufficient; *Reformed Church v. Schoolcraft*, 65 N. Y. 134 (reversing 5 Lans. 206), holding possession under invalid conveyance with claim of title, continued for twenty years sufficient; *Gatling v. Lane*, 17 Neb. 77, 22 N. W. 227, holding sufficient if instrument purport to convey title; *Nieto v. Carpenter*, 21 Cal. 455, holding possession not adverse either at common or Spanish law unless instrument purports on its face to convey title; *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170, holding possession under deed void on its face for want of title in grantor, adverse; *Grant v. Fowler*, 39 N. H. 101; *Farrar v. Fessenden*, 39 N. H. 268,—holding it unnecessary that possession should have commenced under valid deeds; *Sunol v. Hepburn*, 1 Cal. 254 (dissenting opinion), on sufficiency of deed executed by Indian, though void because not executed in accordance with statute; *Nash v. Fletcher*, 44 Miss. 609, holding conveyance under void order of probate court sufficient, provided there was no notice of defect; *Packard v. Moss*, 68 Cal. 123, 8 Pac. 818, holding sheriff's deed at execution sale under default judgment while demurrer to complaint was on file, sufficient; *Woodworth v. Fulton*, 1 Cal. 295 (dissenting opinion), on sufficiency of a deed proper on its face though executed by officer of town without authority; *Miller v. Garlock*, 8 Barb. 153, holding void proceeding for laying out a private right may form basis of an adverse user; *McKeghan v. Hopkins*, 14 Neb. 361, 15 N. W. 711, holding tax certificate insufficient.

Cited in reference notes in 36 A. D. 180, on what is color of title and necessity of, to support adverse possession; 65 A. D. 633, on possession under bond for deed or contract of purchase as not adverse to vendor.

Cited in notes in 15 L.R.A.(N.S.) 1219, 1222, on what constitutes color of title; 14 A. D. 581, on necessity of writing to color of title; 88 A. S. R. 719, on contract to convey as color of title.

— Possession of purchaser under contract to convey.

Cited in *Stark v. Starr*, 1 Sawy. 15, Fed. Cas. No. 13,307; *Briggs v. Prosser*, 14 Wend. 227,—holding contract to convey sufficient after purchaser has entitled himself to a deed; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508, holding executory contract stipulating for future conveyance of title sufficient as to hostile claimants; *McQueen v. Ivey*, 36 Ala. 308; *Ormond v. Martin*, 37 Ala. 598,—holding possession under bond not adverse against vendor until purchase money is paid; *Furlong v. Garrett*, 44 Wis. 111; *Simpson v. Sneclode*, 83 Wis. 201, 53 N. W. 499,—holding possession under ex-

ecutory contract adverse to vendor after payment of purchase money; *Vrooman v. Shepherd*, 14 Barb. 441; *Coogler v. Rogers*, 25 Fla. 853, 7 So. 381,—holding possession under executory contract of sale is adverse except as to vendor; *Ward v. Cochran*, 18 C. C. A. 1, 36 U. S. App. 307, 71 Fed. 127, holding possession of vendee in contract of sale who paid purchase money, adverse to vendor; *Fosgate v. Herkimer Mfg. & Hydraulic Co.* 12 Barb. 352, holding payment of consideration makes agreement for sale, tantamount to deed, as a foundation for possession; *Fain v. Garthright*, 5 Ga. 6, holding possession under bond for title adverse and under color of title against stranger though purchase money has not been paid; *Hart v. Bostwick*, 14 Fla. 162, holding error to refuse instruction that possession under contract of sale could not be adverse as to seller without proof of execution.

Criticized in *Allen v. Smith*, 6 Blackf. 527, holding possession under bond for title not adverse against conveyance from true owner.

— Possession under public grant or authority.

Cited in *Cawley v. Johnson*, 21 Fed. 492, holding possession under receipt of receiver of land office describing land, adverse; *Hindley v. Manhattan R. Co.* 185 N. Y. 335, 78 N. E. 276, holding erection and operation of elevated railroad in street under legislative and municipal grants, continued for twenty years, gives title to easement from abutting owners.

— As to cotenants.

Cited in *Millard v. McMullin*, 68 N. Y. 345, holding possession adverse upon purchase, assumption of exclusive ownership and execution of purchase money notes; *Abernathie v. Consolidated Virginia Min. Co.* 16 Nev. 270, holding possession with claim of entire estate under grant from one cotenant continued for twenty years gives title to entire tract; *Price v. Hall*, 140 Ind. 314, 49 A. S. R. 196, 39 N. E. 941, holding *contra* of possession by grantee of entire estate unless there was an intent to oust.

Possession as evidence of title.

Cited in note in 60 A. D. 602, on possession as evidence of title.

Limitations against state.

Cited in *Wright v. Phipps*, 90 Fed. 556, holding statute requires possession inconsistent with state's title continued forty years to bar its claim; *People v. New York*, 8 Abb. Pr. 7, 17 How. Pr. 56, 28 Barb. 240, holding neither common-law rule nor the statute making conveyances of land held adversely void, applies to the state or its officers; *People v. Van Rensselaer*, 9 N. Y. 291, on necessity of adverse possession in defendant setting up statute in action by people.

Cited in reference note in 65 A. D. 636, on running of limitations against state.

Possession against grantee of government.

Cited in *Harges v. Congressional Twp.* 29 Ind. 70; *Chicago, R. I. & P. R. Co. v. Allfree*, 64 Iowa, 500, 20 N. W. 779,—holding grantee of government barred by adverse possession for statutory period after accrual of title, though it commenced before.

Cited in note in 76 A. S. R. 490, 491, on possession of state lands as between individuals.

Claim of right by implication.

Cited in *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546, holding "claim of right" may be implied from manner of occupancy and acts of ownership; *New York C.*

& *H. R. R. Co. v. Brennan*, 12 App. Div. 103, 42 N. Y. Supp. 529, holding occupancy of city lot in manner customary among owners implies claim of title; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441, holding occupancy and improvement of farm in good faith implies claim of right.

Presumption as to character of possession.

Cited in *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540, holding possession presumed in subordination to legal title unless proved adverse; *Brown v. Lipcomb*, 9 Port. (Ala.) 472, holding presumption that slave is held in subordination to legal title may be rebutted by proof of disclaimer or conversion.

Requisite certainty in verdict.

Cited in *Thompson v. People*, 23 Wend. 537, on refusal to pronounce judgment on an uncertain or imperfect verdict though able to be made out by reference.

— Special verdict.

Cited in *Williams v. Willis*, 7 Abb. Pr. 90; *Eisemann v. Swan*, 6 Bosw. 668,—holding it must find all facts so as to enable court to make decision without resort to evidence; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033, holding it should find inferential, and not merely evidentiary, facts; *Chicago & N. W. R. Co. v. Dunnleavy*, 129 Ill. 132, 22 N. E. 15, holding it should find facts, and not mere evidence of facts, so as to leave nothing for court except questions of law.

Cited in reference notes in 59 A. S. R. 918, on requisites of special verdict; 57 A. S. R. 944, on presumption as to existence of facts not included in special verdict.

Cited in note in 1 L.R.A. 303, on necessity that special verdict find facts, and not evidence of facts.

Adverse possession as question for jury.

Cited in *Bissing v. Smith*, 85 Hun, 564, 33 N. Y. Supp. 123, holding question as to whether party was holding actual, adverse possession with claim of right, for jury.

Continuity of possession.

Cited in *Hamilton v. Boggess*, 63 Mo. 233, holding it not broken by absence from land occasioned by military order.

Cited in note in 13 A. D. 332, on tacking successive possessions to make out title by adverse possession.

Character of statute of limitation.

Cited in *Sheldon v. Adams*, 41 Barb. 54, 18 Abb. Pr. 406, on statute as one of repose.

Titles prior to Revolution.

Cited in *People v. Livingston*, 8 Barb. 253, holding titles acquired prior to Revolution not valid unless they emanated from English or Dutch Crown.

18 AM. DEC. 491, VAN BEUREN v. WILSON, 9 COW. 158.

Wages of seamen on lost voyage.

Cited in *Daniels v. Atlantic Mut. Ins. Co.* 24 N. Y. 447, holding seamen not entitled to wages unless freight is earned on voyage; *Wells v. Meldrum*, 1 Blatchf. & H. 342, Fed. Cas. No. 17,402, holding seamen of vessel condemned as unseaworthy may bring action against master for two months' wages allowed by statutes; *Swift v. Tatner*, 89 Ga. 660, 32 A. S. R. 101, 15 S. E. 842, holding seizure of ship under attachment did not excuse owners from performing contract for wages.

— **Remedy for recovery.**

Distinguished in *Wilson v. Borstel*, 73 Me. 273, holding seaman's wages allowed by Federal statutes may be recovered in common-law action.

Duty of owners as to libelled or arrested vessel.

Cited in *American Ins. Co. v. Ogden*, 20 Wend. 287 (reversing 15 Wend. 532), holding it duty of owners to furnish master with credit voyage requires.

18 AM. DEC. 497, RUST v. GOTT, 9 COW. 169.

Validity of wagering agreement.

Cited in *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055, holding gambling agreement void as based upon illegal consideration.

Cited in reference notes in 36 A. D. 216, on validity of wagers; 19 A. D. 647; 44 A. D. 361,—on illegality of wagers.

— **On elections.**

Cited in *Hill v. Kidd*, 43 Cal. 615; *Ball v. Gilbert*, 12 Met. 397,—holding wager on event of election, illegal and void; *Russell v. Pyland*, 2 Humph. 131, 36 A. D. 307, holding it good defense that note was won on wager on election; *Horn v. Foster*, 19 Ark. 346, holding wager won upon election not subject of set-off; *Clark v. Gisbon*, 12 N. H. 386, on legality of wager on election to presidency of United States.

Cited in reference notes in 36 A. D. 458, on wagers on result of election; 33 A. D. 136, on effect of wagers on elections; 42 A. D. 230; 55 A. D. 419,—on invalidity of wager on event of election.

Cited in notes in 18 L.R.A. 862, on legality of betting on elections; 11 A. R. 58, on validity of wagers on result of election; 37 A. S. R. 702, on validity and enforceability of election wagers.

Recovery of wagers.

Cited in *Hickerson v. Benson*, 8 Mo. 11, 40 A. D. 118, holding that where loss may be foreseen with moral certainty, betting contract may not be rescinded to allow recovery; *Morgan v. Groff*, 4 Barb. 524, holding money deposited with agent to make bet may be recovered, while contract is executory; *Brush v. Keeler*, 5 Wend. 250, holding action will not lie to recover bet made after election previous to result known; *Fowler v. Van Surdam*, 1 Denio, 557, holding money bet on result of election may be recovered from stakeholder; *Morgan v. Pettit*, 4 Ill. 529, holding amount of wager on election in another state may be recovered by action.

Cited in reference note in 40 A. D. 421, on right to recover money lost in gaming.

Conclusiveness of certificate of election.

Cited in reference notes in 53 A. D. 72, on conclusiveness of certificate of election; 62 A. D. 456, on effect of certificate of election as evidence of matters contained therein; 78 A. D. 192, on certificate of election as prima facie evidence of result; 60 A. D. 773, on certificate of election granted on returns of board of canvassers as only prima facie evidence of matters stated therein.

18 AM. DEC. 501, HYDE v. STONE, 9 COW. 230, Later trial in 7 Wend. 354, 22 A. D. 582.

Rights and liabilities as between cotenants generally.

Cited in reference notes in 75 A. D. 171, on conveyance of his interest by tenant in common; 66 A. D. 473, on right of tenant in common of personalty to sue in assumpsit cotenant who has sold the common property.

Cited in note in 16 A. S. R. 660, on sale by one tenant in common of chattels.

Conversion as between cotenants.

Cited in *Osborn v. Schenck*, 83 N. Y. 201, holding trover will lie for destruction or sale of property by cotenant; *Dyckman v. Valiente*, 42 N. Y. 549, holding part owner of property need not show destruction by co-owners to bring conversion; *White v. Osborn*, 21 Wend. 72, holding trover will lie for sale of whole property held in common, by one of cotenants; *Perry v. Granger*, 21 Neb. 579, 33 N. W. 261; *Farr v. Smith*, 9 Wend. 338, 24 A. D. 162; *Weld v. Oliver*, 21 Pick. 559,—holding trover will lie for sale of personal property held in common, by one of cotenants; *The Two Marys*, 10 Fed. 919, holding one part owner of property can recover in trover for destruction or sale by other; *White v. Brooks*, 43 N. H. 402, holding cotenant may sue for money had and received for common property wrongfully sold; *Winner v. Penniman*, 35 Md. 163, 6 A. R. 385, holding trover will lie against one joint owner of note who surrendered it without authority of other; *Robinson v. Dickey*, 143 Ind. 205, 52 A. S. R. 417, 42 N. E. 679, holding trover or replevin will not lie against the co-owner in exclusive possession who does not deny title of other; *Tyler v. Taylor*, 8 Barb. 585, holding trover will not lie by tenant in common against cotenant for dispossession; *Frans v. Young*, 24 Iowa, 375, holding joint owner of personal property cannot sell or pledge interest of co-owner; *Hyer v. Caro*, 17 Fla. 332, holding part owner of ship cannot recover from co-owner except for acts which deprive him of control; *Hyde v. Stone*, 7 Wend. 354, 22 A. D. 582, holding trover will lie by son for personal estate of deceased father.

Cited in reference notes in 24 A. D. 36; 52 A. D. 77,—on trover against cotenant; 24 A. D. 164, as to when tenant in common may maintain trover against cotenant; 24 A. D. 266, as to when trespass or trover will lie by one cotenant against another; 27 A. D. 574, on destruction of common chattel by cotenant as conversion; 22 A. D. 594, on conversion of property of cotenancy by sale or destruction thereof.

Cited in notes in 21 A. D. 166, on conversion by tenant in common; 24 A. S. R. 818, on conversion by cotenant in chattels; 12 L.R.A. 264, on liability of tenant in common in trover who sells the common property.

Trespass by cotenant.

Cited in *Moulton v. Robinson*, 27 N. H. 550, holding trespass will lie against sheriff for selling whole of property on execution against one cotenant; *King v. Phillips*, 1 Lans. 421, holding trespass will lie against tenant by cotenant who is dispossessed.

Sale of property by qualified owner as conversion.

Cited in *White v. Phelps*, 12 N. H. 382, holding trover will lie against mortgagor who sells entire property, excluding mortgagee; *Millar v. Allen*, 10 R. I. 49, holding mortgagor who again mortgages property and gives possession without notice of prior mortgage guilty of conversion.

Personal property of wife.

Cited in *Jordan v. Jordan*, 52 Me. 320, holding personal property of wife, vested at common law absolutely in husband; *Hopper v. McWhorter*, 18 Ala. 229, holding husband becomes tenant in common in personal property held by wife with others.

Directed verdict.

Cited in *Wilcox v. Hoch*, 62 Barb. 509, holding directing a verdict, subject to opinion of general term error, when there are disputed questions of fact.

Distinguished in *People v. Cook*, 8 N. Y. 67, 59 A. D. 451, holding court rightly directed verdict for plaintiff where defense wholly failed.

18 AM. DEC. 503, WHITBECK v. WHITBECK, 9 COW. 266.**Right to specific performance of contract.**

Cited in reference note in 30 A. S. R. 50, on title necessary to give right to specific performance.

Action for price of land.

Cited in *Walcott v. Ronalds*, 2 Robt. 617, holding party to whom land is conveyed absolutely to sell for another, liable for proceeds; *Basford v. Pearson*, 9 Allen, 387, 85 A. D. 784, holding assumpsit will lie to enforce promise to pay price for land sold; *Nugent v. Teachout*, 67 Mich. 571, 35 N. W. 254, holding price agreed for sale of land recoverable under counts of lands sold and conveyed.

— Action on agreements collateral to sale.

Cited in *Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99, holding agreement to pay lien of attorney enforceable against purchaser with notice; *Lewis v. Harris*, 31 Ala. 689, holding action at law will lie on promise made in consideration of waiver of equitable right.

Sufficiency of consideration.

Cited in reference note in 26 A. D. 109, on sufficiency of consideration for promise.

Oral contract for sale of land.

Cited in reference notes in 72 A. S. R. 847, on specific performance of verbal contract for sale of land; 55 A. S. R. 562, on part performance of contract for purchase of land within statute of frauds.

Parol evidence as to writing.

Cited in reference note in 24 A. S. R. 659, on applicability of parol evidence rule to parties not in privity.

Cited in note in 20 L.R.A. 105, on parol evidence of some deed to be performed by grantee.

— As to consideration generally.

Cited in *Jones v. Ward*, 10 Yerg. 160, holding receipt may be explained by parol testimony.

Cited in reference notes in 20 A. D. 153; 26 A. D. 126,—on parol evidence as to consideration.

Cited in note in 23 A. D. 526, on parol evidence to show want of consideration.

— Consideration for deed.

Cited in *Trimmer v. Trimmer*, 13 Hun, 182; *Stackpole v. Robbins*, 47 Barb. 212,—holding parol evidence admissible to contradict consideration clause in deed; *Rapelye v. Anderson*, 4 Hill, 472, holding parol evidence admissible to prove a greater or less consideration of the same kind as that expressed; *Taggart v. Stanbery*, 2 McLean, 543, Fed. Cas. No. 13,724, holding parol admissible to show consideration expressed in conveyance had not been paid; *McGehee v. Rump*, 37 Ala. 651, on parol evidence to explain consideration in deed; *Harwell v. Fitts*, 20 Ga. 723, holding recital of payment of consideration in deed does not estop party to deny it; *Frink v. Green*, 5 Barb. 455, holding parol admissible to show actual consideration for deed; *Taylor v. Baldwin*, 10 Barb. 582, holding strangers to deed may, to prevent fraud, show by parol true character of transaction.

Cited in reference note in 29 A. D. 730, on conclusiveness of acknowledgment of receipt of consideration in deed.

Cited in note in 30 A. D. 117, on parol evidence as to consideration clause of deed.

Persons estopped by deed.

Cited in *Pacific Biscuit Co. v. Dugger*, 42 Or. 513, 70 Pac. 523, holding rule that written instrument cannot be varied by parol applies only between parties and privies; *Earle v. Crane*, 6 Duer, 564, holding written agreement concludes parties and privies, but not strangers.

Contract to pay another's debt.

Cited in *Robinson v. Gilman*, 43 N. H. 485, holding statute of frauds does not apply to promise to pay debt of another which is also party's debt; *Lee v. Newman*, 55 Miss. 365, holding agreement to pay creditor of promisee not within statute of frauds.

Cited in notes in 21 A. D. 556, on parol undertaking to answer for debt or default of another; 95 A. D. 257, on original promise to pay another's debt not being within statute.

New trial for cumulative evidence.

Cited in *Beebe v. Beebe*, 2 Mich. N. P. 144, holding newly discovered evidence, merely cumulative, no ground for new trial.

Cited in reference notes in 38 A. D. 731, on discovery of cumulative evidence as ground for new trial; 38 A. D. 105; 53 A. D. 185,—on newly discovered evidence as ground for new trial.

18 AM. DEC. 508, BAKER v. STACKPOOLE, 9 COW. 420.**Declarations of partner.**

Cited in reference notes in 36 A. S. R. 632, as to whether declarations of partner bind firm; 22 A. D. 386, on power of partner to bind firm by sealed instrument.

— After dissolution generally.

Cited in *Benedict v. Hecox*, 18 Wend. 490, holding declarations of partner as to acts before dissolution, incompetent; *Doughton v. Tillay*, 4 Blackf. 433, discussing admissibility of admissions of one partner after dissolution, against firm; *Brisban v. Boyd*, 4 Paige, 17; *Burns v. McKenzie*, 23 Cal. 101,—holding admissions by partner after dissolution, not competent to bind copartner concerning partnership business; *Thompson v. Bowman*, 6 Wall. 316, 18 L. ed. 736, holding declarations of partner in ownership of land, not competent after its sale to bind other partners; *Bispham v. Patterson*, 2 McLean, 87, Fed. Cas. No. 1,441, holding admissions of late partner not evidence to bind firm.

Cited in reference note in 25 A. D. 363, on admissions by partner after dissolution.

Cited in note in 40 A. S. R. 567, on rights, liabilities, and remedies resulting from admission of new partner after dissolution.

— Acknowledgments of debt after dissolution.

Cited in *Willis v. Hill*, 19 N. C. (2 Dev. & B. L.) 231, 31 A. D. 412, holding admissions after dissolution incompetent to establish debt due by partnership; *Hart v. Woodruff*, 24 Hun, 510, holding statement of account due third party binding, only on partner making it; *Atwood v. Gillett*, 2 Dougl. (Mich.) 206, holding acknowledgment of partnership debt not binding on copartner; *Tate v. Clements*, 16 Fla. 339, 26 A. R. 709, holding admission of debt by partner does not prevent statute of limitations running; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 A. D. 322, holding promise to pay by partner after dissolution will not revive against firm debt barred by statute; *Lusk v. Smith*, 8 Barb. 570, holding partner cannot, after dissolution, bind copartners on note under general authority to adjust debts; *Fontaine v. Lee*, 6 Ala. 889, holding partner cannot, after dissolution, bind

copartners on note without authority; *Owings v. Low*, 5 Gill & J. 134, holding declarations of partner after dissolution cannot establish contract against co-partner.

Disapproved in *Mann v. Locke*, 11 N. H. 246, holding admissions of partner after dissolution competent against firm as to contracts prior thereto.

Subsequent admissions to bind third persons.

Cited in *Whetmore v. Murdoch*, 3 Woodb. & M. 380, Fed. Cas. No. 17,509, holding admissions of insolvent as to prior transactions not competent in suit in which assignees defend; *Lacoste v. Chief Justice*, 28 Tex. 420, holding admissions by administrator after his discharge, not evidence against sureties.

Application of payments.

Cited in *Camp v. Smith*, 136 N. Y. 187, 32 N. E. 640, holding court will make such applications of general payments as equity and justice require; *Stone v. Seymour*, 15 Wend. 19, on doctrine of application of payments.

Cited in reference notes in 29 A. D. 691; 37 A. D. 625,—on application of payments; 39 A. D. 599, on how application of payments is made.

Cited in notes in 12 L.R.A. 713, on rule as to application of payments; 3 E. R. C. 355, on appropriation of payments.

—As between existing and contingent debts.

Cited in *Shipsey v. Bowery Nat. Bank*, 4 Jones & S. 501, holding general payments should be applied to indebtedness then existing; *Brown v. Shirk*, 75 Ind. 266, holding general payments applied on sums due rather than on sums not due; *Thomas v. Kelsey*, 30 Barb. 268, holding money collected on execution should be applied to fixed rather than contingent liability; *Hunter v. Osterhoudt*, 11 Barb. 33, holding payments of rent, generally, must be applied on rent due at time; *Lanier v. Wyman*, 5 Robt. 147, holding landlord could apply general payment of rent to secured or unsecured liability.

—As between sole or joint debts.

Cited in *Gass v. Stinson*, 3 Sumn. 98, Fed. Cas. No. 5,262, holding partner paying private creditor, who is also partnership creditor, presumed to pay private account; *Hatch v. Benton*, 6 Barb. 28, holding a payment specifically applied could not be set off between different parties.

—Right to make or direct application.

Cited in *Bayley v. Wynkoop*, 10 Ill. 449; *Lachomette v. Thomas*, 5 Rob. (La.) 172; *Allen v. Culver*, 3 Denio, 284; *Horn v. Planters' Bank*, 32 Ga. 1,—holding debtor has right of application of payment between several items of indebtedness; *Emery v. Tichout*, 13 Vt. 15, holding payments are to be applied according to understanding of parties; *Bell v. Bell*, 20 S. C. 34, holding creditors had right in absence of direction, to apply payment to secured or unsecured debt; *Brice v. Hamilton*, 12 S. C. 32; *Jones v. Kilgore*, 2 Rich. Eq. 63,—holding party receiving payments has right of application when no directions are given; *Seymour v. Marvin*, 11 Barb. 80, holding debtor may say on what account any given payment shall be applied; *Van Rensselaer v. Roberts*, 5 Denio, 470, holding general payment made by one indebted individually and jointly may be applied by creditor to either account; *Pattison v. Hull*, 9 Cow. 747; *Sherwood v. Haight*, 26 Conn. 432, holding person indebted on different accounts may have payments applied to whichever he pleases.

Cited in reference note in 33 A. S. R. 520, on debtor's application of payments.

Distinguished in *Long Island Bank v. Townsend*, Hill & D. Supp. 204, holding

deposits of indorser on individual account should not, without his assent, be applied to note.

18 AM. DEC. 516, McCARTEE v. ORPHAN ASYLUM SOC. 9 COW. 437.

Interpretation of wills.

Cited in *Re Philadelphia*, 2 Brewst. (Pa.) 462, holding equity may apply "cy pres" interpretation to one part of will so whole may stand; *McGraw v. Cornell University*, 45 Hun, 354, holding property not effectually disposed of by will passes to heirs or next of kin.

Construction of statutes to give effect to terms.

Cited in *Re Walton*, Deady, 598, Fed. Cas. No. 17,130, holding statutes should be construed to make them operative if possible; *Drake v. Drewry*, 109 Ga. 399, 35 S. E. 44, holding every part of a statute must be viewed in connection with whole; *Vallance v. Bausch*, 8 Abb. Pr. 68, 17 How. Pr. 243, construing acts respecting separate property of married women; *Spratt v. Huntington*, 4 Thomp. & C. 551, construing statutes on motion to vacate irregular order.

— Conflicting and repugnant terms.

Cited in *Morgan v. Leland*, 1 Code Rep. 123, holding conflicting provisions of Code should be construed so as to have both stand; *Hummer v. Hummer*, 3 G. Greene, 42, holding seemingly repugnant statutes gave courts concurrent jurisdiction.

— General and specific provisions.

Cited in *State, Bartlett, Prosecutor, v. Trenton*, 38 N. J. L. 64, holding specific directions in legislative act not affected by general prohibitory clause in same act; *Gabel v. Williams*, 39 Misc. 489, 80 N. Y. Supp. 489, holding tax law provision for redemption governs as being more just than that in another act.

— Statutes in "pari materia."

Cited in *Mitchell v. Duncan*, 7 Fla. 13; *Prather v. Jeffersonville, M. & I. R. Co.* 52 Ind. 16; *Dugan v. Gittings*, 3 Gill. 138, 43 A. D. 306; *Smith v. People*, 47 N. Y. 330, 1 Cowen Crim. Rep. 469; *Greene v. New York*, 60 N. Y. 303; *People v. Deming*, 13 How. Pr. 441, 1 Hilt. 271; *State ex rel. Scovill v. Moorehouse*, 5 N. D. 406, 67 N. W. 140,—holding statutes *in pari materia* relating to same things must be read together; *Tyler v. Wells*, 2 Mo. App. 526, holding acts of Congress *in pari materia*, should be construed together; *Bamberg v. Stern*, 1 N. Y. City Ct. Rep. 342, holding acts *in pari materia* are to be taken together as if one law; *Palmer v. Foley*, 44 How. Pr. 308, holding intention of legislature must be ascertained by comparison of act with others *in pari materia*; *Casey v. Harned*, 5 Iowa, 1, holding effect will be given to several statutes on same subject if possible; *Wardlow v. Home for Incurables*, 4 Dem. 473, holding statutes on same subject should be construed so as to be consistent; *Davidson v. New York*, 2 Robt. 230 (dissenting opinion), on construction of statutes *in pari materia*.

Cited in reference notes in 38 A. D. 328; 41 A. S. R. 633,—on construction of statutes *in pari materia*; 23 A. D. 477; 43 A. D. 469; 58 A. D. 392,—on construction together of statutes *in pari materia*; 10 A. S. R. 53, on construing together statutes taking effect simultaneously.

Repeal of statutes.

Cited in *Hirm v. State*, 1 Ohio St. 15, holding act to restrain sale of spirituous liquors did not, by implication, revoke licenses under previous act; *New York*

v. Walker, 4 E. D. Smith, 258, holding law on sale of spirituous liquors not repealed by later statute; *Re McKeon*, 26 Misc. 464, 58 N. Y. Supp. 589, holding act of annexation for other purposes did not affect jurisdiction of surrogate court; *Gillin v. Canary*, 19 Misc. 594, 44 N. Y. Supp. 313, 28 N. Y. Civ. Proc. Rpp. 230, holding rule allowing consolidation of actions in city court subject to sections of Code limiting jurisdiction; *Czarnowsky v. Rochester*, 55 App. Div. 388, 66 N. Y. Supp. 931, holding section in Code not affected by law placing venue in actions against cities; *Spratt v. Huntington*, 2 Hun, 341, holding two sections of Code not so repugnant that one is repealed; *Miller v. Marx*, 55 Ala. 322, on repeal of exemption law by subsequent variant enactments; *State v. Wilson*, 43 N. H. 415, 82 A. D. 163, holding common law abrogated by statute inconsistent with its continued operation; *Loomis v. Loomis*, 51 Barb. 257, holding statute in revocation of wills by marriage not repealed by subsequent act on property of married women; *People v. Guild*, 4 Denio, 551, holding statute on method of docketing decree of surrogate not repealed by subsequent one; *Adams v. Perkins*, 25 How. Pr. 368, holding amendment to statute did not abrogate grant of term fee; *Spratt v. Huntington*, 48 How. Pr. 97, holding act on examination of adverse party not repealed by subsequent act; *Peck v. Peck*, 60 How. Pr. 206, holding act on disqualification upon remarriage never became operative law save as modified by repealing act; *Lenhard v. Lynch*, 62 How. Pr. 56, holding amendment to law repealed in express terms of no force or effect; *Woodruff v. Dickie*, 5 Robt. 619 (dissenting opinion), on abrogation of Revised Statutes by Code; *Mongeon v. People*, 55 N. Y. 613, 2 Cowen, Crim. Rep. 50, holding statute repeals former one only to extent two are repugnant.

Cited in reference note in 34 A. D. 493, on effect of repeal of statute.

—By implication.

Cited in *Harriman v. State*, 2 G. Greene, 270; *Ruffner v. Hamilton County*, 1 Disney (Ohio) 39; *Spencer v. State*, 5 Ind. 41,—holding repeal of statutes by implication not favored in law; *Van Rensselaer v. Snyder*, 9 Barb. 302, holding earliest of two acts will remain in force unless two are inconsistent; *Vallance v. Bausch*, 28 Barb. 633, holding statute not presumed to abrogate any former law relating to same matter; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1; *Peck v. Peck*, 8 Abb. N. C. 400; *Williams v. Potter*, 2 Barb. 316; *Gerould v. Wilson*, 16 Hun, 530; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149,—holding manifest repugnance between statutes must be shown to warrant repeal by implication; *Nelson v. State*, 39 Ala. 667, holding repeal of statute implied from change of status; *United States v. Gates*, 4 N. Y. Leg. Obs. 8, Fed. Cas. No. 15,191, on constructive repeal of statutes for inconsistency; *Hall v. Martin*, 46 N. H. 337, holding repeal of statutes and changes in common law by implication not favored.

Cited in notes in 22 A. D. 379; 41 A. S. R. 672; 88 A. S. R. 273; 20 L. ed. U. S. 236,—on repeal of statute by implication.

Who is "purchaser."

Cited in *Stamm v. Bostwick*, 122 N. Y. 48, 9 L.R.A. 597, 25 N. E. 233, holding "purchase" includes every mode of acquisition known to law, except substitution of heir; *Wright v. Sampter*, 152 Fed. 196, holding defendant receiving payment of debt from bankrupt otherwise than by descent, a purchaser.

Validity of charitable trusts.

Cited in *Hinckley's Estate*, 58 Cal. 457, holding trusts for perpetual charitable uses not in conflict with public policy; *Downing v. Marshall*, 23 How. Pr. 4.

on validity of power in trust for charitable organizations; *Williams v. First Presby. Soc.* 1 Ohio St. 478, holding deed to trustees of unincorporated congregation, not void for uncertainty of beneficiaries; *McCaughal v. Ryan*, 27 Barb. 376, holding express trust, more extensive than allowed by statute, void.

Cited in reference note in 53 A. D. 450, as to when uses are executed.

Cited in note in 1 L.R.A. 417, on the statute of Elizabeth.

— Of gifts by will to charity.

Cited in *Sohier v. St. Paul's Church*, 12 Met. 250, holding bequest to church wardens in trust for charitable purposes, valid; *Farrington v. Putnam*, 90 Me. 405, 38 L.R.A. 339, 37 Atl. 652, on power of charitable institution to take property devised to it in trust; *Levy v. Levy*, 33 N. Y. 97, holding trust for charity in will void by statute of uses and trusts; *McIntire Poor School v. Zanesville Canal & Mfg. Co.* 9 Ohio 203, 34 A. D. 436, holding bequest for charitable uses with sufficient objects and trustees, takes effect as executory devise.

— Necessity of trustee.

Cited in *King v. Woodhull*, 3 Edw. Ch. 79, holding court of chancery had power to allow charitable gift immediately to unincorporated voluntary association; *Wilson v. Towle*, 36 N. H. 129, holding trust shall not fail for want of trustee; *Williams v. Williams*, 8 N. Y. 525, holding devise for support of charity or religion, defective for want of grantee, would be supported in equity; *Richards v. Merrimack & C. River R. Co.* 44 N. H. 127; *Johnson v. Mayne*, 4 Iowa, 180,—holding equity will not allow trust sufficiently defined, to fail for want of trustee; *Green v. Allen*, 5 Humph. 170 (dissenting opinion), on jurisdiction of equity to appoint trustee to execute trust.

Jurisdiction of equity over charitable trusts.

Cited in *Shotwell v. Mott*, 2 Sandf. Ch. 46, holding chancery had jurisdiction of charitable trusts at common law; *Harrington v. Pier*, 105 Wis. 485, 76 A. S. R. 922, 50 L.R.A. 307, 82 N. W. 345; *Burr v. Smith*, 7 Vt. 241, 29 A. D. 154,—holding jurisdiction of chancery over bequests to charitable uses existed prior to statute of 43d Elizabeth; *Crimes v. Harmon*, 35 Ind. 198, 9 A. R. 690, holding statute of Elizabeth created no new law on subject of charitable trusts; *Green v. Allen*, 5 Humph. 170 (dissenting opinion), on jurisdiction of chancery over charities anterior to statute of Elizabeth; *Williams v. Pearson*, 38 Ala. 299, holding trusts for charitable uses favored by courts of equity; *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 439, holding courts of equity have jurisdiction in cases of charities for religious purposes; *Green v. Allen*, 5 Humph. 170 (dissenting opinion), on power of equity to afford relief upon misemployment of charitable funds; *Amherst College v. Ritch*, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876, holding equity will lend its aid to uphold devise which endows charity; *Bell County v. Alexander*, 22 Tex. 350, 73 A. D. 268, holding bequest to county for use of public schools, trust enforceable in chancery; *Episcopal Church v. Barksdale*, 1 Strobb. Eq. 197, holding equity has jurisdiction of trust fund, in hands of vestrymen; *Robertson v. Bullions*, 9 Barb. 64, holding equity will restrain trustees of religious society from wasting its property; *De Barante v. Gott*, 6 Barb. 492, holding equity will follow estate covered by trust and compel execution thereof; *Bartlett v. Nye*, 4 Met. 378, holding court will enforce trust in favor of society for charitable purposes; *Moore v. Moore*, 4 Dana, 354, 29 A. D. 417, holding devise not void for uncertainty enforceable in equity under jurisdiction over trusts.

Devises and bequests, to corporations.

Cited in *Atty. Gen. ex rel. Marselus v. Reformed Protestant Dutch Church*, 33 Barb. 303, holding devise to corporation void by statute of wills; *Wright v. Methodist Episcopal Church*, Hoffm. Ch. 202, discussing general validity of devises to corporations; *Theological Seminary v. Childs*, 4 Paige, 419, holding exception in statute of wills to corporations taking by devise, not a prohibition; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 600; *Knypers v. Reformed Dutch Church*, 6 Paige, 570,—holding under statute of wills corporation cannot take real estate by devise; *Ayres v. Methodist Church*, 3 Sandf. 351, holding religious society incorporated under act of 1784 cannot take by devise; *Downing v. Marshall*, 23 N. Y. 366, 80 A. D. 290, holding corporations could take no interest in land under power created by will unless authorized by legislature; *Williams v. Williams*, 8 N. Y. 525; *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227, 1 Keyes, 561,—holding corporations had right at common law of taking personal property by bequest; *American Bible Soc. v. Noble*, 11 Rich. Eq. 156, holding devise of lands to be converted by executors to money and proceeds distributed to religious corporations, valid; *Kennedy v. Palmer*, 1 Thomp. & C. 582, note, on right at common law of corporations to take personal property by bequest; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484, holding corporations may take and hold lands unless restrained by their charters; *Chamberlain v. Chamberlain*, 43 N. Y. 424, holding charitable corporations not authorized by statutes to take property beyond limits in charters; *Ayers v. Methodist Episcopal Church*, 3 Sandf. 351, on devises to corporations in trust.

Cited in reference notes in 46 A. D. 188; 80 A. D. 286, 315,—on devises to corporations; 60 A. S. R. 318, on power of corporation to take under will.

Cited in note in 60 A. S. R. 318, as to whether heirs may assail devise or bequest to corporation.

—To charitable societies.

Cited in *Re Griffin*, 167 N. Y. 71, 60 N. E. 284, holding bequest to charitable association good at common law; *Bascom v. Albertson*, 34 N. Y. 584, holding charitable bequest to persons unknown, to establish institution in another state, void by laws of New York; *Wardlow v. Home for Incurables*, 4 Dem. 473, holding benevolent society not released by subsequent statute from act making it incompetent to receive devise; *Carter v. Balfour*, 19 Ala. 814, holding bequest to unincorporated mission society valid; *Burbank v. Whitney*, 24 Pick. 146, 35 A. D. 312, holding bequest to charitable unincorporated society enforceable.

Distinguished in *American Bible Soc. v. Marshall*, 15 Ohio St. 537, holding corporation created in another state not disabled by statute of wills in that state from taking real estate by devise.

Conveyances through third party.

Cited in *Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394, holding wife joined by husband may convey to third party, and deed from him to husband is valid; *King v. Rundle*, 15 Barb. 139, on exceptions to rule that one cannot do indirectly what he cannot do directly.

Powers of corporations.

Cited in *Commercial Bank v. Nolan*, 7 How. (Miss.) 508, holding act of incorporation has reference to existing laws of its state.

Cited in reference notes in 56 A. D. 741; 57 A. D. 414,—on incidental powers of corporations; 53 A. D. 770, on inherent corporate powers.

Cited in note in 94 A. D. 381, 386, on capacity of corporations to take title to realty.

18 AM. DEC. 543, ORSER v. STORMS, 9 COW. 687.**Possession or title sufficient to maintain trespass or trover.**

Cited in *Staples v. Smith*, 45 Me. 470, holding one having possession or right to immediate possession may maintain trespass against wrongdoer; *Neff v. Thompson*, 8 Barb. 213, holding constructive possession sufficient to allow general owner to maintain trespass; *Cannon v. Kinney*, 4 Ill. 9; *Laing v. Nelson*, 41 Minn. 521, 43 N. W. 476,—holding possession of personal property by bailee sufficient.

Cited in reference notes in 25 A. D. 121, on requisites to maintain action of trespass; 37 A. D. 617, on prerequisite to maintenance of trespass; 19 A. D. 305, 330, 469, 536; 21 A. D. 222, 589; 23 A. D. 683; 34 A. D. 80,—on possession necessary to maintain trespass; 18 A. D. 751, on possession of realty to maintain trespass; 21 A. D. 345, on right of property necessary to maintain trover; 51 A. D. 646, on necessity for possession to maintain trespass *quare clausum fregit*; 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 25 A. D. 548, on sufficiency of constructive possession of absolute owner to sustain trespass; 60 A. D. 390, on what possession is sufficient to support trespass in cases of chattels; 72 A. D. 351, on possession necessary to maintain trespass in case of chattels; 35 A. D. 511, on sufficiency of possession alone to maintain trespass against wrongdoer; 43 A. D. 269, on sufficiency of possession as evidence of title to maintain trespass; 38 A. D. 546, on what possession is necessary to authorize maintenance of trespass; 22 A. D. 41, on notice of possession to maintain trespass *quare clausum fregit*; 18 A. D. 726; 60 A. S. R. 538, 935,—on who may maintain trespass; 42 A. S. R. 907, on action of trespass by one in possession; 26 A. D. 559, on chattel mortgagor's right to bring trespass against wrongdoer; 49 A. D. 626, on right of officer to maintain trespass after levy; 34 A. D. 678, on right of officer holding property under writ to maintain trespass for taking or injury thereto; 20 A. D. 238, on lessor's right to maintain trespass during lease against third persons.

Cited in note in 85 A. D. 321, on remedy for injuries to real estate held adversely to plaintiff.

—Action by bailee.

Cited in *Montgomery Gaslight Co. v. Montgomery & E. R. Co.* 86 Ala. 372. 5 So. 735, holding bailee for hire of railroad cars had such property to maintain action for injury to them.

Cited in reference notes in 26 A. D. 430, on trover by bailee; 73 A. D. 306, on right of bailee or bailor to maintain trespass.

Cited in note in 21 A. D. 589, on trespass by bailee.

Possessory and proprietary rights in property.

Cited in *People ex rel. Cooper v. Fields*, 1 Lans. 222, holding entry of one entitled to possession not unlawful though made against will of one in possession; *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 A. D. 540, holding general or special property in goods with constructive possession sufficient for replevin; *Booth v. Terrell*, 16 Ga. 20, holding lender may maintain trover against stranger for conversion of thing loaned.

Annotation cited in *Sigler v. Murphy*, 107 Iowa, 128, 77 N. W. 577, on protection of possessory rights as against stranger.

Cited in note in 70 A. D. 262, on property in inferior wild animals.

Title to increase of animals.

Cited in *Moore v. Mohney*, 1 Mich. N. P. 143, holding increase of cattle let for

hire belongs to hirer; *Van Sickle v. Van Sickle*, 8 How. Pr. 265, holding increase of cattle belong to married woman who had right of possession; *Allen v. Delano*, 55 Me. 113, 92 A. D. 573, holding colt of mare sold on condition belongs to vendor.

Cited in note in 54 A. D. 585, on ownership of increase of animals.

Rights as to trespassing animals.

Cited in reference notes in 25 A. D. 66, on remedy where cattle do damage on another's land; 34 A. D. 80, on effect of failure to maintain fence on right to detain.

18 AM. DEC. 561, BRILEY v. CHERRY, 13 N. C. (2 DEV. L.) 2.

Priority under judicial sale.

Cited in *Saunders v. Ferrill*, 23 N. C. (1 Ired. L.) 97, holding defendant's creditors not privies with him; *Den ex dem. Paul v. Ward*, 15 N. C. (4 Dev. L.) 247, holding judgment for dower no estoppel to creditors.

Cited in note in 89 A. D. 371, as to when execution sale passes plaintiff's interest in land.

Judgment in detinue as change of ownership of property.

Cited in *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455, holding a verdict and judgment in detinue relates to commencement of suit.

Right to issue of slave born pending judgment in specie.

Cited in *Vines v. Brownrigg*, 18 N. C. (1 Dev. & B. L.) 239, holding issue born between rendition of judgment in detinue for slaves and satisfaction of execution belong to defendant; *Cates v. Whitfield*, 53 N. C. (8 Jones, L.) 266, sustaining the right of a plaintiff who had recovered judgment for a female slave, to a scire facias from supreme court to show cause why execution should not issue for child born pending suit but before final judgment.

18 AM. DEC. 564, SMITH v. GREENLEE, 13 N. C. (2 DEV. L.) 126.

Validity of agreement to unite in application for franchise.

Cited in *Hyer v. Richmond Traction Co.* 168 U. S. 471, 42 L. ed. 547, holding agreement between parties contemplating application for public franchise, to unite, not void *per se*.

Validity of public sales—Agreement or conduct tending to stifle competition.

Cited in *Costillo v. Thompson*, 9 Ala. 937, holding sheriff's deed not avoided by purchaser's making known certain facts at sale, with intention of purchasing below value; *Loyd v. Malone*, 23 Ill. 43, 74 A. D. 179, holding that agreement not to bid in competition at public sale vitiates the sale; *Morris v. Woodward*, 25 N. J. Eq. 32, holding foreclosure sale vitiated by successful bidder's agreement with mortgagee prepared to bid, to pay the claim in consideration of refraining from bidding; *Whitaker v. Bond*, 63 N. C. 290, holding purchase at auction vitiated by purchaser's agreement with prospective bidder to divide in case latter would desist therefrom; *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359, holding that any agreement to stifle competition is fraud; *Kine v. Turner*, 27 Or. 356, 41 Pac. 664, holding void as against public policy, contract by prospective purchaser of public land to convey part upon receipt of patent, in consideration of refraining from bidding; *Hamilton v. Hamilton*, 2 Rich. Eq. 355, 46 A. D. 58, holding auction sale avoided by bidder obtaining property at one fourth its

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value by buying off prospective bidder prepared to pay value; *Barrett v. Bath Paper Co.* 13 S. C. 128, holding sheriff's sale avoided by purchaser's agreement with judgment creditors that if sale was for less than judgment, balance due would be paid and assignment of judgment taken.

Cited in reference notes in 77 A. S. R. 410, on validity of agreement to deter bidders at execution sale; 49 A. D. 392, on effect of acts discouraging or preventing competition at execution sale; 29 A. D. 136, on effect of fraudulent prevention of competition at execution sale; 53 A. D. 94, on setting aside judicial sale for irregularity preventing competition.

Cited in note in 20 L.R.A. 551, 552, 553, 555, on effect of preventing or checking bids on validity of sale at auction.

— **Combination of bidders.**

Cited in *Bailey v. Morgan*, 44 N. C. (Busbee, L.) 356; *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787,—holding sale not avoided by mere fact that successful bidder was an association formed for purpose of making said bid; *Jenkins v. Frink*, 30 Cal. 586, 89 A. D. 134, sustaining validity of agreement by which one of several is to purchase at public sale for benefit of all; *Hunt v. Elliott*, 80 Ind. 245, 41 A. R. 794, holding agreement between two for one to purchase personally at auction and to hold, use, and dispose thereof for benefit of both not against public policy; *Phippen v. Stickney*, 3 Met. 384, holding agreement for one to buy at auction for benefit of three persons, where made for convenience, not invalid *per se*; *Gulick v. Webb*, 41 Neb. 906, 43 A. S. R. 720, 60 N. W. 13, holding sheriff's sale not invalidated *per se* by agreement of the judgment lienors to protect interests by joint purchase through trustee where financially unable to bid individually; *Goode v. Hawkins*, 17 N. C. (2 Dev. Eq.) 393; *James v. Fulcro*, 5 Tex. 512, 55 A. D. 743,—holding agreement to purchase for benefit of all through one at public sale, not invalid *per se*.

Cited in reference notes in 20 A. D. 229; 44 A. D. 731,—on combinations and agreements to prevent competition at public auction; 55 A. D. 755, as to when agreements to unite in bid at auction sale are valid.

Cited in notes in 96 A. D. 270, on effect of combinations tending to stifle competition at auctions; 24 A. D. 408, on invalidity of sheriff's sale at which bidders combined to prevent competition.

— **By-bidding.**

Cited in *Springer v. Kleinsorge*, 83 Mo. 152, holding public sale announced to be without by-bidding, invalidated by by-bidding upon sales previous to that sought to be enforced; *Bowman v. McClenhan*, 20 App. Div. 346, 46 N. Y. Supp. 945, holding sale at auction advertised to be to highest bidder without reserve, avoided if owner secretly employs puffers; *Breslin v. Brown*, 24 Ohio St. 565, 15 A. R. 627, holding agreement for partnership between two prospective bidders upon public improvement in event of either being successful therein, not void as against public policy where neither intent, effect, or necessary tendency was to stifle competition; *Hartwell v. Gurney*, 16 R. I. 78, 13 Atl. 113, sustaining personal liability of assignee for creditors employing puffer to whom property is struck off.

Cited in note in 96 A. D. 267, on legality of employment of puffers at auction.

18 AM. DEC. 567, *DOWD v. WADSWORTH*, 13 N. C. (2 DEV. L.) 130. Suit in guardian's name.

Cited in reference note in 34 A. D. 771, on nature of suit brought in name of guardian.

Conversion by exercise of dominion over chattels.

Cited in *Sandford v. Wilson*, 2 Tex. App. Civ. Cas. (Willson) 188, holding possession with claim of title is conversion; *Powell v. Powell*, 21 N. C. (1 Dev. & B. Eq.) 379, holding possession under claim of right is conversion.

Cited in reference notes in 37 A. D. 60, on what constitutes conversion; 55 A. D. 51, on evidence of conversion.

— Refusal to surrender on demand.

Cited in *Smith v. Durham*, 127 N. C. 417, 37 S. E. 473, holding that one in possession of another's property is bound to surrender it on demand; *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436, holding that one in rightful possession of property has a reasonable time to investigate before surrender.

Cited in reference notes in 35 A. D. 616, on refusal to deliver goods as evidence of conversion; 43 A. D. 765, on refusal to deliver goods upon demand as evidence of conversion; 26 A. D. 356; 55 A. D. 51,—on demand and refusal as prima facie evidence of conversion; 47 A. D. 747, on refusal of goods after demand as conversion where consequences doubtful.

Cited in note in 24 A. S. R. 807, on demand and refusal as evidence of conversion.

Pleading special capacity of plaintiff.

Cited in *Bradley v. Graves*, 46 Ala. 277, holding words "guardian of A," in a suit mere matter of description; *Savage v. Carter*, 64 N. C. 196, holding a declaration on a note payable to "M. E. B., agent of W. R. S.," should be in name of M. E. B.

18 AM. DEC. 570, REID v. REID, 13 N. C. (2 DEV. L.) 247.**Receipt as evidence.**

Cited in *Keaton v. Jones*, 119 N. C. 43, 25 S. E. 710, holding a receipt only prima facie; *Harper v. Dail*, 92 N. C. 394, holding receipt may be contradicted by parol.

Cited in reference notes in 34 A. D. 183, on receipts as evidence; 45 A. D. 130, on receipt as evidence of payment; 9 A. S. R. 597, on nonconclusiveness of receipts; 72 A. S. R. 590, on explanation of receipt by parol.

Cited in note in 23 A. D. 368, on receipt in full as prima facie evidence of settlement.

18 AM. DEC. 573, DAWSON v. DAWSON, 16 N. C. (1 DEV. EQ.) 93.**Voluntary conveyances.**

Cited in reference notes in 25 A. D. 59, on voluntary conveyances; 84 A. D. 564, on equitable relief in cases of voluntary conveyances.

Cited in notes in 11 L.R.A. 457, on effect of voluntary executory trust; 12 L.R.A. (N.S.) 547, on sufficiency of declaration to establish voluntary trust where legal title is retained by settlor.

— Reformation of.

Cited in *Powell v. Morisey*, 98 N. C. 426, 2 A. S. R. 343, 4 S. E. 185, holding that equity will not correct a mistake in a voluntary deed; *Burton v. Le Roy*, 5 Sawy. 510, Fed. Cas. No. 2,217, holding an imperfect conveyance without a meritorious consideration will not be enforced in equity; *Oxley v. Tryon*, 25 Iowa, 95; *Enos v. Stewart*, 138 Cal. 112, 70 Pac. 1005,—holding same as to a mistake of description in such a conveyance.

Cited in note in 65 A. S. R. 521, on reformation of voluntary conveyances.

Protection of rights vested under voluntary deed.

Cited in *Love v. Belk*, 36 N. C. (1 Ired. Eq.) 163, holding that equity will protect trusts originally well constituted and which have been assigned by a complete instrument, though consideration is inadequate.

18 AM. DEC. 577, DONALDSON v. BANK OF CAPE FEAR, 16 N. C. (1 DEV. EQ.) 103.**Equitable nature of partnership property.**

Cited in *Ross v. Henderson*, 77 N. C. 170, holding that partnership property is held in trust as security for partnership debts.

Cited in reference notes in 59 A. D. 363, on partnership interest in real estate; 60 A. D. 539, on regarding as partnership property realty purchased with partnership funds; 48 A. S. R. 69, on how intent shown that realty shall be deemed partnership property.

Cited in notes in 27 L.R.A. 461, as to who are vested with title of partnership real estate; 21 A. D. 374, on extent of partner's interest in partnership property, and rights of partnership and individual creditors.

Power of partner to convey property.

Cited in reference notes in 71 A. D. 703, on right of one partner to convey only his own interest in real estate; 63 A. D. 365, on effect of conveyance or mortgage of firm property by one partner.

Cited in notes in 20 L. ed. U. S. 798, on right of partners to convey partnership realty; 28 L.R.A. 172, on position of purchasers of partnership real estate from partner holding legal title.

Who are bona fide purchasers.

Cited in reference notes in 25 A. D. 108, on necessity of payment in full before notice to constitute one a bona fide purchaser; 30 A. D. 184, on person taking legal estate in payment of, or as security for, previous debt as a bona fide purchaser.

Cited in note in 40 A. D. 240, as to whether creditor taking conveyance or assignment for prior debt is bona fide purchaser.

Pre-existing debt as a consideration.

Cited in *Busenbarke v. Ramey*, 53 Ind. 499; *Holt v. Bancroft*, 30 Ala. 193,—holding deed to secure pre-existing debt not founded on a valid consideration; *Holderby v. Blum*, 22 N. C. (2 Dev. & B. Eq.) 51, holding assignee of bond as security for pre-existing debt, and no other consideration, not a bona fide purchaser; *McKay v. Gilliam*, 65 N. C. 130, holding a mortgage to secure a pre-existing debt not valid as against prior donees; *Donald v. Hewitt*, 33 Ala. 534. 73 A. D. 431, holding same as to a lien on a steamboat to secure a pre-existing debt; *Potts v. Blackwell*, 56 N. C. (3 Jones, Eq.) 449, on an existing debt as a valid consideration; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521, holding securing of consideration money to be paid not payment.

Pre-requisites to equitable aid in collection of debts.

Cited in *Bethell v. Wilson*, 21 N. C. (1 Dev. & B. Eq.) 610, holding that a creditor cannot have sale of debtor's property where he has not obtained judgment nor sued out executions; *Brittain v. Quiet*, 54 N. C. (1 Jones, Eq.) 328, 62 A. D. 202, holding that debt must be established by a judgment; *McKibben v. Barton*, 1 Mich. 213, holding that creditor must obtain a lien on real estate fraudulently conveyed.

Cited in reference notes in 90 A. D. 288, on necessity of creditor's exhausting

remedy at law before filing creditors' bill; 64 A. D. 175, on necessity of creditor's establishing debt by judgment and execution *nulla bona* to entitle him to set aside fraudulent conveyance; 44 A. D. 722, on necessity of creditor having judgment and execution unsatisfied to maintain bill to reach debtor's equitable assets or property fraudulently transferred.

18 AM. DEC. 580, WILLIAMS v. HELME, 16 N. C. (1 DEV. EQ.) 151.

Right of surety to retain funds belonging to insolvent principal.

Cited in Tuscumbia, C. & D. R. Co. v. Rhodes, 8 Ala. 206, sustaining right of surety to retain any indemnity which he may have, on insolvency of debtor; Abbey v. Van Campen, Freem. Ch. (Misc.) 273, holding that on insolvency of principal the surety may retain any funds belonging to such principal as indemnity; Battle v. Hart, 17 N. C. (2 Dev. Eq.) 31, holding same as against assignee for value and without notice; Long v. Barnett, 38 N. C. (3 Ired. Eq.) 631, holding that principal on insolvency cannot assign an indemnity given surety; Mosteller v. Bost, 42 N. C. (7 Ired. Eq.) 39, holding same though assignment be for value; Scott v. Timberlake, 83 N. C. 382; Walker v. Dicks, 80 N. C. 263,—holding that surety may use his liability as a counterclaim against what he owes insolvent principal; Mattingly v. Sutton, 19 W. Va. 19, holding that insolvent principal cannot collect a debt due from surety without first indemnifying surety; Baker v. Brem, 103 N. C. 72, 4 L.R.A. 370, 9 S. E. 629, holding same as to enforcement of a judgment where plaintiff is insolvent; Green v. Crockett, 22 N. C. (2 Dev. & B. Eq.) 390, sustaining right of sureties to restrain sale of land reserved until payment of secured purchase money.

Cited in reference note in 49 A. D. 435, on right of surety to retain possession of property in his hands belonging to debtor.

Cited in note in 30 L.R.A. 568, on injunction on behalf of surety against judgment for matters arising subsequently to their rendition.

Distinguished in Eigenmann v. Clark, 21 Ind. App. 129, 51 N. E. 725; Follett v. Buyer, 4 Ohio St. 586,—where principal was solvent.

Insolvency of principal as essential to equitable relief for surety.

Cited in Allen v. Wood, 38 N. C. (3 Ired. Eq.) 386, holding that a surety seeking contribution from a cosurety must allege principal is insolvent.

Right of surety to subrogation to security.

Cited in Henry v. Compton, 2 Head, 549; Kirkman v. Bank of America, 2 Coldw. 397,—holding that collateral taken by a creditor inures to the indemnity of the surety.

Cited in note in 13 L.R.A. 340, on surety's indemnity.

18 AM. DEC. 585, LILES v. FLEMING, 16 N. C. (1 DEV. EQ.) 185.

Equity jurisdiction to enforce postnuptial agreements.

Cited in Going v. Orns, 8 Kan. 85, holding that whenever such contract would be binding at law if made through a trustee, it will be binding in equity if made directly between husband and wife; Wood v. Warden, 20 Ohio, 518, holding postnuptial agreement whereby property is set apart to separate use of wife will be sustained in equity; Taylor v. Eatman, 92 N. C. 601, sustaining in equity a deed from husband to wife in consideration of natural affection and to make sure maintenance for her; Walton v. Parish, 95 N. C. 259, holding same as to such a deed, the husband being about to enter the military service, he retaining sufficient property to pay existing debts; Thomas v. Brown, 10 Ohio St. 247,

holding same as to such a deed, serious domestic difficulties having arisen and husband and wife intending to live separate; *Powell v. Powell*, 9 Humph. 477, sustaining a sale of slaves to wife on consideration of relinquishment of dower; *Hoot v. Sorrell*, 11 Ala. 386, holding same as to other personalty on same grounds; *Lyles v. Clements*, 49 Ala. 445, holding that husband may relinquish to wife all claim to the rent and profits of her estate; *Maraman v. Maraman*, 4 Met. (Ky.) 84, on jurisdiction of equity to sustain a conveyance direct from husband to wife.

Distinguished in *McCaulley v. McCaulley*, 7 Houst (Del.) 102, 30 Atl. 735, holding postnuptial contract for a collateral satisfaction of a wife's claim for dower in the whole of her husband's estate, void.

Validity of agreements between husband and wife.

Cited in reference note in 39 A. D. 639, on validity of agreement to make provision for wife out of her share of estate.

Cited in note in 69 L.R.A. 369, on consideration of conveyance by husband to wife.

18 AM. DEC. 587, MCAULEY v. WILSON, 16 N. C. (1 DEV. EQ.) 276.

Descent of property ineffectually bequeathed.

Cited in *Davidson College v. Chambers*, 56 N. C. (3 Jones, Eq.) 253, holding that when a legacy from any cause fails to take effect, the subject devolves upon next of kin as intestate property.

Charitable uses and trusts.

Cited in reference notes in 53 A. D. 479, on charitable uses; 59 A. D. 619, on validity of bequests to charitable uses; 42 A. D. 355, as to when charitable bequests are void; 26 A. D. 68, on trust in favor of unincorporated religious or charitable society.

Cited in notes in 3 L.R.A. 146, on charitable trusts under statute; 21 A. D. 363, on charitable bequests and devises; 5 L.R.A. 33, as to whether statute of uses and trusts prevails in United States; 64 A. S. R. 771, on certainty and unity required in charitable trusts.

— Where beneficiary is indefinite.

Cited in *Holland v. Peck*, 37 N. C. (2 Ired. Eq.) 255, holding a bequest to an unincorporated multitude of persons in their aggregate capacity is void.

Cited in note in 14 L.R.A. (N.S.) 117, on necessary certainty as to beneficiaries of bequest for charity or religion.

Distinguished in *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809, holding that devises for charitable purposes to institutions to be established, if sufficiently definite, will be upheld.

Doctrine of cy pres.

Cited in *Fairbault v. Taylor*, 58 N. C. (5 Jones, Eq.) 219; *Lemmond v. Peoples*, 41 N. C. (6 Ired. Eq.) 137; *Bridges v. Pleasants*, 39 N. C. (4 Ired. Eq.) 26, 44 A. D. 94,—holding that doctrine of *cy pres* does not exist in North Carolina; *Beekman v. People*, 27 Barb. 260, holding that the court will not frame a scheme to carry out a radically imperfect and indefinite execution.

Cited in notes in 26 A. D. 68; 33 A. D. 479; 14 A. S. R. 446; 14 L.R.A. (N.S.) 63, 64,—on doctrine of *cy pres*.

Disapproved in *Jackson v. Phillips*, 14 Allen, 539, holding that a valid bequest for charitable purposes which cannot be carried out because of a change of circumstance since testator's death will be executed as nearly as possible according to his expressed intent.

18 AM. DEC. 591, POINDEXTER v. McCANNON, 16 N. C. (1 DEV. EQ.) 373.

Distinction between conditional sale and mortgage.

Cited in *Alstin v. Cundiff*, 52 Tex. 453; *Ruffier v. Womack*, 30 Tex. 332, holding if relation of debtor and creditor exists between the parties the transaction is a mortgage; *Earp v. Boothe*, 24 Gratt. 368, holding test to be whether object of transaction was a loan of money and security or pledge, or whether a purchase; *Wilson v. Drumrite*, 21 Mo. 325, holding that party cannot create an irredeemable security for money under an agreement for a resale; *West v. Hendrix*, 28 Ala. 226, holding conveyance made in satisfaction of a debt cannot be a mortgage; *Newson v. Roles*, 23 N. C. (Ired. L.) 179, holding sale accompanied by parol agreement for a resale at same full price at election of first owner is not a mortgage; *Munnerlin v. Birmingham*, 22 N. C. (2 Dev. & B. Eq.) 358, holding an agreement to resell a slave at a certain price at a certain time, and not after that date, is not a mortgage, and is of no effect if not complied with before that time; *M'Laurin v. Wright*, 37 N. C. (2 Ired. Eq.) 94, holding a fair price and possession simultaneously taken and kept, with no covenant to repay, shows a sale.

Cited in reference note in 31 A. D. 626, as to when deed absolute in form will be treated as a mortgage.

Cited in notes in 94 A. S. R. 235, 236, on distinction between conditional sale and mortgage; 18 E. R. C. 15, as to test whether transaction is mortgage or conditional sale.

— Construction in favor of mortgage.

Cited in *Russell v. Southard*, 12 How. 139, 13 L. ed. 927; *Hughes v. Sheaff*, 19 Iowa, 335; *Klein v. McNamara*, 54 Miss. 90; *DeBruhl v. Maas*, 54 Tex. 464; *Vangilder v. Hoffman*, 22 W. Va. 1; *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388,—holding in a doubtful case equity is inclined to consider a transaction a mortgage rather than a conditional sale; *Keithley v. Wood*, 151 Ill. 566, 42 A. S. R. 265, 38 N. E. 149, holding same where defeasance is in a collateral paper; *Gillis v. Martin*, 17 N. C. (2 Dev. Eq.) 470, 25 A. D. 729, holding an agreement by bargainee at time of receiving an absolute deed that, if land was sold within two years, he would, refund to bargainor the excess received over purchase money and interest to be a mortgage where unexplained; *Barnes v. Holcomb*, 12 Smedes & M. 306, holding stipulation by vendee that in two years vendor might redeem a slave by paying consideration named in a bill of sale, makes the transaction a mortgage, where the bill of sale was for an antecedent indebtedness; *Eiland v. Radford*, 7 Ala. 724, 42 A. D. 610, holding where subsequent acts are consistent with a sale, transaction will be so treated.

Cited in reference note in 42 A. S. R. 273, on construction of doubtful instrument as mortgage.

Cited in note in 50 A. D. 195, on considering transaction as mortgage instead of conditional sale in case of doubt.

Validity of a conditional sale.

Cited in *Slutz v. Desenberg*, 28 Ohio St. 371, holding conditional sale clearly established will be enforced.

18 AM. DEC. 595, KEATON v. COBB, 16 N. C. (1 DEV. EQ.) 439.

Resulting trusts.

Cited in note in 34 L. ed. U. S. 1092, on resulting trusts in case of joint purchasers.

Purchase of trust estate by trustee.

Cited in *Leach v. Leach*, 65 Wis. 284, 26 N. W. 754, holding void a sale by *cestui que trust* to trustee where *cestui que trust* at the time of the sale was unaware of all facts relating to property.

Cited in reference notes in 25 A. D. 400, on invalidity of purchase by trustee at his own sale; 53 A. D. 125, on right of agents, trustees, executors, administrators, guardians, and attorneys to purchase for their own benefit.

Cited in note in 21 A. D. 466, on trustee's right to purchase at his own sale.

Costs of cestui que trust incurred at law.

Cited in *Allen v. Gillreath*, 41 N. C. (6 Ired. Eq.) 252; *Newsom v. Bufferlow*, 17 N. C. (2 Dev. Eq. 87),—holding that one who defends an ejectment upon an equitable title cannot in equity recover his own costs at law; *Murphy v. Grice*, 22 N. C. (2 Dev. & B. Eq.) 199, holding that *cestui que trust* may recover costs which he has paid defendant, in suit at law.

18 AM. DEC. 598, TOLAR v. TOLAR, 16 N. C. (1 DEV. EQ.) 456.**Voluntary conveyances generally.**

Cited in reference note in 25 A. D. 59, on voluntary conveyances.

Cited in note in 11 L.R.A. 118, on necessity for consideration to authorize specific performance of contracts.

Relief of grantee where deed is destroyed before registration.

Cited in *Tyson v. Harrington*, 41 N. C. (6 Ired. Eq.) 329; *Tate v. Tate*, 21 N. C. (1 Dev. & B. Eq.) 22,—granting relief where grantor destroyed deed before registration; *Morris v. Ford*, 17 N. C. (2 Dev. Eq.) 412, holding granting relief to a purchaser at an execution sale, where party's deed had been destroyed before registration by fraud of a third person; *Thomas v. Thomas*, 32 N. C. (10 Ired. L.) 123, holding same on petition for dower where deed to husband could not be found; *Brendle v. Herron*, 88 N. C. 383, holding same where a deed to a minor was destroyed though with consent of minor.

Distinguished in *Crump v. Black*, 41 N. C. (6 Ired. Eq.) 321, 51 A. D. 422, denying a conveyance where defendant is a bona fide purchaser without notice.

—Destruction of voluntary conveyance.

Cited in *Smith v. Turner*, 39 N. C. (4 Ired. Eq.) 433, 47 A. D. 353; *Plummer v. Baskerville*, 36 N. C. (1 Ired. Eq.) 252,—granting a decree for another conveyance without regard to consideration.

Title of grantee before registration of deed.

Cited in *Shields v. Mitchell*, 10 Yerg. 1, holding that grantee before registration has an equity and also an incomplete legal title.

Effect of deed to pass title.

Cited in *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254, holding that destruction of deed does not divest an acquired title; *Walker v. Coltraine*, 41 N. C. (6 Ired. Eq.) 79, holding that a deed operates from delivery, and cannot be redelivered.

Cited in note in 11 L.R.A. 457, on effect of voluntary executory trust.

18 AM. DEC. 602, FLOYD v. BROWNE, 1 RAWLE, 121.**Effect of judgment in trespass or trover.**

Cited in *Bugbee's Estate*, 43 Phila. Leg. Int. 47, on extinguishment of lease by recovery of judgment for damages by lessee against lessor for failure of title.

Cited in notes in 92 A. S. R. 874, on right to only one complete satisfaction from joint tortfeasors; 54 A. D. 205, on judgment against one cotrespasser as bar to action against other; 58 L.R.A. 413, on effect of judgment against one joint tortfeasor on liability of other.

— To pass title.

Cited in *Fox v. Prickett*, 34 N. J. L. 13, holding in Pennsylvania a judgment for value of chattel divests plaintiff's title; *Fox v. The Lucy A. Blossom*, Fed. Cas. No. 5,013, holding same as to vessel where judgment is recovered and paid to owner of vessel sunk in collision; *Fox v. Northern Liberties*, 3 Watts & S. 103, holding recovery of judgment by owner of property against wrongful taker transfers right of former therein to latter; *Story v. Luzenberg*, 4 Rob. (La.) 240; *State use of McMurray v. Doan*, 39 Mo. 44; *Hyde v. Kiehl*, 183 Pa. 414, 38 Atl. 998, 29 Pittsb. L. J. N. S. 41 (reversing 19 Pa. Co. Ct. 564); *Merrick's Estate*, 5 Watts & S. 9; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129,—on effect of judgment on title to property.

Cited in reference notes in 38 A. D. 697, on effect of judgment to vest title in defendant; 59 A. D. 667, on recovery and satisfaction of judgment in trespass or trover vesting title in defendant.

Cited in note in 42 A. S. R. 434, on vesting of title by judgment for value of personal property in action of trespass or trover.

Distinguished in *Barb v. Fish*, 8 Blackf. 481, holding property in goods for which trover is brought is not vested in the defendant by a verdict and judgment in favor of plaintiff for nominal damages.

Disapproved in *Hopkins v. Hersey*, 20 Me. 449; *Spivey v. Morris*, 18 Ala. 254, 52 A. D. 224,—holding recovery in trover, without satisfaction, does not invest defendant with title to property.

18 AM. DEC. 604, STREAPER v. FISHER, 1 RAWLE, 155.

Nature of ground rent.

Cited in *Lehigh & W. B. Coal Co. v. Wright*, 7 Kulp, 434, 15 Pa. Co. Ct. 433; *Sachse v. Myers*, 15 Pa. Super. Ct. 425,—on the nature of estate created by ground rent; *Juvenal v. Patterson*, 10 Pa. 282, on question of kind of title passed by assignment of ground rent.

— As incident to estate.

Cited in *Wasserman v. Carroll*, 2 Pa. Super. Ct. 551, holding ground rent not reserved in deed passed to grantee; *Manderbach v. Bethany Orphans' Home*, 109 Pa. 231, 2 Atl. 422, 43 Phila. Leg. Int. 214, on question of its passing with estate.

— As covenants which run with land.

Cited in *Springer v. Phillips*, 71 Pa. 60, 29 Phila. Leg. Int. 101, holding covenant to pay ground rent runs with land; *Fisher v. Lewis*, 1 Clark (Pa.) 422, holding action may be maintained for breach of the building covenant by holder of ground rent, assigned to him before the breach occurred; *Ingersoll v. Sergeant*, 1 Whart. 337, on right of assignees of ground rent to sue; *Guldin v. Butz*, 2 Wood. Dec. 74, on question of covenants binding assignees, etc.

Covenant in mining lease.

Cited in *Verdolite Co. v. Richards*, 7 Northampton Co. Rep. 113, holding lessee's covenant to mine only specified mineral runs with land.

Estate in lands subject to execution sale.

Cited in *Rickert v. Madeira*, 1 Rawle, 325, holding interest of mortgagee not

subject to levy and execution; *Sergeant v. Ford*, 2 Watts & S. 122, holding purchaser at execution sale acquires only title or interest of defendant in execution in land sold; *Rash's Estate*, 2 Pars. Sel. Eq. Cas. 160, on question of what estates may be sold.

What passes under execution sale of "rents."

Cited in *Heartley v. Beaum*, 2 Pa. St. 165, holding ground rent passed under term "rents."

Time for objection to deed under judicial sale.

Cited in *Vanernan v. Cooper*, 4 Clark (Pa.) 371, holding where purchase is not tainted with fraud, all objections not showing that the parties are not before the court, must be taken advantage of at acknowledgment of the deed, or before title is finally passed by action of court.

Effect of levy on execution on subsequent proceeding.

Cited in *Lynch v. Earle*, 18 R. I. 531, 28 Atl. 763, on effect of levy on subsequent proceedings; *Hoffman v. Danner*, 14 Pa. 25, holding quantity of land which passes by sheriff's sale is to be ascertained by the extent of the levy.

Cited in reference note in 28 A. D. 708, on levy of execution controlling subsequent proceedings in determining what passes by sale.

Cited in notes in 33 A. D. 698, on necessity of levy to sustain sale; 21 L.R.A. 42, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy.

Pending action as bar.

Cited in note in 84 A. D. 455, on necessity in order that pendency of one action shall bar another, that both be for the same cause and relief.

18 AM. DEC. 608, ADLUM v. YARD, 1 RAWLE, 163.

Conclusiveness of answers of garnishee.

Cited in *M'Irlee v. Guy*, 1 Phila. 488, 11 Phila. Leg. Int. 91, holding jury not bound by his answers if there is anything to discredit them.

Estoppel by receipt of benefits.

Cited in *Re Bank of United States*, 2 Pars. Sel. Eq. Cas. 110, holding party cannot contest an instrument from which he derives a benefit, or affirm it in part or disaffirm it in part; *Lauer's Appeal*, 12 W. N. C. 165, holding where one seeks to rescind an agreement on ground of fraud he will not be permitted to retain possession of property acquired under same; *Ingram v. Hartz*, 48 Pa. 380, holding receipt by tenant of surplus from a distress did not estop him to say that it was illegal because no rent was due; *English's Estate*, 17 Phila. 501, 42 Phila. Leg. Int. 446, 16 W. N. C. 511, holding distributee cannot, after participating in results of a family arrangement for distribution, be permitted to repudiate any of its conditions.

— Affirmance of voidable sale by acceptance of proceeds.

Cited in *Maple v. Kussart*, 53 Pa. 348, 91 A. D. 214, holding if one receive purchase money he affirms sale whether it were void or only voidable; *Beeson v. Beeson*, 9 Pa. 279, holding *cestui que trust* knowing of purchase by trustee and of right to avoid it, may ratify it by assenting to the application of the purchase money to his use; *Sailor v. Hertzogg*, 10 Pa. 296, on question of heirs of grantor who had received proceeds from sale of land being estopped from denying validity of deed; *Crowell v. Meconkey*, 5 Pa. 168, holding trustee who made his election to let sale stand must abide by his election; *Williard v. Williard*, 56 Pa. 119, on general principal of estoppel by receiving part of proceeds of sale.

— Void judicial or administrator's sales.

Cited in *Fink v. Miller*, 19 Pa. Super. Ct. 556, holding that one receiving purchase money of land sold affirms the sale and cannot claim against it, whether void or only voidable; *Stroble v. Smith*, 8 Watts, 280, holding one who accepts part of purchase money arising out of sheriff's sale is estopped to deny validity of the sale; *Austin v. Loring*, 63 Mo. 19, holding owner who did not object to sale and took surplus estopped; *Huffman v. Gaines*, 47 Ark. 220, 1 S. W. 100, holding debtor who receives surplus of proceeds after execution against him is satisfied, waives improper notice of sale; *Wilkins v. Anderson*, 11 Pa. 399, holding taking of balance from sheriff by one *ex jure* at time of receipt, estops such person from denying that he was party to the action, which resulted in sale; *Spragg v. Shriver*, 25 Pa. 282, 64 A. D. 698, holding defendant who induces another to purchase cannot after payment, acknowledgment of deed, and appropriation of proceeds to his debts, impeach validity of sale; *Warden v. Eichbaum*, 14 Pa. 121, holding receipt by the committee of the lunatic, will not estop a future committee of the lunatic from recovering possession of the property even though valuable improvements have been made upon it since the sale; *Hamilton v. Hamilton*, 4 Pa. 193, holding as to property sold on award without judgment one who has received the purchase price is estopped from attacking validity of sale; *Price v. Winter*, 15 Fla. 66, holding infant who has received his share for interest in estate of ancestor estopped from claiming lands against purchasers; *Deford v. Mercer*, 24 Iowa, 118, 92 A. D. 460, holding heirs estopped who after arriving at full age with full knowledge received and retained purchase money arising by sale by their guardian; *Hays v. Heidelberg*, 9 Pa. 203, holding judgment creditor who as agent for another, purchased land from administrator the price of which was applied in part satisfaction of his judgment, estopped from proceeding against land to recover residue of his judgment; *Smith v. Warden*, 19 Pa. 424, holding receipt by heir for share of purchase money of land sold under judgment against administrator alone, estopped heir from asserting title against purchasers.

— To attack assignment under which dividend was accepted.

Cited in *Frierson v. Branch*, 30 Ark. 453; *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 36 A. R. 345; *Scott v. Edes*, 3 Minn. 377, Gil. 271; *Gutzwiller v. Lackman*, 23 Mo. 168; *Wilson Bros. Woodenware & Toy Co. v. Daggett*, 9 N. Y. Civ. Proc. Rep. 408; *Roberson v. Tonn*, 76 Tex. 535, 13 S. W. 385; *Gerf, S. & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96,—holding creditors who have accepted benefits under assignment cannot attack its validity; *Perley v. Mason*, 64 N. H. 6, 3 Atl. 629; *Reinhard v. Keenbartz*, 6 Watts, 93; *Wilson v. Biggar*, 7 Watts & S. 111; *Pearsoll v. Chapin*, 44 Pa. 9; *Ogden Paint, Oil & Glass Co. v. Child*, 10 Utah, 475, 37 Pac. 734 (dissenting opinion); *Owen v. Arvis*, 26 N. J. L. 22,—on same point; *Drew Glass Co. v. Baldwin*, 27 Mo. App. 44, holding one who proves claim before assignee is estopped from attacking validity of assignment; *Greene v. A. & W. Sprague Mfg. Co.* 52 Conn. 330, holding creditors joining in accepting deed for their benefit cannot set up irregularity in the proceedings; *Burke's Estate*, 1 Pars. Sel. Eq. Cas. 470, holding where a creditor does an act affirming an assignment his election is made, and he is estopped from afterwards impeaching it; *Lockett v. Kinzell*, 99 Tenn. 713, 42 S. W. 442, holding creditor not estopped by indicating to assignee that he will take under the assignment, where neither assignee nor creditor has changed his attitude toward trust property in consequence; *Swanson v. Tarkington*, 7 Heisk. 612, holding party accepting provisions of deed of trust for his benefit, thereby affirms the instrument *in toto*; *Van Nest v. Yoe*, 1

Sandf. Ch. 4, holding creditor who received payment on account under an assignment but was ignorant of fraudulent circumstances is not precluded from attacking assignment.

Cited in reference note in 61 A. S. R. 692, on estoppel of creditor to contest assignment for creditors.

Cited in note in 3 E. R. C. 327, on right to assume inconsistent positions in legal proceedings.

Validity of assignments for creditors.

Cited in reference note in 56 A. D. 286, on affirming fraudulent assignment for benefit of creditors.

Cited in note in 58 A. S. R. 95, on effect of fraud on assignment for benefit of creditors.

— Provision for release by creditor.

Cited in *Re Wilson*, 4 Pa. 430, 45 A. D. 701, holding general assignment by two partners stipulating for a release to themselves and a third partner is fraudulent on its face though nonexecuting partner had no estate but such as passed to assignee; *Hennessy v. Western Bank*, 6 Watts & S. 300, 40 A. D. 560, holding assignment by partnership stipulating for release not valid without containing transfer of separate property of each of the partners.

— Reservation in favor of debtor.

Cited in *M'Clurg v. Lecky*, 3 Penr. & W. 83, 23 A. D. 64, holding debtor cannot make a reservation, at expense of his creditors, of any part of his property for his own benefit; *Johnston v. Harvy*, 2 Penr. & W. 82, 21 A. D. 426, holding conveyance by father to sons in trust for payment of all judgments on record against grantor and for his maintenance and that of his family fraudulent as to creditors; *Hennon v. McClane*, 88 Pa. 219, holding conveyance of land in consideration of future maintenance is a question of actual fraud for jury, and, in absence of evidence of existing creditors at the time, is valid.

Conveyances to defraud and delay creditors.

Cited in *Kehner v. Burkhart*, 5 Pa. 478, holding conveyance in consideration of debt due, the residue of the consideration being secured by judgment bonds, payable within six years, which were intended to be applied to pay creditors, fraudulent.

Cited in reference notes in 27 A. D. 207, on right to attack fraudulent assignment for creditors; 28 A. D. 206, on validity of fraudulent conveyances as between parties; 58 A. S. R. 74, on creditor's attack on conveyance as fraudulent; 69 A. S. R. 73, on waiver of right to assail fraudulent transfer.

Confirmation of deeds procured by fraud.

Cited in *Chess v. Chess*, 1 Penr. & W. 32, 21 A. D. 350, holding deed procured by actual fraud void, and cannot be confirmed by subsequent acts or declarations of grantor.

18 AM. DEC. 625, LANCASTER v. DOLAN, 1 RAWLE, 231.

What constitutes "conveyance" within statute of fraudulent conveyances.

Cited in *Webb v. Raff*, 9 Ohio St. 430, holding mortgage is conveyance within statute.

— Who are purchasers within statute.

Cited in *Simmons Hardware Co. v. Kaufman*, 77 Tex. 131, 8 S. W. 283; *Weinberg v. Rempe*, 15 W. Va. 829,—holding mortgagee purchaser within meaning of

statute; *Presbyterian Corp. v. Wallace*, 3 Rawle, 109; *Mott v. Clark*, 9 Pa. 399, 49 A. D. 566,—on same point.

Validity of voluntary conveyances as to subsequent purchasers and creditors.

Cited in *Gilliland v. Penn*, 90 Ala. 230, 9 L.R.A. 413, 8 So. 15, holding one made with fraudulent intent is void against subsequent purchasers and creditors; *Grumbles v. Sneed*, 22 Tex. 565; *Fowler v. Stoneum*, 11 Tex. 478, 62 A. D. 490,—holding grantor and his heirs and all those claiming under him with actual notice are bound by a deed made to defraud subsequent purchasers, or to hinder and delay creditors; *Prestidge v. Cooper*, 54 Miss. 74, holding under statute conveyance is void as to subsequent purchasers only when made with intent to defraud such purchasers and they cannot take advantage of intent to hinder, delay, or defraud existing creditors; *Foster v. Walton*, 5 Watts, 378, holding none but creditors can take advantage of fraudulent conveyance and subsequent purchaser with notice is concluded by it; *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740, holding voluntary deed with intent to hinder and delay creditors not void as to subsequent purchaser with constructive or actual notice of it, unless grantee therein was party or privy to fraud intended by grantor; *Speise v. M'Coy*, 6 Watts & S. 485, 40 A. D. 579; *Mahle v. Kurtz*, 9 Pa. Co. Ct. 280, 66 Kulp, 157,—on question as to when fraudulent conveyance is valid as to subsequent purchasers; *Ferguson's Appeal*, 117 Pa. 426, 11 Atl. 885, 29 W. N. C. 573, 45 Phila. Leg. Int. 24, 18 Pittsb. L. J. N. S. 458, on question of when rights of one who holds under voluntary conveyance will be enforced in equity.

Cited in reference notes in 20 A. D. 141, on voluntary conveyances; 30 A. D. 338, on validity of voluntary conveyances; 56 A. D. 662, on validity of voluntary conveyance as to subsequent creditors; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers.

Cited in note in 9 L.R.A. 419, as to when voluntary conveyances are void as to subsequent purchasers.

Record as constructive notice of fraudulent deed.

Cited in *Gardner v. Cole*, 21 Iowa, 205, holding where grantor remains in possession, claiming and selling property as his own to purchaser for value, without actual notice, record of fraudulent deed does not defeat right of subsequent purchaser to avoid the instrument.

Power of married woman over separate estate.

Cited in *Walker v. Reamy*, 36 Pa. 410, holding act of 1848 did not make separate estate of a married woman so exclusively her own as to exclude her husband's use of it, or enable her to invest it in any way she please, without his consent; *Heath v. Knapp*, 4 Pa. 228; *O'Hara v. Dilworth*, 72 Pa. 397; *Bacon's Estate*, 6 Phila. 335, 24 Phila. Leg. Int. 12,—on question of right of *cestui que trust* to dispose of her own estate; *Barnett's Appeal*, 46 Pa. 392, 86 A. D. 502, 21 Phila. Leg. Int. 44; *Harris's Estate*, 3 Phila. 326, 16 Phila. Leg. Int. 13; *Hardy v. Van Harlingen*, 7 Ohio St. 208,—on question of limitation of wife's disposal of estate by settlement; *Hoover v. Samaritan Soc.* 4 Whart. 445, holding married woman, having power to dispose of estate, may execute same for benefit of her husband; *Wright v. Brown*, 5 Phila. 3, 19 Phila. Leg. Int. 20, holding act of 1848 did not prevent a married woman from making a valid conveyance or mortgage of an estate devised to her separate use, without the intervention of a trustee, nor did it restrain her from applying the proceeds to her husband's use; *Whitehurst's Estate*, 18 Phila. 73, 43 Phila. Leg. Int. 175, 18 W. N. C. 403, 2 Pa.

Co. Ct. 212 (dissenting opinion), on question of powers of married woman over property acquired by settlement; Real Estate Trust Co's Appeal, 48 Phila. Leg. Int. 462, holding *feme covert* has only those powers over her separate estate that are expressly conferred; Brooks's Estate, 8 Pa. Co. Ct. 514, 47 Phila. Leg. Int. 298, on policy of courts of Pennsylvania in regard to her disability to bind or convey her estate.

Cited in reference note in 47 A. D. 115, on wife's power over separate estate.

Cited in notes in 30 A. D. 240, on power of *feme covert* over separate estate in absence of statutory regulations; 57 A. D. 345, on power of married woman to devise separate realty.

Distinguished in *Hinney v. Phillips*, 50 Pa. 382, holding married woman, having a separate estate, may dispose of it or its income by gift or loan to her husband.

Disapproved in *Phillips v. Graves*, 20 Ohio St. 371, 5 A. R. 675, holding that she may charge her separate estate for debts except as limited by the settlement; *Hall v. Bank of Virginia*, 13 W. Va. 584, holding she may dispose of or charge her estate in anyway not covered by an express restraint; *Kimm v. Weippert*, 46 Mo. 532, 2 A. R. 541, holding *feme covert* is absolutely a *feme sole* with respect to her separate estate when she is not specially restrained by the instrument under which she acts to some particular mode of disposition.

Mode of execution of power of married woman to dispose of separate estate.

Cited in *Weeks v. Sego*, 9 Ga. 199; *Swift v. Castle*, 23 Ill. 209; *Leaycraft v. Hedden*, 4 N. J. Eq. 512; *Stahl v. Crouse*, 1 Pa. St. 111; *Shalter v. Ladd*, 8 Pa. Co. Ct. 528; *Rogers v. Smith*, 4 Pa. 93; *Wright v. Brown*, 44 Pa. 224, 20 Phila. Leg. Int. 60; *McMullin v. Beatty*, 56 Pa. 389; *Maurer's Appeal*, 86 Pa. 380, 6 W. N. C. 77; *MacConnell v. Lindsay*, 131 Pa. 476, 19 Atl. 306, 25 W. N. C. 375, 47 Phila. Leg. Int. 189, 20 Pittsb. L. J. N. S. 297; *Holliday v. Hively*, 198 Pa. 335, 47 Atl. 988; *Hays's Estate*, 201 Pa. 391, 50 Atl. 775 (affirming 32 Pittsb. L. J. N. S. 14); *Re Wagner*, 2 Ashm. (Pa.) 448; *Pullen v. Rianhard*, 1 Whart. 514; *Thomas v. Folwell*, 2 Whart. 11, 30 A. D. 230; *Dorrance v. Scott*, 3 Whart. 309, 31 A. D. 509; *Funk's Estate*, 28 W. N. C. 557; *Wetherill v. Mecke*, *Brightly* (Pa.) 135; *Cochran v. O'Hern*, 4 Watts & S. 95; *Wallace v. Coston*, 9 Watts, 137; *Wetherill v. Wetherill*, 1 Phila. 64, 7 Phila. Leg. Int. 62; *Gamble's Estate*, 13 Phila. 198, 36 Phila. Leg. Int. 5; *Shantz's Estate*, 19 Phila. 113, 45 Phila. Leg. Int. 455, 7 Pa. Co. Ct. 199, 23 W. N. C. 31; *Keifer v. Carusi*, 7 D. C. 156,—holding power of married woman to bind or dispose of her separate estate is limited to the terms of the settlement; *Page's Estate*, 75 Pa. 87, 31 Phila. Leg. Int. 36, 6 Legal Gaz. 38, holding act of 1848 did not give wife power, not conferred by donor, over her separate estate; *Markoe v. Maxcy*, 5 Cranch, C. C. 306, Fed. Cas. No. 9,093, holding wife had no power to convey but by last will and testament or by instrument in nature of last will and testament, as provided for in deed of trust; *Steinmetz's Estate*, 168 Pa. 175, 31 Atl. 1092, 36 W. N. C. 378, holding where no power of alienation is given in instrument creating trust for married woman, she cannot pass the estate by will; *Steinmetz's Estate*, 15 Pa. Co. Ct. 259, 3 Pa. Dist. R. 440, holding separate use trust takes away power of alienation by *cestui que trust*, including transfer by will as well as by deed; *Shonk v. Brown*, 61 Pa. 320, 26 Phila. Leg. Int. 221, holding that where married woman has title and power to convey, but is restricted as to the manner, the legislature may remove the restriction, but not where there is want of power to convey in any mode; *Jones's Appeal*, 57 Pa. 369, holding same where deed vests

in wife the full beneficial estate in fee without restriction imposed by grantor in terms of deed or an estate in another to be impaired; *Drusadow v. Wilde*, 63 Pa. 170, holding deed of trust in question vested general power of appointment in married woman and that her will was an effectual exercise of that power.

Power of sale as including power to mortgage.

Cited in *Gordon v. Preston*, 1 Watts, 385, 26 A. D. 75; *Zane v. Kennedy*, 73 Pa. 182, 5 Legal Gaz. 84; *Watts's Appeal*, 78 Pa. 270; *McCreary v. Homberger*, 151 Pa. 323, 31 A. S. R. 760, 24 Atl. 1066, 31 W. N. C. 41; *Barry v. Merchants' Exch. Co.* 1 Sandf. Ch. 280,—holding it includes power to mortgage; *Trutch v. Bunnell*, 5 Or. 504; *Faulk v. Dashiell*, 62 Tex. 642, 50 A. R. 542,—on same point; *Rosengarten's Estate*, 30 Pa. Super. Ct. 244, holding executrix who is given a life interest in real estate and an unrestricted power of sale of all real estate of decedent, has no power to bind estate by confession of judgment.

Distinguished in *Campbell v. Foster Home Assn.* 163 Pa. 609, 30 Atl. 222, 35 W. N. C. 293 (affirming 2 Pa. Dist. R. 845, 33 W. N. C. 217), holding rule that power to sell includes power to mortgage does not apply to a mere letter of attorney with a naked power to sell, uncoupled with any interest in the land or the fund; *Kenworthy v. Equitable Trust Co.* 218 Pa. 286, 67 Atl. 469, holding it inapplicable where trust contains express prohibition against encumbering estate; *Kenworthy v. Levi*, 214 Pa. 235, 63 Atl. 690, holding same where deed of trust give power to "sell and convey in fee simple the whole or any part of the trust estate, provided, however, that the principal of the estate shall not become impaired or encumbered."

Disapproved in *Rutherford Land & Improv. Co. v. Sanntrock*, 60 N. J. Eq. 471, 46 Atl. 648, holding it gives no power to mortgage; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 A. S. R. 927, 85 N. W. 1019, holding power of attorney "to sell and convey any real estate" of grantor does not include power to mortgage.

Power of directors to incur debts and execute mortgages.

Cited in *Watts v. McKean & E. Land & Improv. Co.* 31 Phila. Leg. Int. 341; 6 Legal Gaz. 340, upholding power of directors of corporation to contract debts and secure them by bonds and mortgages.

Protection of separate estate.

Cited in *Craige v. Craige*, 9 Phila. 545, 29 Phila. Leg. Int. 382, 4 Legal Gaz. 389, holding public policy demands even in doubtful cases the widest latitude of construction where rights of married women are to be protected; *Barton's Estate*, 1 Pars. Sel. Eq. Cas. 24, on question of assent of *feme covert* as validating breach of trust.

Trust for separate use of married woman.

Cited in *Hildeburn's Estate*, 8 Pa. Co. Ct. 369; *Quin's Estate*, 144 Pa. 444, 22 Atl. 965; *Springer v. Arundel*, 7 Phila. 224, 26 Phila. Leg. Int. 148,—holding to make it binding it must appear that it was created in contemplation of marriage; *Hannis's Estate*, 11 Pa. Co. Ct. 94, 1 Pa. Dist. R. 83, 29 W. N. C. 414, holding provision in a will that "that share of my married daughter is not to be subject to or under control of her present or any future husband, nor liable in any way for any debts that may be contracted by him," creates a trust for separate use.

Cited in note in 78 A. D. 409, on construction of statute of uses regarding trusts for benefit of married women.

Validity of inalienable trust for married woman.

Referred to as leading case in *Dodson v. Ball*, 60 Pa. 492, 100 A. D. 586, 26 Phila. Leg. Int. 260, on donor's right to restrain alienation of gift on trust.

Cited in *Hays v. Leonard*, 155 Pa. 474, 26 Atl. 664, 32 W. N. C. 402 (affirming 10 Pa. Co. Ct. 648), holding married women's acts have not rendered useless a separate use trust to protect married woman from importunities of her husband, and same form of words will create such use as were formerly appropriate; *Wells v. McCall*, 64 Pa. 207, 2 Legal Gaz. 153, holding donor may create an active, operative trust, to preserve an estate and protect it against the husband or creditors of a beneficiary, or to make it conduce to some useful and legal but temporary purpose, without infringing on law against perpetuities; *Hamesley v. Smith*, 4 Whart. 126, on question of gift to married woman with restrain upon alienation.

Liability of separate estate of married women for their debts.

Cited in *Curtis v. Engel*, 2 Sandf. Ch. 287; *Kantrowitz v. Prather*, 31 Ind. 92, 99 A. D. 587,—holding in order to enforce contract of a married woman against her separate estate, her intent to deal with the property must affirmatively appear and the contract must be one from which benefits result to the property; *Crowe v. Lippincott*, 21 Pittsb. L. J. N. S. 433, holding income of separate use trust, accruing during coverture, not subject to attachment for debts.

Execution of power without reference thereto in instrument of appointment.

Cited in *Coryell v. Duntun*, 7 Pa. 530, 49 A. D. 489, holding conveyance by married woman, who held property in trust with power to revoke and appoint new uses, passes estate, though not referring to the power; *Taylor v. Smiley*, 14 Phila. 76, 37 Phila. Leg. Int. 282, 9 W. N. C. 30, holding deed of trust containing power of revocation by grantor revoked by last will of grantor, although it contained no reference to the power.

Cited in reference note in 49 A. D. 716, on sufficiency of execution of power of appointment under a will.

Execution of trust under statute of uses.

Cited in *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. 252, holding trust for separate use of married woman not executed; *Kuhn v. Newman*, 26 Pa. 227, holding devise in trust for separate use of testator's granddaughters, not then married nor contemplating marriage, vests complete legal estate in granddaughters clear of the trust; *Dodson v. Ball*, 60 Pa. 492, 100 A. D. 586, 26 Phila. Leg. Int. 260, holding equity preserves an actual trust to give effect to donor's right over his property, but in favor of public policy permits a passive trust to fail.

Estate as affected by donor's limitations.

Cited in *Huber's Appeal*, 80 Pa. 348, 2 W. N. C. 579, 33 Phila. Leg. Int. 289, holding devise depends on the qualities stamped and powers conferred on it by testator, not alone in the parties in whom title is formerly vested.

18 AM. DEC. 633, BANK OF PENNSYLVANIA v. WINGER, 1 RAWLE, 295.

Effect of levy to discharge lien or debt.

Cited in *Lytle v. Mehaffy*, 8 Watts, 267; *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213,—holding it is not a satisfaction; *Ramsey's Appeal*, 2 Watts, 228, 27 A. D. 301, on question whether divesting lien discharges debt; *Sutton's Estate*, 4 Kulp, 297, on question of lien being waived without extinguishing debt.

Satisfaction of judgment.

Cited in reference notes in 41 A. D. 625; 44 A. D. 738,—on what constitutes satisfaction of judgment.

Right of lien holder to pass first fund and come in upon a subsequent one.

Cited in *Horning's Appeal*, 90 Pa. 388; *Wirt's Appeal*, 36 Phila. Leg. Int. 412,—upholding right of lien creditor to pass first fund and come in upon subsequent one; *McDevitt's Appeal*, 70 Pa. 373, holding creditor having two funds subject to his encumbrance may pass by the first and come upon the second, dependent upon the equities among the junior lien holders.

Cited in reference notes in 43 A. D. 527, on priority among judgment liens; 43 A. D. 527, on postponement of judgment lien to subsequent lien.

Cited in note in 14 A. D. 669, on right of judgment creditor who has seized debtor's goods to discharge same and leave judgment in force as to land.

Proceeds of judicial sale as substitute for property.

Cited in *Kohl v. Harting*, 8 Watts, 329, on question of price for land at judicial sale being substituted for land.

Relation of lien creditors to fund.

Cited in *Finney v. Com.* 1 Penr. & W. 240, holding lien creditors are to look to application of the fund on which they have a lien, at their peril; *Konigmaker v. Brown*, 14 Pa. 269, on question of effect of judicial sale upon lien creditors.

Extinguishment of prior liens by judicial sale under junior one.

Cited in *Presbyterian Corp. v. Wallace*, 3 Rawle, 109, holding sale of part of mortgaged premises under younger judgment against one claiming title under mortgagor, exonerates the land from lien of mortgage, and property not sold remains liable for ratable proportion of debt due on mortgage; *Luce v. Snively*, 4 Watts, 396, 28 A. D. 725, as an exception to rule that one who buys land at judicial sale takes it free from all liens for and on account of debts of previous owners.

When surety becomes principal.

Cited in *Warren v. Sennett*, 4 Pa. 114, as showing that surety may become principal; *Philadelphia Loan Co. v. Elliott*, 15 Pa. 224, holding that by payment by a guarantor he became in law the principal.

Release of surety as affecting principal's liability.

Cited in *Mortland v. Hines*, 8 Pa. 265, holding release of surety, after joint judgment against him and his principal, does not discharge principal from obligation to pay judgment.

Merger by judgment.

Cited in note in 68 L.R.A. 567, on judgment against principal and surety as merger of relation.

18 AM. DEC. 638, REITENBACH v. REITENBACH, 1 RAWLE, 362.

Evidence to impeach conveyance for fraud on creditors.

Cited in *Abney v. Kingsland*, 10 Ala. 355, 44 A. D. 491, holding declarations made by party in possession of property that he held same in his own right, or under another, are admissible in evidence as part of the *res gestæ*; *Savage v. Murphy*, 8 Bosw. 75, on question of admissibility of such declarations.

— Declarations of grantor.

Cited in *Borland v. Mayo*, 8 Ala. 104; *Shields v. Ruddy*, 3 Idaho, 148, 28 Pac. 405; *Caldwell v. Rose, Smith* (Ind.) 190; *Waterbury v. Sturtevant*, 18 Wend. 353; *Wilbur v. Strickland*, 1 Rawle, 458; *Hartman v. Diller*, 62 Pa. 37; *Caldwell v. Williams*, 1 Ind. 405,—holding that where there is a common purpose Am. Dec. Vol. III.—39.

between assignor and assignees to defraud, the declarations of assignor made after the deed are admissible to prove fraud.

Cited in reference note in 26 A. D. 238, on admissibility against vendee of declarations of vendor.

Distinguished in *Weaver v. Yeatmans*, 15 Ala. 539, holding declarations of vendor are not admissible against his vendee, without first establishing facts from which an inference may fairly be deduced, that there was a combination between vendor and vendee to defraud creditors of former.

Admissibility of declarations of coconspirators.

Cited in *State v. Thibeau*, 30 Vt. 100, holding declarations by one Confederate made after the offense and merely a narration of past transaction, not made for the purpose of furthering the illegal design are not evidence against others not present.

Cited in notes in 27 A. D. 115, on admissibility of declarations of parties to combination to defraud creditors; 19 L. ed. U. S. 107, on admissibility of declarations of coconspirator where illegal combination is proved.

18 AM. DEC. 642, BARNES v. SHELTON, HARP. L. 33.

Parol agreement contemporaneous with note.

Cited in *Germania Bank v. Osborne*, 81 Minn. 272, 83 N. W. 1084, holding parol admissible to establish set-off to note, by showing agreement for return or repurchase of property for which note was given.

Cited in notes in 43 L.R.A. 483, on contemporaneous executed agreements as defense to note; 56 A. S. R. 669, on variation of promissory note by subsequent parol agreement; 4 E. R. C. 208, on admissibility of parol evidence to impeach consideration of bill of exchange or promissory note.

Distinguished in *McGrath v. Barnes*, 13 S. C. 328, 36 A. R. 687, holding parol evidence not admissible to show contemporaneous agreement that payment of note was conditional.

18 AM. DEC. 643, KELLY v. REMBERT, HARP. L. 65.

Liability for causing illegal arrest.

Cited in *McCool v. McCluney*, Harp. L. 486, holding that trespass is proper action against party causing an illegal arrest.

Cited in note in 21 A. D. 222, on liability of justice issuing warrant without jurisdiction.

Liability of officer for official acts.

Cited in *Fuller v. Gould*, 20 Vt. 643, holding that no action lies against officer for error of judgment in performing his duties.

Cited in reference notes in 32 A. D. 49, on judicial liability; 67 A. D. 404, on liability of justice of the peace as trespasser exceeding jurisdiction.

Cited in notes in 15 E. R. C. 53, on civil liability of judge for his judicial acts; 14 L.R.A. 141, on civil liability of judge acting in excess of statutory grant of jurisdiction.

18 AM. DEC. 647, NICKS v. MARTINDALE, HARP. L. 135.

Time from which statute of limitations operates.

Cited in *Bucklin v. Ford*, 5 Barb. 393, holding that statute operates only from time right to sue vests in someone; *Dillard v. Philson*, 5 Strobb. L. 213, on limitation of action on contract being computed from the breach thereof.

Suspension of limitations.

Cited in *Caldwell v. Southern Exp. Co.* 1 Flipp. 85, Fed. Cas. No. 2,303, holding that statute was suspended during Civil War as to matters between citizens of opposite sides.

Cited in reference notes in 1 A. S. R. 789, on continuance of statute of limitations after it has commenced to run; 28 A. D. 467, on effect of subsequent disability to stop running of limitations; 44 A. D. 159, on continuance of running of statute of limitations notwithstanding intervening disability; 44 A. D. 329, on necessity that disability to prevent running of limitations existed at time cause of action accrued.

Cited in notes in 16 E. R. C. 153, on disability to sue as affecting running of statute of limitations; 36 A. D. 78, on subsequent or successive disabilities affecting running of limitations; 11 A. S. R. 342; 25 L. ed. U. S. 317,—on effect of disability occurring after statute of limitations begins to run.

—Effect of death of defendant.

Cited in *Bolt v. Dawkins*, 16 S. C. 198; *Chevallier v. Durst*, 6 Tex. 239; *M'Collough v. Speed*, 3 M'Cord, L. 455; *Irwin v. Garretson*, 1 Cin. Sup. Ct. Rep. 533,—holding that where statute has commenced to run against a person, it is not interrupted by his death; *Lawton v. Bowman*, 2 Strobb. L. 190, holding that time after debtor's decease during which suit is prohibited must be added to time within which suit must be brought under statute of limitations; *Martin v. Archer*, 3 Hill, L. 211, on reasonable time to recommence action abated by death of party, to avoid operation of statute of limitations.

Cited in reference note in 28 A. D. 467, on suspension of limitations by death until grant of administration.

Cited in note in 65 A. D. 596, on effect of death to suspend running of statute of limitations.

Nature and effect of limitation.

Cited in *Riddlehoover v. Kinard*, 1 Hill, Eq. 376, holding that possession for twenty years under void will gives title as against all persons not under legal disability.

18 AM. DEC. 649, DRUMMOND v. HYAMS, HARP. L. 268.**Books of account as evidence.**

Cited in reference notes in 25 A. D. 596; 27 A. D. 279; 61 A. D. 299,—on books of account as evidence; 22 A. D. 416, on what are admissible as books of original entries.

Cited in notes in 52 L.R.A. 698, on proof of physical labor by books of account; 52 L.R.A. 580, on time for making transfers of accounts from memoranda to make them admissible in party's favor.

18 AM. DEC. 650, PAGE v. LOUD, HARP. L. 269.**What excuses notice of nonpayment.**

Cited in reference note in 33 A. D. 111, on what excuses notice of nonpayment.

—Insolvency of maker.

Cited in reference notes in 22 A. S. R. 748, on maker's insolvency excusing demand and notice on note; 43 A. D. 248, on insolvency of maker of note as affecting necessity for notice to indorser; 45 A. D. 110, on insolvency of maker as dispensing with notice of dishonor to indorsers; 61 A. S. R. 238, on effect of

maker's insolvency on necessity of demand of payment; 24 A. D. 715, on effect of maker's insolvency to dispense with necessity of notice to charge indorser.

18 AM. DEC. 652, ORDINARY v. STEEDMAN, HARP. L. 287.

Claims barred by lapse of time.

Cited in *Ex parte Epting*, 22 S. C. 399, holding claim for legacy barred by lapse of more than twenty years from time of decree ascertaining its amount.

18 AM. DEC. 654, BROUGHTON v. BIRCHMORE, HARP. L. 300.

Uncertainty of description in sheriff's deed.

Cited in reference notes in 55 A. D. 472; 19 A. S. R. 108; 61 A. S. R. 927,—on description in sheriff's deed; 68 A. S. R. 815, on sufficiency of description in sheriff's deeds; 64 A. D. 225, on certainty of description required in sheriff's deed; 27 A. D. 524, on certainty of description in sheriff's levy, return, or deed; 41 A. D. 661, on necessity of describing land with reasonable certainty in sheriff's deed; 100 A. D. 335, on admissibility of advertisement to show land conveyed by sheriff's deed void for uncertainty in description.

18 AM. DEC. 656, HARMAN v. GARTMAN, HARP. L. 430.

Trespass against cotenant.

Cited in *Johnson v. Payne*, 1 Hill, L. 111, holding that tenant cannot maintain trespass against cotenant without an actual ouster; *Dorn v. Beasley*, 6 Rich. Eq. 406, on same point; *Gibson v. Vaughn*, 2 Bail. L. 389, 23 A. D. 143, holding that tenant cannot maintain trespass against cotenant for removing fixture from common property.

Cited in reference notes in 92 A. D. 496, on trespass by one cotenant against another; 24 A. D. 266, as to when trespass or trover will lie by one cotenant against another.

Cited in notes in 23 A. D. 145, on right of tenant in common to maintain trespass against cotenants without actual ouster; 10 L.R.A. (N.S.) 214, on trespass *quare clausum fregit* by tenant in common of realty against cotenant.

Ouster of cotenant.

Cited in *Jefcoat v. Knotts*, 13 Rich. L. 50, on what constitutes ouster.

Cited in reference notes in 25 A. D. 709, on what will constitute an ouster; 90 A. D. 454, as to what constitutes adverse possession and ouster of tenant in common by cotenant.

Right of cotenants to use of common estate.

Cited in reference notes in 51 A. S. R. 716, on rights of cotenants to common use of the estate; 50 A. S. R. 746, on seisin and possession of property in cotenancy.

18 AM. DEC. 660, HUNTINGTON v. SHULTZ, HARP. L. 452.

What is an arrest.

Cited in notes in 19 A. D. 486, on what is an arrest; 61 A. D. 152, on what constitutes an arrest where party submits thereto.

Exemption from arrest and summons.

Cited in *Worth v. Norton*, 56 S. C. 56, 76 A. S. R. 524, 45 L.R.A. 524, 33 S. E. 792, holding that constitutional provision exempting members of Congress from arrest does not include service of summons in civil action.

Cited in notes in 38 A. R. 719, on immunity of witness from legal process;

3 L.R.A. 267, on witness's privilege from arrest; 25 L.R.A. 724, on nature of privilege of nonresident witness from suit; 25 L.R.A. 733, on privilege of non-resident witnesses from suit.

Distinguished in *Christian v. Williams*, 35 Mo. App. 297, holding person attending trial in another jurisdiction exempt from service of summons.

18 AM. DEC. 661, GLENN v. McCULLOUGH, HARP. L. 484.

New promise affecting statute of limitations.

Cited in reference notes in 30 A. D. 348, on new promise or acknowledgment to revive debt; 58 A. D. 155, as to when acknowledgment is sufficient to remove bar of statute of limitations.

Cited in notes in 21 A. D. 588, on acknowledgment to revive debt; 16 E. R. C. 175, on sufficiency of acknowledgment to postpone running of statute of limitations; 102 A. S. R. 767, on effect of mere acknowledgment to suspend running or remove bar of limitations.

18 AM. DEC. 663, STATE v. BENNETT, HARP. L. 503.

Forcible entry and detainer.

Cited in reference notes in 22 A. D. 496; 30 A. D. 396; 65 A. D. 737,—on forcible entry and detainer; 84 A. D. 680, on essential elements of forcible entry; 44 A. S. R. 331, on what amounts to forcible entry.

Cited in note in 8 L.R.A.(N.S.) 428, on right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession who forcibly dispossessed him.

—Evidence admissible in action of.

Cited in reference notes in 39 A. D. 465, on admissibility of evidence of title in action of forcible entry and detainer; 29 A. D. 687, on inadmissibility of defendant's title under indictment for forcible entry and detainer.

Cited in notes in 77 A. D. 552, as to when title may be given in evidence in actions of forcible entry and unlawful detainer; 77 A. D. 555, on title admissible on behalf of defendant to show right of possession in forcible entry and unlawful detainer proceedings.

18 AM. DEC. 666, STONEY v. McNEIL, HARP. L. 557.

Privileged communication between attorney and client.

Cited in *Strickland v. Capital City Mills*, 74 S. C. 16, 7 L.R.A.(N.S.) 426, 54 S. E. 220, holding that contract as to fee to be paid for services and assignment of interest in judgment is not privileged communication.

Cited in reference note in 83 A. D. 118, on privileged communications.

Cited in notes in 22 A. D. 410; 25 A. D. 420; 66 A. S. R. 220,—on privileged communications to attorney.

Irregularities avoiding attachment.

Cited in note in 79 A. D. 164, on what irregularities and defects will avoid attachment.

18 AM. DEC. 670, BOWKER v. WALKER, 1 VT. 18.

Estoppel to deny grantor's title.

Cited in *Ripley v. Yale*, 18 Vt. 220; *Miller v. Larson*, 17 Wis. 624; *Greeno v. Munson*, 9 Vt. 37, 31 A. D. 605,—holding that vendee under contract of purchase cannot set up title adverse to vendor without surrender of possession under

contract; *Hall v. Dewey*, 10 Vt. 593; *Red v. Shepley*, 6 Vt. 602,—holding same as to lessee or one holding under him.

18 AM. DEC. 672, CHITTENDEN v. BARNEY, 1 VT. 28.

Apportioning mortgage debt upon parcels of the security.

Cited in *Salem v. Edgerly*, 33 N. H. 46, holding that owner of part of mortgaged property taking assignment of mortgage can recover only their fair proportion of the debt from the other owners; *Robinson v. Leavitt*, 7 N. H. 73, on redemption of party of mortgaged premises by payment of ratable proportion of debt secured; *Lyman v. Lyman*, 32 Vt. 79, 76 A. D. 151, on apportionment of mortgage debt upon different parcels of the security.

Cited in reference note in 63 A. D. 298, on right of purchasers of various portions of mortgaged premises to have mortgage applied in inverse order of dates of sales.

Criticized in *Gates v. Adams*, 24 Vt. 70, as carrying doctrine of apportioning mortgage debt upon different parcels, further than is consistent with rights of mortgagee.

18 AM. DEC. 675, MARTIN v. MARTIN, 1 VT. 91.

Fraudulent conveyances.

Cited in *McEwen v. Shannon*, 64 Vt. 583, 25 Atl. 661, on conveyances in fraud of creditors being void at common law and by statute.

Cited in reference notes in 31 A. D. 484, on fraudulent conveyances and transfers; 28 A. D. 206, on validity of fraudulent conveyances as between parties.

Cited in note in 3 A. S. R. 738, on enforceability of note having its inception under contract in fraud of creditors.

—Validity as against grantor's administrator.

Cited in *Crawford v. Lehr*, 20 Kan. 509, holding that administrator cannot avoid his intestate's sale of property on ground that it is in fraud of creditors; *McLane v. Johnson*, 43 Vt. 48, holding that under statute administrator may bring suit to set aside such sale; *Harrington v. Gage*, 6 Vt. 532, on same point.

Cited in reference notes in 62 A. D. 546, on right of personal representatives to impeach decedent's deed for fraud as to creditors; 50 A. D. 469, on right of administrator of grantor or vendor to impeach fraudulent conveyance, transfer, or assignment; 64 A. D. 176, on impeaching deed of intestate as fraudulent by administrator where there are no funds to pay debts.

Cited in note in 5 A. D. 253, on validity of fraudulent conveyance against grantor and his executors or administrators.

18 AM. DEC. 676, LAMPSON v. FLETCHER, 1 VT. 168.

Equitable assignments.

Cited in *Preston v. Russell*, 71 Vt. 51, 44 Atl. 115, as illustrating the application of the doctrine of equitable assignments; *Williams v. Irving*, 47 How. Pr. 440, on effect of payments upon judgments to judgment debtor before notice of assignment.

18 AM. DEC. 678, HAVEN v. HOBBS, 1 VT. 238.

Signatures by hands of another.

Cited in *Bellows v. Weeks*, 41 Vt. 590, holding that signatures of three selectmen written by one of them upon authority of the others are valid; North-

western Sav. Bank v. International Bank, 90 Mo. App. 205, holding that indorsement of promissory note may be made by one having parol authority.

Cited in notes in 22 L.R.A. 297, on signatures to notes, contracts, and bonds signed by another; 52 A. D. 776, as to whether attorney executing instrument should sign his own name as attorney in addition to principal's name.

Contracts for support of illegitimate children.

Cited in Meyer v. Meyer, 123 Wis. 538, 102 N. W. 52, upholding agreement and bond for support of child, given in consideration of withdrawal of bastardy proceedings; Brown v. Mansur, 64 N. H. 39, 5 Atl. 768, holding valid an assignment of certificate of life insurance by father of illegitimate child to its mother for support of the child; Hoit v. Cooper, 41 N. H. 111, holding that notes given town selectman in settlement of prosecution against father of illegitimate children were valid.

Compromise of bastardy proceedings.

Cited in note in 56 A. D. 222, on right to compromise proceedings under bastardy acts.

Extrinsic evidence as to liability as maker.

Cited in note in 20 L.R.A. 707, on extrinsic evidence to show who is liable as maker of note, where no agency is indicated.

18 AM. DEC. 680, ARMS v. BURT, 1 VT. 303.

Nature of estate passing by instrument.

Cited in School Dist. No. 5 v. Everett, 52 Mich. 314, 17 N. W. 926, holding that conveyance to school district of property to hold "during time it is used for school purposes" conveys a determinable fee.

Cited in reference note in 45 A. D. 190, as to what words in a deed pass a fee.

Distinguished in White v. Fuller, 38 Vt. 193, holding that instrument creating tenancy, reserving annual rent, with right of re-entry for nonpayment, is a lease, though it be perpetual in duration.

Assignment of deed as conveyance.

Cited in note in 31 A. S. R. 28, on effect of indorsement or assignment of deed as a conveyance.

Levy of attachment upon interest in land.

Cited in Menager v. Farrell, 6 Ariz. 316, 57 Pac. 607, holding that statutory provisions as to levy of an attachment must be strictly complied with.

Distinguished in Collins v. Gibson, 5 Vt. 243, holding that levy of attachment upon equity of redemption is good.

18 AM. DEC. 684, THOMPSON v. BOARDMAN, 1 VT. 367.

Power of guardian to make contract binding on ward.

Cited in Andrus v. Blazzard, 23 Utah, 233, 54 L.R.A. 354, 63 Pac. 888; Hardy v. Citizens' Nat. Bank, 61 N. H. 34,—holding that guardian has no authority to bind his ward by promissory note or mortgage.

Cited in reference notes in 34 A. D. 152, on rights and powers of guardian; 89 A. S. R. 257, on powers of guardians in chancery at common law.

Cited in notes in 89 A. S. R. 266, on common-law powers of testamentary guardians; 89 A. S. R. 264, on common-law powers of guardians in socage.

Continuance of guardianship.

Cited in reference note in 70 A. D. 616, on continuance of chancery guardian until majority of infants.

Jurisdiction to appoint guardian.

Cited in reference notes in 44 A. D. 714, on jurisdiction of chancery to appoint guardian of infants; 73 A. D. 558, on how far jurisdiction of chancery is devested by probate system.

18 AM. DEC. 691, BURLINGTON v. CALAIS, 1 VT. 385.**Declarations of agent as evidence.**

Cited in reference notes in 21 A. D. 158; 22 A. D. 212,—on admissibility against principal of declaration of agent; 25 A. D. 139, as to when agents' declarations are evidence against principal; 31 A. D. 61, on admissibility of declarations of agent or servant against principal or master.

Criticized in Underwood v. Hart, 23 Vt. 120, holding declaration of attorney inadmissible to prove that justice had not been at office at certain time.

Legal residence of transient pauper.

Cited in Newbury v. Topsham, 7 Vt. 407, holding that single woman keeping her personal effects at a place and returning there after occasional absences, had a legal residence at such place; Bristol v. Rutland, 10 Vt. 574, holding that person leaving family in one town and working in another, and becoming disabled there, is a transient person under statute, and not liable to removal; Starksborough v. Hinesburgh, 13 Vt. 215, holding that "coming and residing within this state" includes residents within the state at time of passage of the act; Lowry v. Keyes, 14 Vt. 66, on same point.

Distinguished in Middletown v. Poultney, 2 Vt. 437, holding that pauper going to another state and leaving family in the town, but not maintaining a home there, did not have legal residence in the town.

18 AM. DEC. 695, BABCOCK v. KENNEDY, 1 VT. 457.**Rents and profits of mortgaged property after condition broken.**

Cited in Lyman v. Mower, 6 Vt. 345, holding mortgagee entitled to rents, after notice, as against assignee of mortgagor; Stedman v. Gassett, 18 Vt. 346, holding tenant not liable to mortgagor for rent subsequent to notice and demand by mortgagee; Wires v. Nelson, 26 Vt. 13, holding subordinate mortgagee entitled to rents and profits as against mortgagor or his assigns; Kimball v. Pike, 18 N. H. 419, holding that assignment of reversion by mortgage carries with it right to rent subsequently accruing on lease made prior thereto; Barnes v. Beach, 18 Vt. 146, on right of mortgagee, after condition broken, to sustain ejectment and recover damages for detention of property after notice to quit; Mason v. Gray, 36 Vt. 308, on notice of mortgagee's claim to rents being equivalent to notice to quit; Hughes v. Hamilton, 19 W. Va. 366, on rents and profits under mortgages; Sanderson v. Price, 21 N. J. L. 637 (dissenting opinion), on mortgagee's right to rents and profits against assignee of mortgagor after notice.

Cited in reference note in 38 A. D. 277, on right of mortgagee to collect rents.

Cited in note in 15 E. R. C. 637, on right of mortgagee to intercept rent by notice to tenant.

18 AM. DEC. 699, MOONEY v. MAYNARD, 1 VT. 470.**Liability as to trespassing animals.**

Cited in *Wilhite v. Speakman*, 79 Ala. 400, holding person not maintaining lawful fence, liable for damage from his seizure of trespassing animal.

Cited in reference notes in 34 A. D. 80, on effect of failure to maintain fence on right to distrain; 25 A. D. 66, on remedy where cattle do damage on another's land.

Cited in notes in 49 A. D. 251, on liability for trespass by animals as affected by duty to maintain fences.

Distinguished in *Johnson v. Wing*, 3 Mich. 163, holding that owners of adjoining lands not separated by partition fence are liable to each other for damages from trespassing animals.

18 AM. DEC. 701, GOODRICH v. HATHAWAY, 1 VT. 485.**Possession to maintain trespass.**

Cited in reference note in 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*.

Right of purchaser of trees.

Cited in *Yale v. Seeley*, 15 Vt. 221, holding that purchaser of standing trees upon land of another, who has cut and left them lying upon the land, has right to enter and take them away.

Cited in note in 55 L.R.A. 519, on incidental rights of purchaser of standing timber.

18 AM. DEC. 703, GLASSCOCK v. BATTON, 6 RAND. (VA.) 78.**Retention of possession as badge of fraud.**

Cited in note in 97 A. D. 344, on change of possession sufficient as against creditors and subsequent purchasers.

— By vendor.

Cited in *Sydnor v. Gee*, 4 Leigh, 535, on effect of a subsequent acquirement of possession by vendee upon intervening rights of third persons; 20 A. D. 199, on retention of possession by vendor or mortgagor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 30 A. D. 262, on retention of possession by vendor or mortgagor as evidence of fraud.

Distinguished in *Davis v. Turner*, 4 Gratt. 422, holding retaining possession of personal property by the vendor after an absolute sale is only prima facie fraudulent as to creditors; *Benjamin v. Madden*, 94 Va. 66, 26 S. E. 392, holding retention of possession by vendor not fraudulent as to a creditor whose debt was contracted prior to sale.

— By mortgagor.

Cited in *Hempstead v. Johnston*, 18 Ark. 123, 65 A. D. 458, holding where mortgage is on public record possession is immaterial; *Hundley v. Buckner*, 6 Smedes & M. 70, holding that recording of mortgage is equivalent to an actual delivery of the property; *Rose v. Burgess*, 10 Leigh, 186, holding that possession of property by mortgagor is not adverse to right of mortgagee.

Cited in reference notes in 26 A. D. 552, on effect of retention of possession by mortgagor of personal property; 1 A. D. 455, on necessity of change of possession where chattel mortgage is recorded.

Validity of voluntary conveyance.

Cited in reference note in 20 A. D. 158, on validity of fraudulent voluntary conveyance as against subsequent bona fide purchaser from grantor.

18 AM. DEC. 708, CULPEPER AGRI. & MFG. SOC. v. DIGGES, 6 RAND. (VA.) 165.**Waiver of objections.**

Cited in reference notes in 78 A. D. 369, on appearance as waiver of irregularities in process; 43 A. D. 125; 48 A. D. 348,—on appearance of defendant as waiver of defects in service of process.

Effect of misnomer.

Cited in reference notes in 56 A. S. R. 884, on judgment against corporation by wrong name; 51 A. D. 73, on effect of misnomer of corporation in contract.

Cited in note in 99 A. D. 351, on effect of conveyance by or to a party in wrong name.

What constitutes a misnomer of a corporation.

Cited in *First Nat. Bank v. Huntington Distilling Co.* 41 W. Va. 530, 56 A. S. R. 878, 23 S. E. 792, holding "Huntington Distillery Company" for "Huntington Distilling Company" not a fatal variance; *Grafton Grocery Co. v. Home Brewing Co.* 60 W. Va. 281, 54 S. E. 349, holding same as to "H. B. Co." for "H. B. Co. of Grafton;" *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345, 9 A. & E. Ann. Cas. 770, holding omission of word "Company" immaterial; *Douglass v. Branch Bank*, 19 Ala. 659, holding if it is apparent on face of deed what corporation was intended a mistake in setting out name will not vitiate deed.

How objection to misnomer taken.

Cited in reference note in 4 A. S. R. 760, on taking advantage of misnomer of corporation by plea of abatement only.

18 AM. DEC. 710, KELLY v. KELLY, 6 RAND. (VA.) 176.**Advancement as presumptive satisfaction of debt.**

Cited in *Brooks v. Summers*, 100 Ky. 620, 38 S. W. 1047, holding advancement to a child operates to satisfy a debt due child if equal in amount or greater than debt; *Re McNamara*, 148 Mich. 346, 111 N. W. 1066, holding a conveyance immediately prior to death of grantor for a nominal consideration presumed to be a satisfaction of a debt due from grantor for caring for him.

Cited in reference note in 49 A. D. 666, on presumption as to conveyance by father to son whom he owes.

18 AM. DEC. 715, RHODES v. COUSINS, 6 RAND. (VA.) 188.**Equitable aid to collect a debt.**

Cited in *Virginia Pass. & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198, holding that creditor must first obtain a lien on property unless otherwise provided by statute; *Post v. Roach*, 26 Fla. 442, 7 So. 854, holding creditor must have judgment to obtain lien on real property, and judgment and execution to obtain lien on personal property; *King v. Payan*, 18 Ark. 583; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611,—holding that creditor must be a judgment creditor; *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135, holding in absence of statute equity has no jurisdiction over creditors at large; *Roper v.*

McCook, 7 Ala. 318, holding creditor must have execution issued and returned "no property found;" Williams v. Bizzell, 11 Ark. 716, holding creditor must show that satisfaction of judgment by ordinary process has failed; Crowell v. Horacek, 12 Neb. 622, 12 N. W. 99, holding that one who has not reduced his claim to a judgment cannot maintain an action to enjoin a debtor from transferring his property; McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. ed. 675, holding that it need not be averred that personal estate has been exhausted; Wallace v. Treacle, 27 Gratt. 479, on judgment and execution unsatisfied as a prerequisite to equitable aid on collection of a debt.

Cited in reference notes in 66 A. D. 658, on injunction against debtor's disposing of property; 69 A. D. 171, on right of creditor to injunction against debtor disposing of his property; 90 A. D. 289, on necessity of return of execution *nulla bona* before filing creditors' bill to reach transferred real estate.

Cited in notes in 66 A. S. R. 287, on who may maintain creditors' bill to set aside fraudulent conveyance; 66 A. S. R. 276, on recovery of judgment as prerequisite to filing of creditors' bill; 64 A. D. 492, on right of creditor to have receiver appointed.

Writ of ne exeat.

Cited in Cable v. Alvord, 27 Ohio St. 654, defining ne exeat, as writ issued upon cause shown, to restrain a party from leaving state until bail was given; Davidor v. Rosenberg, 130 Wis. 22, 118 A. S. R. 986, 109 N. W. 925, holding at common law writ was simply to obtain equitable bail; Parks v. Rucker, 5 Leigh, 149, holding that ne exeat will not be granted where bail can be demanded at law.

Cited in reference note in 52 A. D. 411, as to when writ of ne exeat will be granted.

Cited in notes in 14 A. D. 561, 562; 22 A. D. 678,—on writ of ne exeat; 28 A. D. 429; 7 L.R.A. 397,—as to when writ of ne exeat will issue; 118 A. S. R. 990, on general prerequisites to issuance of writ of ne exeat; 118 A. S. R. 991, on departure from realm of one who is sought to be restrained by writ of ne exeat; 118 A. S. R. 992, on equitable and legal demands which will sustain writ of ne exeat; 118 A. S. R. 990, on necessity for existence and maturity of debt to warrant issuance of writ of ne exeat.

Affidavit for writ ne exeat.

Cited in McGee v. McGee, 8 Ga. 295, 52 A. D. 407, holding that petition must charge positively that defendant is going out of state or that he has expressed such intention; Gresham v. Peterson, 28 Ark. 377, holding that application must come clearly within spirit of law.

Cited in note in 118 A. S. R. 995, on necessity and requisites of affidavits upon which issuance of writ of ne exeat is sought.

18 AM. DEC. 719, HITE v. LONG, 6 RAND. (VA.) 457.

Former suit or recovery as bar.

Cited in White v. Martin, 1 Port. (Ala.) 215, 26 A. D. 365, holding recovery of value of slave in trover action bars subsequent suit to recover her issue born pending first action; O'Neal v. Brown, 21 Ala. 482, holding recovery for taking of goods belonging to plaintiff as trustee bars action for individual property taken at same time; Foss v. Whitehouse, 94 Me. 491, 48 Atl. 109, holding recovery in assumpsit of money paid to obtain release from unlawful imprisonment bars action of trespass thereupon; Funk v. Funk, 35 Mo. App. 246, holding

judgment in replevin suit bars trover for value of other articles taken at same time; *Bendernagle v. Cocks*, 19 Wend. 207, 32 A. D. 448, holding where a demand is entire a recovery for part bars a suit for whole.

Distinguished in *Wittick v. Traun*, 27 Ala. 562, 62 A. D. 778, holding separate action of detinue maintainable for each of several chattels held under same claim of title; *Woodworth v. Gorsline*, 30 Colo. 186, 58 L.R.A. 417, 69 Pac. 705, holding unsatisfied judgment in replevin suit against sheriff for property unlawfully taken on execution no bar to action on indemnity bond; *Huffman v. Knight*, 36 Or. 581, 60 Pac. 207, holding dismissal of replevin action because brought for an undivided interest no bar to trover for same property; *Sangster v. Com.* 17 Gratt. 124, holding recovery of proceeds by owner of goods sold under attachment against another no bar to action of trespass for taking.

Waiver of trespass to goods.

Cited in *Manchester Home, Bldg. & L. Asso. v. Porter*, 106 Va. 528, 56 S. E. 337, holding receiving pay for goods wrongfully sold a waiver of trespass for them.

Measure of damages in trespass.

Cited in reference notes in 28 A. D. 282; 35 A. D. 465; 42 A. D. 249; 48 A. D. 158, 530,—on measure of damages in trespass; 93 A. D. 744, on recovery of exemplary damages in trespass; 80 A. D. 153, as to when exemplary damages recoverable in trespass.

Choice of remedies.

Cited in *Trafford v. Hubbard*, 15 R. I. 326, 8 Atl. 690, holding action on case maintainable for tort in refusing possession of premises.

Splitting demands.

Cited in *Zetelle v. Myers*, 19 Gratt. 62, holding actions for account under deed of trust and for moneys received under power of attorney, both instruments being given for common object, not separately maintainable.

Statement of cause of action for trespass.

Cited in *Warner v. Capps*, 37 Ark. 32, holding plaintiff in action for taking must allege property in thing taken.

Necessity of possession to maintain trespass.

Cited in notes in 18 A. D. 546, on possession as prerequisite to maintenance of trespass in case of chattels; 18 A. D. 548, on necessity of actual or constructive possession to maintenance of trespass in case of chattels.

Recaption of personal property.

Cited in *Barr v. Post*, 56 Neb. 698, 77 N. W. 123, sustaining right of owner to retake personal property without unnecessary force.

Final judgment on appeal.

Cited in *Wilson v. Bank of Mt. Pleasant*, 6 Leigh, 570, holding appellate court must, upon reversing decision sustaining demurrer, enter final judgment.

18 AM. DEC. 726, PLEASANTS v. PENDLETON, 6 RAND. (VA.) 473.

Passing of title to property generally.

Cited in reference notes in 28 A. D. 550; 39 A. S. R. 44,—as to when sale of personalty is complete; 58 A. D. 66, on when property passes in sale; 30 A. D. 685, as to when property does not pass by contract of sale; 51 A. D. 711, on passing of title in sale of personal property if anything remains to be done.

Cited in note in 23 E. R. C. 256, on passing of title by sale of unascertained chattels.

Change of possession.

Cited in note in 5 E. R. C. 97, on what constitutes a change of possession of goods mortgaged or sold.

Constructive delivery to pass title to property.

Cited in *Elam v. Keen*, 4 Leigh, 333, 26 A. D. 322, holding constructive or symbolical delivery is sufficient to pass right; *Morgan v. King*, 28 W. Va. 1, 57 A. R. 633, holding actual delivery not essential where goods sold are sufficiently designated so that no question can arise as to thing intended; *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123, holding that property in articles incapable of actual delivery pass by delivery of bill of sale or other evidence of title; *Magee v. Billingsley*, 3 Ala. 679, holding that a sale is complete as soon as both parties have agreed upon the terms; *Race v. Hansen*, 12 Ill. App. 605, holding sale of a designated cow and payment of consideration price passed property though by arrangement she was to remain in vendor's pasture for a specified time.

Cited in reference notes in 20 A. D. 481, on delivery of chattels; 19 A. D. 343; 47 A. D. 387,—on delivery to pass title to chattel; 31 A. D. 450, on sufficiency of delivery of chattels sold; 31 A. D. 39, on sufficiency of delivery to pass title to chattels; 26 A. D. 284, on what is sufficient delivery on a sale of chattels; 44 A. D. 538, on sufficiency of symbolical or constructive delivery; 26 A. D. 628, on sufficiency of constructive delivery to pass title to chattels; 61 A. D. 299, as to when constructive instead of actual or manual delivery may be made; 37 A. D. 617, on sufficiency of delivery accompanying sale of property in stranger's possession.

Cited in note in 49 A. D. 325, on delivery and acceptance to take verbal sale of goods out of the statute of frauds.

Distinguished in *Bird v. Wilkinson*, 4 Leigh, 266, holding a bill of sale only evidence of title.

— Order on warehouseman or bailee.

Cited in *Watts v. Hendry*, 13 Fla. 523; *Daniels v. Conrad*, 4 Leigh, 401; *Hansbrough v. Thom*, 3 Leigh, 147,—holding an order to a party having possession of property, to deliver to vendee, is a transfer of property; *Records v. Philadelphia, W. & B. R. Co.* 9 Phila. 55, 4 Legal Gaz. 297, 29 Phila. Leg. Int. 320, holding where personal property is on storage out of vendor's possession, that a bill of sale with notice to the depository is constructive delivery of the property; *Mitchell v. McLean*, 7 Fla. 329, holding an indorsement and delivery of a receipt of the proprietor of a lumber yard, in which lumber sold is deposited, is a delivery; *Blydenstein v. New York Secur. & T. Co.* 15 C. C. A. 14, 35 U. S. App. 175, 67 Fed. 469, holding a pledge of bales of cotton may be made by pledge of warehouse receipts where bales called for can be ascertained.

Cited in reference note in 48 A. S. R. 351, on sales by delivery of order for goods.

Distinguished in *Cofield v. Clark*, 2 Colo. 101, holding that for an order to a bailee to be a delivery the property must be in the possession of the bailee at the time; *Ferguson v. Louisville City Nat. Bank*, 14 Bush. 555, holding that a warehouse receipt, to pass title, must designate by some mark the particular property embraced.

Disapproved in *Woods v. M'Gee*, 7 Ohio, pt. 2, p. 127, 30 A. D. 220, holding where a part of an undivided lot of property is sold and an order given for

its delivery, there must be some act of selection before property changes; *Carpenter v. Glass*, 67 Ark. 135, 53 S. W. 678, holding an order of 35 barrels of flour shipped with other flour to an agent of vendor, to be delivered to vendee on payment, does not become property of vendee by a consignment.

Delivery of chattels requiring separation, selection, or transportation.

Cited in *Stamps v. Bush*, 7 How. (Miss.) 255, holding a direction to an overseer to have certain cotton hauled to river for vendee, which transportation was no part of contract of sale, constituted a delivery; *Winslow v. Leonard*, 24 Pa. 14, 62 A. D. 354, holding actual delivery, weighing, and setting aside goods, are only circumstances from which intention to vest title may be inferred; *State v. Davis* (W. Va.) 14 L.R.A. (N.S.) 1142, 60 S. E. 584, holding a sale of intoxicating liquors, and delivery in fulfilment of an order received at his place of business, is a sale at place of business; *Com. v. Hess*, 148 Pa. 98, 33 A. S. R. 810, 17 L.R.A. 176, 23 Atl. 977, 9 Lanc. L. Rev. 259, 29 W. N. C. 562, holding where orders for intoxicating liquors are received at the wholesale dealer's place of business, from a person in another county, is a sale at place of business though seller delivers in the county of purchaser; *Bloyd v. Pollock*, 27 W. Va. 75, holding that goods sold, to be delivered at depot in a certain city, became property of vendee on arrival at such depot without notice of their arrival; *State v. Hughes*, 22 W. Va. 743, holding a separation and severance of property necessary to vest property in vendee where goods are not uniform.

Cited in reference note in 52 A. S. R. 521, on separation of articles of same quality sufficient to pass property.

Distinguished in *Haxall v. Willis*, 15 Gratt. 434, holding wheat shipped to depot at place selected by vendee who is to remove it from terminal depot is property of vendee on reaching latter depot.

Disapproved in *Hutchinson v. Hunter*, 7 Pa. 140, holding that goods sold must be ascertained, designated, and separated from the stock or quality with which they are mixed before the property can pass.

—Necessity of separation of articles from a mass, alike in kind and quality.

Cited in *Hurff v. Hires*, 40 N. J. L. 581, 29 A. R. 282, holding sale of a specific quantity of grain from a mass requires no separation where quality is uniform; *Kimberly v. Patchin*, 19 N. Y. 330, 75 A. D. 334, holding same as to wheat in a warehouse; *Kingman v. Holmquist*, 36 Kan. 735, 59 A. R. 604, 14 Pac. 168, holding a separation and selection not essential to delivery of a certain member of plants from an ascertained lot which are identical in kind and value; *Hamilton v. National Loan Bank*, 3 Dill. 230, Fed. Cas. No. 5,987, holding separation of bonds sold from others not necessary to delivery where all are exactly alike in date, amount time of payment, etc.

Distinguished in *Hubler v. Gaston*, 9 Or. 66, 42 A. R. 794, holding no delivery where it does not appear mass or bulk is of a uniform kind or quality.

Disapproved in *Commercial Bank v. Gillette*, 90 Ind. 268, 46 A. R. 222, holding on sale of part of stock of goods title does not pass until part sold is designated or separated; *Scudder v. Worster*, 11 Cush. 573, holding a sale of 160 barrels of pork from a larger lot, no designation or separation being made, does not pass title.

Custom or usage as part of contract.

Cited in *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927, holding that a well-established custom should be considered in interpreting a contract; *Stanton v.*

Small, 3 Sandf. 230, holding usage that goods in a vessel pass by orders without actual delivery to be a part of contract.

Cited in reference note in 55 A. D. 172, on overruling of particular custom against natural reason.

Instructions on effect of evidence.

Cited in *Davis v. Miller*, 14 Gratt. 1, holding it not error, to instruct jury for a party if they find the facts true which the evidence tended to prove.

18 AM. DEC. 748, TRUSS v. OLD, 6 RAND. (VA.) 556.

Possession to maintain trespass or trover.

Cited in *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 52 A. S. R. 890, 21 S. E. 1035, holding that one in actual possession may maintain trespass *quare clausum fregit*.

Cited in reference notes in 53 A. D. 207, on possession required to maintain trespass *quare clausum fregit*; 22 A. D. 41; 51 A. D. 646; 39 A. S. R. 795,—on necessity of possession for maintenance of action for trespass; 36 A. D. 115, on property necessary to maintain trover for chattels; 28 A. D. 708, on property and possession necessary to maintain trover.

Powers of guardian generally.

Cited in notes in 89 A. S. R. 269, as to whether powers of guardian are coupled with an interest; 89 A. S. R. 281, on power of guardian over sale of ward's personal property; 89 A. S. R. 308, on purchase by guardian of ward's property.

Title to guardian to ward's property.

Cited with special approval in *Freeman v. Bradford*, 5 Port. (Ala.) 270, holding the authority of the guardian over the real estate of his ward is conclusive against the control or interference of the ward.

Cited in *Hunter v. Lawrence*, 11 Gratt. 111, 62 A. D. 640, holding that guardian has legal title to ward's personal estate; *Ware v. Ware*, 28 Gratt. 670, sustaining power of a guardian of an infant husband to reduce to possession for the husband his wife's choses in action.

Guardian's possession of ward's land.

Cited in *Zirkle v. McCue*, 26 Gratt. 517, holding that a guardian may maintain a suit for partition of real estate held jointly by ward and another.

Cited in note in 89 A. S. R. 309, on guardian's possession of ward's real property.

Distinguished in *McDodrill v. Pardee & C. Lumber Co.* 40 W. Va. 564, 21 S. E. 878, sustaining an action of trespass by an infant suing by a next friend.

Title of legal representative to assets coming into his hands.

Cited in *Brockenbrough v. Turner*, 78 Va. 438, holding that executor has legal title to assets which come into his hands for administration.

Suit by guardian in his own name.

Cited in *Cochrane v. Hyre*, 49 W. Va. 315, 38 S. E. 554, holding that a suit on a demand taken by a guardian in his own name may be brought in his own name; *Burdett v. Cain*, 8 W. Va. 282, holding that guardian cannot maintain a bill in equity in his own name to recover the distributive share of ward's personal estate of ward's ancestor.

Cited in reference note in 47 A. D. 73, on who must bring trespass where guardian is in possession of ward's land.

Distinguished in *Kinney v. Harrett*, 46 Mich. 87, 8 N. W. 708, holding that

guardian cannot bring ejectment in his own name; *Campbell v. Fitcher*, 168 Ind. 645, 81 N. E. 661, 11 A. & E. Ann. Cas. 1089, holding that guardian has no authority to sue in equity; *Newton v. Nutt*, 58 N. H. 599, denying right of guardian to maintain a suit in his own name on an account for labor of his ward.

Ownership of wood into which trees have been wrongfully converted.

Cited in *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386, holding that a landlord may bring trover against his tenant during the tenancy, for the value of wood into which trees have been wrongfully converted by tenant; *Missouri Lumber & Min. Co. v. Zeiting*, 45 Mo. App. 114 (dissenting opinion), on ownership of felled trees.

Statute of jeofails.

Cited in *Miller v. Hoc*, 1 Fla. 189, holding that statute of jeofails does not apply to cure a verdict where there has been no issue or a nonjoinder; *Reaves v. Dennis*, 6 Smedes & M. 89, holding defects in pleading cured by statute where defendant, instead of demurring, pleads to action.

Cited in reference notes in 59 A. D. 320, on defects cured by verdict; 28 A. D. 711, on what defects are cured by verdict; 39 A. D. 368, on curing defect in declaration.

18 AM. DEC. 751, HETHS v. WOODBRIDGE, 6 RAND. (VA.) 605.

Parol agreements.

Cited in reference note in 34 A. S. R. 141, on specific performance of contract varied by parol agreement.

Cited in notes in 1 A. D. 13, on parol agreement relating to land; 4 L.R.A. (N.S.) 980, on parol modification of original contract required to be in writing.

Part performance of oral contract for sale of lands.

Cited in *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Snyder v. Martin*, 17 W. Va. 276, 41 A. R. 670,—holding that for equity to consider a part performance of a parol agreement to sell land, to create an equitable title, it must be such that, otherwise seller would commit a fraud on purchaser; *Payne v. Graves*, 5 Leigh, 561, holding that possession, to be part performance, must be referable to the agreement set up; *Wright v. Pucket*, 22 Gratt. 370, denying specific performance in equity of a parol agreement where part performance relied upon was not shown to result from agreement proved.

18 AM. DEC. 757, COLEMAN v. COCKE, 6 RAND. (VA.) 618.

Lien of judgment as dependent on execution.

Cited in *Findlay v. Toneray*, 2 Rob. (Va.) 374, holding that judgment gives a lien which continues during capacity to issue an elegit; *McCullough v. Somerville*, 8 Leigh, 415, holding judgment creditor who has charged debtor in execution, on which debtor has been discharged for failure to pay jail fees, is remitted to lien of judgment without scire facias; *Love v. Harper*, 4 Humph. 113, holding the lien of a judgment not lost or suspended by a stay of execution.

Purpose of writ of elegit.

Cited in *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *Byers v. Fowler*, 12 Ark. 218, 54 A. D. 271,—holding the elegit gives a lien on the lands of judgment debtor; *McCullough v. Colby*, 5 Bosw. 477, on purpose of an elegit.

Revival of judgment.

Cited in *Coombs v. Jordan*, 3 Bland. Ch. 284, 22 A. D. 236, holding that a

judicial lien which has been barred by lapse of time cannot be revived as to give it a retrospective effect.

Necessity of elegit to support creditors' suit.

Cited in *Taylor v. Spindle*, 2 Gratt. 44, holding it is not necessary that a judgment creditor should issue an elegit on his judgment before coming into equity for relief.

Fraudulent conveyance.

Cited in *Lockhard v. Beckley*, 10 W. Va. 87, holding where a husband purchases land in name of wife with intent to defraud his creditors, that conveyance may be impeached at suit of such creditors; *Blow v. Maynard*, 2 Leigh, 29, on subjection of fraudulently conveyed land to satisfaction of judgment.

Cited in reference notes in 28 A. D. 113, on conveyances fraudulent as to creditors; 90 A. S. R. 466, on fraudulent conveyance to son; 21 A. D. 432; 26 A. D. 385,—as to when conveyance from father to son is fraudulent; 29 A. D. 124, on validity of gift or voluntary conveyance by father to child.

Rights of creditors in equitable property of debtor.

Cited in *Dold v. Geiger*, 2 Gratt. 98, holding choses in action to which the wife becomes entitled during coverture are liable to claims of creditors of husband, though they are settled by husband on wife.

Priority between equitable estate and judgment lien.

Cited in *Pack v. Hansbarger*, 17 W. Va. 313, holding that a court of equity will limit the lien of a judgment to actual interest which debtor has in the estate; *Parker v. Pierce*, 16 Iowa, 227, holding the lien of a judgment creditor not entitled to a lien over prior equities.

Distinguished in *Delaplain v. Wilkinson*, 17 W. Va. 242, holding under the statute a creditor is entitled to benefit of statute notwithstanding a prior equitable title existed.

Junior and elder equities.

Cited in *Camden v. Harris*, 18 W. Va. 554, holding where equities are equal the elder equity will prevail.

Trust ex maleficio.

Cited in reference notes in 36 A. S. R. 749, as to when constructive trusts arise; 36 A. D. 87; 36 A. D. 182; 90 A. D. 708,—on person acquiring title by fraud as trustee for injured party.

Distinguished in *Tennant v. Tennant*, 43 W. Va. 547, 27 S. E. 334, holding the breaking of a promise not fraud, where there was no fraudulent intent at time of making promise.

Purchaser from a fraudulent grantee.

Cited in *Fenno v. Sayre*, 3 Ala. 458; *Agricultural Bank v. Dorsey*, Freem. Ch. (Miss.) 338,—holding that a bona fide purchaser from a fraudulent grantee for valuable consideration and without notice of the fraud is protected against general creditors of grantor.

Cited in reference notes in 83 A. D. 122, on protection of bona fide purchasers for valuable consideration; 24 A. D. 235, on who are bona fide purchasers; 25 A. D. 532, defining bona fide purchaser; 23 A. D. 614, on protection of bona fide purchaser from fraudulent grantee; 28 A. D. 207, on protection of bona fide purchaser under fraudulent conveyance; 25 A. D. 108, on protection of bona fide purchaser without notice of fraud from one who was a party to the fraud.

Cited in note in 25 A. D. 614, on right of bona fide purchaser from fraudulent purchaser.

Distinguished in *Frazer v. Western*, 1 Barb. Ch. 220, on rights of a purchaser from a fraudulent grantee.

Failure to record conveyance.

Cited in *Withers v. Carter*, 4 Gratt. 407, 50 A. D. 78, holding the fact that a deed is unrecorded does not affect a pre-existing equitable estate of the grantee acquired by purchase from grantor.

18 AM. DEC. 771, WHITEFORD v. COM. 6 RAND. (VA.) 721.

What constitutes homicide generally.

Cited in reference notes in 24 A. D. 580, on crime of murder; 35 A. D. 756; 42 A. D. 153; 49 A. D. 401,—on what constitutes murder; 34 A. D. 386, on intent to kill as essential to murder; 27 A. D. 204, on killing of another while committing a felony as murder.

Cited in note in 13 L.R.A. 135, as to what constitutes criminal intent.

What constitutes murder in first degree.

Cited in *Hill v. People*, 1 Colo. 436; *Com. v. Jones*, 1 Leigh, 598,—holding that common-law murder which is proved to be a wilful, deliberate, and premeditated killing, is in the first degree; *People v. Bealoba*, 17 Cal. 389; *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228,—holding that killing must have been wilful, deliberate, and premeditated; *People v. Lamb*, 2 Keyes, 360, 1 Cow. Crim. Rep. 423, holding premeditated design essential; *Burris v. State*, 38 Ark. 221; *McDaniel v. Com.* 77 Va. 281,—holding that death of deceased must be the ultimate result which the concurring will and deliberation of the prisoner purposed; *Howell v. Com.* 26 Gratt. 995, holding that an actual intent to kill must exist; *Casat v. State*, 40 Ark. 511, holding where the design to kill was formed deliberately and with premeditation, the fact that the accused afterwards became intoxicated, and so remained at time of killing, cannot affect degree of homicide; *Price v. Com.* 77 Va. 393, on what constitutes murder in the first degree.

Cited in reference notes in 54 A. D. 582, on what is murder in first degree; 76 A. S. R. 877, on premeditation to commit homicide; 52 A. S. R. 733; 89 A. S. R. 884,—on premeditation as element of homicide; 6 A. S. R. 31, defining deliberation and premeditation as elements of murder; 32 A. D. 338, on intent to kill as element distinguishing murder of first degree from second degree.

— Interval between homicidal design and execution of same.

Cited in *Vivens v. State*, 11 Ark. 455, holding time of premeditation has no definite legal limits; *Roberts v. State*, 3 Ga. 310, holding that no time is too short; *Cook v. State*, 46 Fla. 20, 35 So. 665; *Dunn v. State*, 143 Ala. 67, 39 So. 147,—holding it in first degree, where an intent to kill exists for any time before the act, of which intent the mind is fully conscious and which accused thereafter executes by killing; *Sweeney v. State*, 35 Ark. 585, holding same if the design to kill be but the conception of a moment, if it was the result of deliberation and premeditation; *Wright v. Com.* 75 Va. 914, holding if design to kill at time of killing is formed, and killing is done without provocation then or recently received, it is murder in the first degree.

Annotation cited in *State v. Foster*, 130 N. C. 666, 89 A. S. R. 876, 41 S. E. 284, holding an intent to kill at the moment as not sufficient; *State v.*

Thomas, 118 N. C. 1113, 24 S. E. 431, holding a statement during a scuffle that "he would take something and kill deceased," but no deadly weapon being used, was no evidence of a premeditated intent.

Cited in reference notes in 74 A. D. 327, on materiality of length of time of deliberation and premeditation of murder; 52 A. D. 737, on necessity of deliberation for any particular length of time to constitute malice aforethought or premeditation.

Statutory degrees of murder.

Cited in *Cook v. Stata*, 46 Fla. 20, 35 So. 665, holding statute does not make anything murder which was not murder before, but merely grades the crime, and citing annotation also to this point.

Cited in reference notes in 6 A. S. R. 31; 13 A. S. R. 711; 14 A. S. R. 121; 16 A. S. R. 19; 76 A. S. R. 877,—on statutory degrees of murder; 27 A. D. 204; 67 A. S. R. 163; 73 A. S. R. 934,—on statutory division of murder into degrees; 66 A. S. R. 456, on degree of homicide perpetrated in felony; 3 A. S. R. 781, on degree of murder committed by means of poison.

Cited in note in 21 A. S. R. 187, on degrees of murder.

Murder in second degree.

Cited in *State v. Phillips*, 24 Mo. 475, holding murder in the second degree is such killing known to the common law where there was no intention to kill and where the malice was implied; *State v. Morrison*, 49 W. Va. 210, 38 S. E. 481, holding specific intent to kill not essential.

Murder and manslaughter distinguished.

Cited in reference notes in 27 A. D. 417; 52 A. D. 736,—distinguishing between murder and manslaughter.

Unintentional homicide.

Cited in notes in 90 A. S. R. 576, on unintentional homicide in commission of misdemeanors and felonies; 90 A. S. R. 582, on unintentional homicide in killing one person while shooting at another.

Intoxication as a defense.

Cited in reference notes in 87 A. D. 101, on intoxication as defense in criminal action; 49 A. D. 401, on intoxication as defense to trial for murder; 72 A. D. 493, on extenuation of crime by voluntary or intentional intoxication.

Cited in note in 45 A. D. 559, on intoxication.

Implied malice.

Cited in *McAdams v. State*, 25 Ark. 405, holding that law implies malice from the killing of a human being without provocation; *Murray v. State*, 1 Tex. App. 417; *McCoy v. State*, 25 Tex. 33, 78 A. D. 520,—holding that malice presumed where means used were likely to do great bodily harm, endangering life and where killing took place thereby.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 19 AM. DEC.

19 AM. DEC. 33, ALLEN v. BOOKER, 2 STEW. (ALA.) 21.

Void parol contract as basis for assumpsit.

Cited in *Hays v. Goree*, 4 Stew. & P. (Ala.) 170, holding under a parol lease for five years, where lessee has enjoyed possession for one year, the lessor may recover, for the use and occupation for that period.

Cited in note in 15 A. D. 63, on how far statute of frauds available as grounds of defense or relief.

Recovery of money paid under void parol contract for sale of lands.

Cited in *Flinn v. Barber*, 59 Ala. 446 (same case on later appeal, 64 Ala. 193), holding money paid under parol contract for purchase of land may be recovered, where the purchaser has not been placed in possession; *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 38 A. S. R. 116, 11 So. 695, upholding action to recover money paid under contract for sale of lands without previous demand; *Donaldson v. Waters*, 35 Ala. 107 (affirming 30 Ala. 175), holding purchaser who retains uninterrupted possession of the land cannot recover back a part of the purchase money, unless the contract has been rescinded.

Cited in notes in 105 A. S. R. 796, 797, on form of action for recovery of money paid under contract unenforceable by statute of frauds; 38 A. S. R. 133, on payment of purchase money unaccompanied by possession as validating contract void by statute of frauds.

Distinguished in *Cope v. Williams*, 4 Ala. 362, holding one who has paid half the purchase money, and retains uninterrupted possession cannot recover from vendor the money received by him.

— **Recovery of property given or services rendered.**

Cited in *Keath v. Patton*, 2 Stew. (Ala.) 38, on recovery by trover of the value of property paid under a parol contract for the sale of land; *Sims v. McEwen*, 27 Ala. 184, holding value of services performed under contract void by statute of frauds recoverable at law.

Recovery of money paid under void contract generally.

Cited in *Davis v. Orme*, 36 Ala. 540, holding by statute, an action lies for the use of the wife, to recover money bet and lost by her husband on a horse race.

Cited in notes in 50 A. D. 679, on recovery of money paid on contract to purchase; 24 A. D. 296, on assumpsit to recover back money paid on contract.

Executed parol agreement for sale of land.

Cited in *Meredith v. Naish*, 3 Stew. (Ala.) 207, holding payment of part of the purchase money is not sufficient part performance, to enable vendor to enforce parol contract for sale of land, and recover at law the remainder of the purchase money; *Brock v. Cook*, 3 Port. (Ala.) 464, holding parol contract for the sale of land followed by possession, improvements, continuous occupancy, and acts by vendor recognizing the sale, will take such contract out of the statute of frauds.

Cited in reference notes in 41 A. D. 56, on enforcement of contracts because of part performance; 61 A. D. 745, on part payment taking case out of statute of frauds.

Returning evidence in record for appeal.

Cited in *Aldridge v. Hightower*, 4 Port. (Ala.) 418, holding justice of the peace has no right to enter upon his minutes, other evidence than such as is made the ground of exceptions.

19 AM. DEC. 37, BRANNAN v. OLIVER, 2 STEW. (ALA.) 47.**Validity of purchase by trustee at his own sale.**

Cited in *Andrews v. Hobson*, 23 Ala. 219, holding purchase by trustee at his own sale will be set aside unless confirmed by *cestuis que trust*, who must make known their dissatisfaction seasonably.

Cited in reference notes, in 20 A. D. 130; 30 A. D. 530,—on trustee's right to purchase at his own sale; 22 A. D. 302, on trustee's right to purchase on sale of trust property; 25 A. D. 400, on invalidity of purchase by trustee at his own sale; 52 A. D. 406, on voidability of purchase made by trustees as executors, administrators, and sheriffs at their own sale.

Distinguished in *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 A. D. 525, holding trustee not an executor or administrator cannot purchase at his own sale, either directly or indirectly; *Cunningham v. Rogers*, 14 Ala. 147, holding that mortgage of slaves, with power of sale who purchased them at sale under the mortgage, and later resold at a profit, was a trustee for difference between the sales.

— By executor or administrator.

Cited in *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361; *McCartney v. Calhoun*, 17 Ala. 301,—holding administrator may acquire title by fair and bona fide purchase at his sale; *Hampton v. Shehan*, 7 Ala. 295; *Chandler v. Shehan*, 7 Ala. 251,—on same point; *Penny v. Jackson*, 85 Ala. 67, 4 So. 720; *Cottingham v. Moore*, 128 Ala. 209, 30 So. 784; *McLane v. Spence*, 6 Ala. 894,—holding an executor or administrator having an interest in the estate may purchase at his own sale, if it is fairly conducted; *Daniel v. Stough*, 73 Ala. 379, holding such a purchase by administrator without interest in the land is voidable at option of *cestuis que trust*, although he acted with fairness, paid full value, and made no profit.

Cited in reference notes in 42 A. D. 542, on invalidity of purchase by executor of property of estate; 56 A. D. 93, as to whether administrator or executor may purchase property of estate for his own benefit.

Cited in note in 78 A. S. R. 195, on power of executors to purchase property of estate.

Distinguished in *Calloway v. Gilmer*, 36 Ala. 354, holding an executor having an interest in the estate cannot purchase at his own sale, although fairly conducted if he is also a guardian; *Foxworth v. White*, 72 Ala. 224, where executor having no interest in the estate made fair sale to third person, and afterwards acquired good title from such vendee; *Montgomery v. Givhan*, 24 Ala. 568, holding executor who by arrangement with creditors obtained indulgence on the debts, which enabled him to purchase, at sale under order of court, had by consent, was held to have purchased for benefit of estate.

Criticized in *Payne v. Turner*, 36 Ala. 623, setting aside purchase by administrator at his own sale under order of court where price was inadequate and bidding not encouraged.

Validity of administrator's sale without order of court.

Cited in *Fambro v. Gantt*, 12 Ala. 298, holding by statute, no title passes by a private sale by the administrator.

Cited in reference note in 68 A. D. 100, on court order as prerequisite to sale of realty by executor.

Validity of instrument as question of law or fact.

Cited in *Richards v. Hazzard*, 1 Stew. & P. (Ala.) 139, holding it is the province of the court, if fraud is apparent on the face of the deed or contract, or follows from the facts presented.

19 AM. DEC. 44, LUCAS v. HICKMAN, 2 STEW. (ALA.) 111.

Occasion for ne exeat.

Cited in *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361, holding ne exeat proper against one who concealed his title to family slaves which complainant in consequence purchased and who induced the belief that he would take them out of the state.

Cited in notes in 22 A. D. 678, on writ of ne exeat; 25 A. D. 535; 28 A. D. 429; 7 L.R.A. 397,—on where writ of ne exeat will issue; 118 A. A. R. 990, on writ of ne exeat as ordinary process in America; 118 A. S. R. 991, on certainty of amount of demand shown as basis of application for writ of ne exeat.

Law of case on appeal.

Distinguished in *Burgess v. Sugg*, 2 Stew. & P. (Ala.) 341, holding re-examination of same questions on same facts, improper.

19 AM. DEC. 46, KING v. GREEN, 2 STEW. (ALA.) 123.

Effect of marriage.

Cited in *Grimes v. Reynolds*, 184 Mo. 679, 83 S. W. 1132 (affirming 94 Mo. App. 576, 68 S. W. 588), holding note given by a wife to her husband during coverture for money borrowed may be proved up by him in probate court as a demand against her individual estate.

Cited in notes in 73 A. S. R. 900, on effect of marriage on antenuptial contracts; 25 A. D. 134, on effect of administratrix marrying the obligor in bond payable to her in her representative capacity to extinguish the debt; 11 L.R.A. (N.S.) 274, as to whether common-law rule precluding executory contract or action at law between husband and wife applies where former acts as trustee or in some other representative capacity.

Effect of making debtor an executor.

Cited in reference note in 40 A. D. 460, on effect upon debt of creditor's making one joint debtor his executor.

Party in different capacities.

Cited in reference note in 34 A. D. 257, on same party as plaintiff and defendant.

Powers, duties, and liabilities of administrator de bonis non.

Cited in reference notes in 39 A. D. 724, on powers of administrator *de bonis non*; 44 A. D. 472, on powers and liabilities of administrators *de bonis non*.

Cited in note in 24 A. D. 385, on duty of administrator *de bonis non*.

Assets passing to successor of personal representative.

Cited in *Spence v. Rutledge*, 11 Ala. 590; *Wagner v. Chenault*, 7 Ala. 677,—holding note or contract made with one as administrator, passes by operation of law to a subsequent administrator; *King v. Griffin*, 6 Ala. 387, holding assets which come into the hands of an administrator, pass to his successor, if he dies, resigns, or is removed before he administers them; *White v. Beard*, 5 Port. (Ala.) 94, 30 A. D. 552, holding administrator *de bonis non* can maintain an action upon the note given to administrator for price of land sold by intestate; *Harbin v. Levi*, 6 Ala. 399, holding that where an administrator has sold property of his intestate, and has not received the price, right of action passes to his successor on removal; *Goodwynne v. Bellerby*, 116 Ga. 901, 43 S. E. 275, holding administrator *de bonis non*, upon being made party to suit on note to predecessor, may, upon satisfaction of resultant judgment, make a deed to the land without further order from the court; *Dunham v. Grant*, 12 Ala. 105, holding administrator cannot sue upon a note payable to himself as administrator, after his removal from office, although no successor has been appointed.

Cited in reference note in 52 A. D. 193, on bond payable to administrator as such as assets in hands of administrator *de bonis non*.

Cited in note in 40 L.R.A. 35, 71, on choses in action passing to administrator *de bonis non*.

Judgments rendered in vacation by consent.

Cited in *Erwin v. Reese*, 54 Ala. 589, holding statute authorizing chancellor by consent to render a decree in vacation, within ninety days after hearing, was not intended to render void orders and decrees made by consent, after that lapse of time.

Cited in reference notes in 62 A. S. R. 141, on rendition of judgment in vacation; 66 A. S. R. 835, on validity of judgment rendered in vacation.

Entry nunc pro tunc.

Cited in reference note in 35 A. D. 526, on entry of judgment *nunc pro tunc*.

Collateral attack on judgment.

Cited in note in 23 A. S. R. 116, on collateral attacks upon judgments.

19 AM. DEC. 49, GATES v. McDANIEL, 2 STEW. (ALA.) 211.**Strict construction of penal statute.**

Cited in reference notes in 10 A. S. R. 34, on construction of penal statutes; 54 A. S. R. 469, on strict construction of penal statutes; 74 A. D. 534, on rule that penal statutes should be strictly construed; 91 A. D. 287, on necessity that penal statute be strictly construed.

Protection of franchise in equity.

Cited in *Columbus v. Rodgers*, 10 Ala. 37, holding equity will restrain an in-

vasion of a franchise which the statutes of its own state conferred to maintain a toll bridge over a river separating two states; *Harrell v. Ellsworth*, 17 Ala. 576, holding equity will restrain owner of private bridge from permitting travelers, to pass over his bridge, in violation of the rights of the proprietor of a near by toll bridge; *Micou v. Tallasse Bridge Co.* 47 Ala. 652, holding equity will enjoin erection of second toll bridge authorized by statute in violation of a toll-bridge franchise granted by prior statute; *Norris v. Farmers' & Teamsters' Co.* 6 Cal. 590, 65 A. D. 535, holding under statute equity will enjoin erection of a free bridge within one mile of a regularly licensed toll bridge.

Distinguished in *Hall v. Ragsdale*, 4 Stew. & P. (Ala.) 252, holding a community in the neighborhood of a turnpike, established by charter will not be restrained from the construction of roads demanded by the situation of the country, and the wants of the neighborhood.

Exclusiveness of franchise for bridge or ferry.

Cited in *Blanchard v. Abraham*, 115 La. 989, 40 So. 379, holding lessee of public ferry has an exclusive license, the invasion of which by the operation of unlicensed free ferries within competitive limits may be prohibited; *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396, holding unauthorized erection of a bridge within a half mile of ferry is within the prohibition of the establishment of another ferry.

Cited in notes in 12 E. R. C. 164, on nature and extent of ferry rights; 59 L.R.A. 548, on interference by bridges with rights of ferryman.

Franchises from municipalities.

Cited in *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 A. S. R. 342, 4 So. 106, holding franchise granted under a city charter is a franchise by the legislature authorizing such charter.

Injunction against wrongful taking for public use.

Cited in *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396, holding equity has jurisdiction to restrain the taking or damaging of private property for public use without just compensation, even though an action at law will lie for recovery of damages in such cases.

Protection of foreign corporations in equity.

Cited in *American Union Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 26, 42 A. R. 90, holding equity will not, at suit of foreign telegraph company, restrain a rival company from obstructing the erection of its poles and wires, where the bill does not show that complainant has any place of business or agent in the state, nor any property or rights of property in the state.

19 AM. DEC. 52, WINN v. YOUNG, 1 J. J. MARSH. 51.

Grounds for new trial.

Cited in reference note in 24 A. D. 319, as to when new trial may be granted.

Cited in note in 47 L.R.A. 37, on inadequacy of damages as ground for setting aside verdict in action on contract.

Interest-bearing notes.

Cited in *Miller v. Cavanaugh*, 99 Ky. 377, 59 A. S. R. 463, 35 S. W. 920, holding note payable two years after date "with interest at 6 per cent per annum, from — until paid" bears interest from date, and not from maturity.

Cited in note in 63 A. D. 439, on validity of contract to pay interest in case of failure to pay principal at maturity of contract.

19 AM. DEC. 54, ROWLAND v. GARMAN, 1 J. J. MARSH. 76.**Parol contract to convey land.**

Cited in *Schierman v. Beckett*, 88 Ind. 52, holding parol contract to convey land a sufficient consideration, and vendor if able and willing to perform, can recover upon note for price; *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105, 49 N. E. 178, holding vendee liable under a parol contract if in possession, and vendor is able and willing to perform.

Dismissal of bill for want of parties.

Cited in *Van Epps v. Van Deusen*, 4 Paige, 64, holding if defendant does not object to want of proper parties until hearing, complainant will be allowed a reasonable time to bring them before the court, if such parties were not omitted by fraud or bad faith of complainant.

Time to object for want of parties.

Cited in reference note in 52 A. D. 190, on first raising objections to want of proper parties on appeal.

Joinder in equity.

Cited in reference note in 38 A. D. 124, on joinder of defendants in equity.

19 AM. DEC. 55, FISHBACK v. WOODFORD, 1 J. J. MARSH. 84.**Parol evidence of fraud.**

Cited in reference note in 26 A. D. 126, on parol evidence to establish fraud in written agreement.

Relief for mistake in written instruments.

Cited in *Oiler v. Gard*, 23 Ind. 212, holding relief will be granted, only where there is a plain mistake, clearly made out by satisfactory proof.

19 AM. DEC. 59, MILLER v. MILLER, 1 J. J. MARSH. 169.**Rights in wife's personality.**

Cited in *Jones v. Warren*, 4 Dana, 334, holding surviving husband may maintain suit on wife's choses in action; *Sallee v. Chandler*, 26 Mo. 124, holding joinder of husband in deed of transfer executed by wife of her separate estate subject to her full power of disposal was immaterial; *Kenyon v. Saunders*, 18 R. I. 590, 26 L.R.A. 232, 30 Atl. 470, holding common-law right of husband to wife's intestate personality is not taken away by statutes authorizing married woman to hold property as if unmarried and dispose of it at death.

Cited in reference note in 49 A. D. 410, on necessity for reducing wife's property to possession to vest title in husband.

Cited in notes in 29 A. D. 47, on husband's interest in wife's chattels and choses in action; 12 A. S. R. 83, on nature and origin of husband's succession to wife's personality.

Criticized in *Leakey v. Maupin*, 10 Mo. 368, 47 A. D. 120, holding husband entitled to wife's choses in action upon reducing them to possession, whether they belonged to the wife at the time of her marriage, or accrued to her during coverture.

19 AM. DEC. 61, HILDRETH v. McINTIRE, 1 J. J. MARSH. 206.**Existence of office de facto.**

Cited in *Decorah v. Bullis*, 25 Iowa, 12, holding before one can claim to be a *de facto* officer, there must be a law creating the office.

Cited in note in 15 L.R.A.(N.S.) 100, on *de jure* office as condition of *de facto* officer.

Distinguished in *Adams v. Lindell*, 5 Mo. App. 197, holding the acts of *de facto* officers may be sustained where there is no *de jure* officer and also where the legal office no longer exists.

— Unconstitutional creation of office.

Cited in *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, holding an unconstitutional act is not a law, and creates no office; *People ex rel. Stidger v. Horan*, 34 Colo. 304, 86 Pac. 252 (dissenting opinion), on the creation of an office by an unconstitutional law; *People v. Duff*, 65 How. Pr. 365, 1 N. Y. Crim. Rep. 307, holding grand jury obtained by methods forbidden by the Constitution cannot be valid.

Cited in notes in 64 A. D. 54, on creation of *de facto* court or office by unconstitutional statute; 21 L.R.A. 144, on *de facto* officers and offices under unconstitutional statutes; 15 L.R.A.(N.S.) 94, on *de jure* office created by unconstitutional statute as a condition of *de facto* officer.

— Unconstitutional judicial office.

Cited in *Walcott v. Wells*, 21 Nev. 47, 37 A. S. R. 478, 9 L.R.A. 59, 24 Pac. 367, holding judge appointed under a void statute increasing number of judges is a *de facto* officer while acting by virtue of his commission, by consent of the other judges, and under assignment by presiding judge to district where no other judge acts.

Effect of assuming nonexistent office.

Cited in *Welch v. Ste Genevieve*, 1 Dill. 130, Fed. Cas. No. 17,372, holding that no validity attached to an unauthorized organization under the general law of a city whose charter was merely disused; *State v. Gardner*, 54 Ohio St. 24, 31 L.R.A. 660, 42 N. E. 999, holding the official acts of public officers in an office created by an unconstitutional statute cannot be attacked collaterally; *Buck v. Eureka*, 109 Cal. 504, 30 L.R.A. 409, 42 Pac. 243, holding incumbents of offices having an irregular or potential existence are *de facto* officers and are estopped from denying that they held such offices.

De facto government.

Cited in *Scheible v. Bacho*, 41 Ala. 423, holding the governments of the Confederate States during the Civil War, were governments *de facto*; *Hawkins v. Filkins*, 24 Ark. 286, holding that if during the Civil War the government of Arkansas was entirely revolutionized, and usurped by force, without law or protection, the people of the state had right to establish a *de facto* government; *Cullins v. Overton*, 7 Okla. 470, 54 Pac. 702, holding county government of disputed region under legislative enactment of Texas, acquiesced in by the United States until such territory was decided to belong to United States by the Supreme Court, was *de facto* government and the judgments of its courts valid; *Daniel v. Hutcheson*, 86 Tex. 51, 22 S. W. 933 (reversing 4 Tex. Civ. App. 239, 22 S. W. 278), holding courts organized, in states held by military force, by order of the President or under the reconstruction acts, existing beyond time laws of war or acts of Congress would justify, are courts *de facto* and their judgments binding; *Burkhart v. Jennings*, 2 W. Va. 242, holding the acts of persons who acted as officers and adhered to the government of Virginia, after the 13th day of June, 1861, are null and void, by ordinance of that date, passed by the convention of the loyal people of Virginia; *Hedges v. Price*, 2 W. Va. 192, 94 A. D. 507, holding during the Civil War, the government of the United States

never recognized the Confederate States of America as a political power, or as having right to command obedience of anyone; *McClure v. Johnson*, 14 W. Va. 432, holding an *ex parte* guardian's settlement during Civil War by commissioner of county under control of government of Virginia at Richmond, is valid.

Cited in note in 51 A. S. R. 825, on necessity of issuance by municipality and officers *de jure* or *de facto* to enforceability of bonds by bona fide holder.

De facto corporations.

Cited in reference notes in 24 A. S. R. 387, on legality of existence of corporation; 24 A. S. R. 893, on what constitutes corporation *de facto*; 26 A. S. R. 743; 38 A. S. R. 556,—as to when corporations *de facto* exist; 23 A. D. 60, on acts of corporations *de facto*.

De facto officers.

Cited in reference notes in 21 A. D. 217; 42 A. D. 148; 44 A. D. 321; 96 A. S. R. 809,—on *de facto* officers; 24 A. D. 117; 90 A. D. 497; 3 A. S. R. 183; 24 A. S. R. 278; 37 A. S. R. 494, 832; 39 A. S. R. 917; 63 A. S. R. 210; 76 A. S. R. 237; 117 A. S. R. 347,—on who are *de facto* officers; 20 A. D. 297, on who are officers *de facto* and their rights and liabilities; 39 A. S. R. 919, as to whether officers *de facto* exist where appointing power is defective; 64 A. D. 684, on effect upon his acts of officer's failure to qualify by giving bonds; 74 A. D. 471, on effect of officer's failure to take oath of office, give bond, etc.

Cited in note in 58 A. R. 442, as to when notary is *de facto* officer.

Rights of de facto officers.

Cited in reference note in 64 A. D. 685, on right of officer *de facto* to fees or emoluments of office.

Validity and effect of acts of de facto officers.

Cited in *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286, holding under the Constitution, requiring all officers under state authority to take oath of office, a deputy constable regularly appointed is not an officer *de jure*, but is one *de facto*, and others have no right to resist him in his discharge of duties and citing annotation also on this point; *People v. Sassovich*, 29 Cal. 480; *Keith v. State*, 49 Ark. 439, 5 S. W. 880,—holding judge's right to office cannot be questioned collaterally; *State ex rel. Baldwin v. Seavey*, 7 Wash. 562, 35 Pac. 389, holding *de facto* officers not vulnerable to collateral proceeding to which they were not parties, and citing annotation also on this point; *Pennywit v. Foote*, 27 Ohio St. 600, 22 A. R. 340 (dissenting opinion), on validity of acts of *de facto* officers.

Annotation cited in *Smith v. Meador*, 74 Ga. 416, 58 A. R. 438, upholding the acts of *de facto* officers on considerations of public policy.

Cited in reference notes in 27 A. S. R. 445, on acts of officers *de facto*; 31 A. S. R. 352; 35 A. S. R. 823,—on effect of acts of *de facto* officers; 37 A. S. R. 832, on binding effect of acts of officers *de facto*; 15 A. S. R. 206, on validity of acts of officer *de facto*; 56 A. D. 435, on validity of acts of officers or deputies *de facto*; 58 A. D. 55, on invalidity of acts of officers *de facto* as to themselves; 58 A. D. 54, on acts of *de facto* officers being effectual as to third persons; 38 A. D. 106, on extent of validity of acts of officer *de facto*; 3 A. S. R. 184, on collateral attack on acts of *de facto* officer; 58 A. R. 442, on validity of acts of *de facto* notary; 67 A. S. R. 828, on collateral attack on judgments by *de facto* judge.

Cited in note in 84 A. D. 133, on validity of judgment of judge *de facto*.

De facto exercise of office.

Cited in *Cary v. State*, 76 Ala. 78, holding warrant issued by notary public as

justice of the peace after term does not authorize arrest unless he acts *de facto*; *Morton v. Lee*, 28 Kan. 286, holding justice of the peace holding over after expiration of term, and continuing to discharge the duties of the office with the general recognition of him as such officer, is a justice of the peace *de facto*; *School Dist. No. 25 v. State*, 29 Kan. 57, on a school district as a corporation *de facto*; *Burt v. Winona & St. P. R. Co.* 31 Minn. 472, 18 N. W. 285 (dissenting opinion); *Brown v. O'Connell*, 36 Conn. 432, 4 A. R. 89 (dissenting opinion),—on *de facto* officers.

De facto exercise of right.

Cited in *Stillman v. Associated Lace Makers' Co.* 14 Misc. 503, 35 N. Y. Supp. 1071, holding service of summons on president *de facto* of defendant corporation gives jurisdiction of such corporation; and citing annotation also on this point.

Annotation cited in *Lebanon & R. Gravel Road Co. v. Adair*, 85 Ind. 244, holding after the election and organization of new board of directors, a note made by the old board to its president is unauthorized, and is not the note of the corporation.

Inalterability of constitutional courts.

Cited in *Sharpe v. Robertson*, 5 Gratt. 518, on the constitutional right to establish a special court of appeals.

Estoppel to deny de facto conditions.

Cited in *Humphreys v. Mooney*, 5 Colo. 282, holding defect in certificate of incorporation of mining corporation not essential to corporate existence in action by company against members.

19 AM. DEC. 70, GARRISON v. HAYDON, 1 J. J. MARSH. 222.

Place for record of deed of land included in new county.

Cited in *Koerper v. St. Paul & N. P. R. Co.* 40 Minn. 132, 41 N. W. 656, holding it must be recorded in the county where land lies at time it is left to be registered, and a subsequent change of county lines imposes no duty to record it again in another county in which the land may happen to fall.

Cited in reference note in 50 A. D. 469, on necessity of recording deed in county where land lies.

Cited in note in 12 A. D. 421, as to where deed must be recorded.

Place for taking acknowledgment.

Cited in note in 41 A. D. 171, as to where acknowledgments may be taken, and necessity of location appearing in certificate.

19 AM. DEC. 71, BRECKENRIDGE v. ORMSBY, 1 J. J. MARSH. 236.

Void and voidable contracts — Of infants generally.

Cited in *Harner v. Dipple*, 31 Ohio St. 72, 27 A. R. 496; *Fetrow v. Wiseman*, 40 Ind. 148,—holding infant's contract of suretyship voidable and subject to affirmation; *Paul v. Smith*, 41 Mo. App. 275, holding contracts of infants not for necessities, voidable; *Chapin v. Shafer*, 49 N. Y. 407, holding chattel mortgage by infant voidable during minority and within reasonable time after majority; *Hall v. Butterfield*, 59 N. H. 354, 47 A. R. 209, holding an executed or executory contract of infant cannot be avoided without restoring to other party the consideration received, or allowing him to recover compensation for the benefit conferred; *Cummings v. Powell*, 8 Tex. 80, on void and voidable contracts of infants; *Duvall v. Graves*, 7 Bush. 461, on avoidance of infants' contracts at their election.

Cited in reference note in 44 A. R. 698, on nature of infant's contract as void or voidable.

Cited in notes in 6 E. R. C. 54, on validity of infant's contracts; 18 A. S. R. 575, 576, 577, on infants' contracts as void or voidable.

— **Conveyances and sales of land by infant.**

Cited in *Weaver v. Jones*, 24 Ala. 420, holding bond for title by infant voidable; *Cole v. Pennoyer*, 14 Ill. 158, holding conveyances by an infant voidable, to be confirmed or repudiated by him at majority; *Middleton v. Hoge*, 5 Bush, 478, holding infancy cannot entitle one to avoidance of land contract ratified after majority; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447, holding infant's deed voidable at election after disability ceases.

Cited in note in 18 A. S. R. 582, on validity of infant's deed of conveyance.

— **Of insane persons.**

Cited in *Heard v. Sack*, 81 Mo. 610, holding contract of insane person voidable; *Shirley v. Taylor*, 5 B. Mon. 99, holding a lunatic's replevy bond voidable; *Evans v. Horan*, 52 Md. 602, holding deed of bargain and sale by an insane person voidable; *Riley v. Carter*, 76 Md. 581, 35 A. S. R. 443, 19 L.R.A. 489, 25 Atl. 667, holding deed of lunatic in trust for benefit of creditors voidable; *Elston v. Jasper*, 45 Tex. 409; *Moran v. Moran*, 106 Mich. 8, 58 A. S. R. 462, 63 N. W. 989,—holding deed of insane person, executed before he has been adjudicated to be such is voidable; *Wolcott v. Connecticut General L. Ins. Co.* 137 Mich. 309, 100 N. W. 569, holding deed of insane person not under guardianship voidable.

Cited in reference notes in 83 A. D. 523, on validity of contracts of insane persons; 16 A. S. R. 342, on deeds of insane persons.

Cited in notes in 21 A. R. 33, on validity of contract of lunatic; 15 A. D. 364, as to whether contracts of lunatics are void or voidable; 71 A. S. R. 431; 19 L.R.A. 489, on validity of a deed made by an insane person.

Distinguished in *Fitzhugh v. Wilcox*, 12 Barb. 235, holding lunatic's contract to sell real estate, after inquest and appointment of committee, void, and no action lies by committee thereon.

— **Of married woman.**

Cited in reference note in 31 A. D. 513, on validity of married women's contracts.

Cited in note in 45 A. D. 176, on validity of married woman's contracts and covenants.

Ratification or disaffirmance of contract.

Cited in *Hansen v. Berthelsen*, 19 Neb. 433, 27 N. W. 423, holding statute of frauds available as a defense to parties and privies; *Johnson v. Jouchert*, 124 Ind. 105, 8 L.R.A. 795, 24 N. E. 580, holding purchaser of a wife's separate real estate cannot plead invalidity of mortgage thereon, executed by herself and husband, without showing that the plea is for her benefit, or that he paid her full value, without notice, or under agreement that he should be permitted to set up its invalidity.

Cited in reference note in 80 A. D. 730, on ratification of illegal contracts.

Cited in note in 49 A. D. 384, on estoppel of persons claiming under same deed.

— **Of infants.**

Cited in *Sharp v. Robertson*, 76 Ala. 343, holding privies in blood and in representation may avoid the voidable deeds of infants; *Veal v. Forston*, 57 Tex. 482, holding conveyance by minor without consideration may be avoided by his

sole heir; *Simkins v. Searcy*, 10 Tex. Civ. App. 406, 32 S. W. 849, on avoidance by privies in blood but not privies in estate; *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177, holding after infant has disaffirmed contract, any one may take advantage of such disaffirmance.

Cited in reference notes in 76 A. D. 418, on disaffirmance of infant's deed; 31 A. D. 295, on right of infant to avoid conveyance on coming of age or within reasonable time thereafter.

Cited in notes in 41 L. ed. U. S. 762, on liability of infant on contract ratified by him; 18 A. S. R. 697, 698, on who may take advantage of infancy.

Distinguished in *Shrook v. Crowl*, 83 Ind. 243, holding plea of infancy by infant mortgagor, in suit against him and his vendee to foreclose, renders his mortgage void, and separate answer by vendee, alleging such infancy and avoidance, is good.

— Of insane persons.

Cited in *Hunt v. Rabitoay*, 125 Mich. 137, 84 A. S. R. 563, 84 N. W. 59, holding only privies in blood or the legal representatives of deceased party can avoid deed of insane grantor; *Tolson v. Gardner*, 15 Mo. 494, holding guardian may avoid the voidable conveyance of his insane ward; *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656, holding deed of insane person, made before inquest, voidable at instance of guardian, heirs, or legal representative only; *Covington v. Neftzger*, 140 Ill. 608, 33 A. S. R. 261, 30 N. E. 764, holding suit to set aside deed of lunatic must be brought by conservator; *Clay v. Hammond*, 199 Ill. 370, 93 A. S. R. 146, 65 N. E. 352, holding restoration of grantor to sanity allows avoidance by either himself or grantee; *Key v. Davis*, 1 Md. 32, holding remainderman cannot avoid deed by first tenant in tail conveying land in fee, because he was insane when deed was executed.

Cited in notes in 19 L.R.A. 493, as to who may disaffirm deed made by insane person; 16 E. R. C. 739, on avoidance of contract of alleged insane person.

Distinguished in *Langley v. Langley*, 45 Ark. 392, holding widow of lunatic showing no interest in premises in controversy, cannot enforce a trust against third person in favor of her deceased husband.

Prerequisites to avoidance of voidable deed.

Cited in note in 19 L.R.A. 491, on necessity of restoration of consideration in order to disaffirm deed because of grantor's insanity.

Mode of avoiding deed.

Cited in *Bozeman v. Browning*, 31 Ark. 364, on disaffirmance of infant's contract by a devise.

Payment of mortgage debt as affecting title.

Cited in *Chester v. Wellford*, 2 Flipp. 347, Fed. Cas. No. 2,662, holding title cannot be set up against the mortgagor, after the debts secured by it are paid; *Armitage v. Wickliffe*, 12 B. Mon. 488, holding the legal title reverts in the mortgagor when the mortgage debt is paid.

Cited in reference notes in 54 A. S. R. 300; 73 A. S. R. 898,—on effect of payment of mortgage debt; 34 A. D. 200, on what amounts to discharge of mortgage; 57 A. D. 470, on effect of payment or release of mortgage debt before or after forfeiture.

— As extinguishing mortgage.

Cited in *Bush v. Macklin*, 87 Ky. 482, 9 S. W. 420, holding payment of mortgage debt extinguishes the mortgage lien as against mortgagor; *Ladue v. Detroit*

& M. R. Co. 13 Mich. 380, 87 A. D. 759, holding payment, release, or anything which extinguishes the debt extinguishes the mortgage; *Fisher v. Otis*, 3 Chand. (Wis.) 83, 3 Pinney (Wis.) 78, holding mortgage to secure note may be extinguished by payment of the note.

Cited in reference notes in 51 A. D. 151; 69 A. D. 559,—on payment of mortgage debt as extinguishment of mortgage; 41 A. D. 733, on release of debt as release of mortgage or other security; 38 A. S. R. 445, on payment or release of debt as discharging mortgage; 63 A. D. 339, on effect of payment or release of mortgage debt to discharge mortgage.

Cited in note in 18 E. R. C. 577, on release of debt as discharge of all securities for same and necessity of reconveyance to revest legal estate in mortgagor.

— **Payment after default.**

Cited in *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642, holding payment of debt secured by deed of trust, whether before or after maturity, extinguishes power of sale, and no title passes by sale after such payment, even to purchaser without notice.

Disapproved in *Slaughter v. Doe*, 67 Ala. 494, holding payment of mortgage after default not a bar to ejectment by mortgagee, where mortgage is silent as to time mortgagee may take possession, or where mortgagor's time of possession is expressed and has passed.

Title of mortgagee.

Cited in *Walcop v. McKinney*, 10 Mo. 229, holding mortgagee may maintain ejectment against mortgagor.

Jurisdiction of equity over land outside the county.

Cited in *Jones v. Fletcher*, 42 Ark. 422, holding jurisdiction to enjoin sale of land under a fraudulent or satisfied mortgage, or for an account of the amount due on mortgage, and to cancel fraudulent conveyances of land, is not confined to county where land is situated, but extends to any county where defendants can be personally served; *Ralston v. Hughes*, 13 Ill. 469, holding equity can enter decree affecting real estate situated in any part of the state, if part of such land lies in county where suit is instituted, and the greater part does not lie in any other county.

Conformity of bill to proofs.

Cited in *Blandy v. Griffith*, Fed. Cas. No. 1,529; *Foster v. Goddard*, 1 Black, 506, 17 L. ed. 228,—holding in equity proceedings the proofs and allegations must agree.

19 AM. DEC. 92, VANADA v. HOPKINS, 1 J. J. MARSH. 285.

Construction of powers given agent.

Cited in *Com. v. Hawkins*, 83 Ky. 246, holding power of attorney must be construed to effectuate object of parties, if ascertainable from instrument; *Reed v. Welsh*, 11 Bush. 450, holding as to manner of executing power clearly given, that, if uncertain, the construction given by agent, if reasonable, will bind the principal.

Cited in reference note in 42 A. D. 616, on mode of construing agent's powers.

Implied authority of agent.

Cited in *Camp v. Southern Bkg. & T. Co.* 97 Ga. 582, 25 S. E. 362, holding party alleging that agency of bank messenger and collector included notice to principal of dissolution of certain partnership must prove the authority or duty of messenger to impart information.

Cited in reference notes in 39 A. D. 391, on agent's necessarily implied power; 71 A. D. 284, on right of agent to use necessary means to accomplish object of agency.

Cited in notes in 33 A. D. 723, on authority to execute all instruments necessary to complete sale as incident of power to sell; 17 L.R.A. (N.S.) 214, on power of real estate broker to make contract of sale.

— Power to sell as implying power to warrant or covenant for title.

Cited in *Peters v. Farnsworth*, 15 Vt. 155, 40 A. D. 671, holding agent to sell real estate may bind his principal by covenants of warranty; *Le Roy v. Beard*, 8 How. 451, 12 L. ed. 1151, holding power to sell land and to execute deeds included power to enter into covenant of seisin; *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812, holding power of agent to sell land binds principal to execute and deliver deed according to terms of the contract; *Abbott v. Galveston*, 97 Tex. 474, 79 S. W. 1064, holding a charter which empowered a city to take, grant, and convey real property for corporate purposes was sufficient authority for it to convey with covenants of general warranty; *Dennis v. Ashley*, 15 Mo. 453, holding an authority to sell a slave includes a power to warrant soundness of such slave.

Construction of deed executed by agent.

Cited in *Tenney v. East Warren Lumber Co.* 43 N. H. 343, holding in deed purporting to be executed by agent of corporation, if general intention that the corporation makes the grant, is apparent, any expression used inconsistent with that intention if literally construed is to be rejected.

Judicial notice as to meaning of terms.

Cited in *Power v. Bowdle*, 3 N. D. 107, 44 A. S. R. 511, 21 L.R.A. 328, 54 N. W. 404, holding symbol writing, N. W.⁴; N. W.⁴ of N. E.⁴; N. E. S. W.; W.⁴ S. W., in assessment rolls, are invalid as descriptions of parts of sections of land.

Cited in reference notes in 37 A. D. 84, on what falls within judicial notice; 37 A. S. R. 78, on judicial notice as to meaning of words; 44 A. S. R. 528, on judicial notice as to meaning of word in general use.

Cited in notes in 89 A. D. 691, on judicial notice as to meaning of English words and phrases; 124 A. S. R. 46, on judicial notice of language, words and phrases, and abbreviations.

Contract to convey as implying deed with covenants.

Cited in *Andrews v. Word*, 17 B. Mon. 518, holding covenant to make title binds covenantor to make title with general warranty; *Dwight v. Cutler*, 3 Mich. 566, 64 A. D. 105, holding under general contract to sell real estate, the vendor will be required to convey by deed of general warranty; *Schultz v. Griffin*, 121 N. Y. 294, 18 A. S. R. 825, 24 N. E. 480, to the same effect.

19 AM. DEC. 103, CRAIG v. DURRETT, 1 J. J. MARSH. 365.

Right of jury to apply common knowledge of values.

Cited in *Baum v. Winston*, 3 Met. (Ky.) 127, holding that where there was no proof of value of labor, jury might find value from their own knowledge of business transaction; *Darby v. Knapp*, 2 Mo. App. 486, holding same where an attorney proves services on account of which he sues, but does not prove their value; *Louisville & N. R. Co. v. Mason*, 11 Lea, 116, holding same in action against carrier for damages to stock, although no witness has given an opinion as to value of stock or amount of damages resulting from particular proved injuries.

19 AM. DEC. 104, LAMPTON v. PRESTON, 1 J. J. MARSH. 454.**Owner's right to property.**

Cited in note in 4 A. D. 370, on owner's right to claim property.

Title by accession.

Cited in reference note in 33 A. D. 766, on title by accession.

Cited in notes in 44 A. S. R. 446, on title by accession to property taken innocently; 54 A. D. 586, on effect of bestowing labor upon another's property.

— To products of soil wrongfully severed.

Cited in *Strubbee v. Cincinnati R. Co.* 78 Ky. 481, 39 A. R. 251, holding owner of trees cut from his land by trespasser cannot be divested of title thereto, although trespasser converted them into railroad ties and sold them to bona fide purchaser; *United States v. Kelly*, 3 Wash. Ter. 421, 17 Pac. 878, holding defendant liable for conversion of timber cut and removed from public lands and sold to defendants, who manufactured it into lumber without knowledge of the trespass; *Lewis v. Courtright*, 77 Iowa, 190, 41 N. W. 616, holding that where defendant purchased right to make hay of one he believed authorized to sell such right, land owner could not recover value of the cured hay.

Cited in notes in 32 L.R.A. 422, on title by accession to crops, fruit, and timber, wrongfully severed; 32 L.R.A. 429, 430, on title by accession to crops, fruit, and timber, wrongfully severed when they are distinguishable though changed or mixed; 32 L.R.A. 431, 432, on title by accession to crops, fruit, and timber, wrongfully severed when article is changed by process.

19 AM. DEC. 116, HUNT v. BOYIER, 1 J. J. MARSH. 464.**New trial for newly discovered evidence.**

Cited in *Daniel v. Daniel*, 2 J. J. Marsh. 52, refusing new trial for discovery of witnesses to fact involved in issue and determined by former trial.

— In equity.

Cited in *Snider v. Rinehart*, 20 Colo. 448, 39 Pac. 408, holding that, to obtain new trial in equity for newly discovered evidence, it must be shown that the evidence was not discovered in time to have been used in the legal proceeding; *Bishop v. Duncan*, 3 Dana, 15, holding equity will not allow trial for newly discovered evidence which relates only to matters in issue at former trial, nor unless there was no negligence in preparation or application for new trial at law.

Relief equity from judgments at law generally.

Cited in reference notes in 22 A. D. 444, on power of equity over judgments at law; 41 A. D. 628; 72 A. S. R. 804,—on relief in equity from judgment at law; 24 A. D. 426, on jurisdiction of equity to direct new trial at law; 28 A. D. 36, as to when equity will grant new trial after trial at law.

Cited in notes in 21 A. D. 631, on control of equity over judgments at law; 19 A. D. 609, as to how and when new trial at law is obtainable in equity; 54 A. S. R. 260, on mode of obtaining and granting equitable relief against judgment, decree, or other judicial determination.

19 AM. DEC. 120, LEWIS v. HOOVER, 1 J. J. MARSH. 500.**Detinue for promissory notes.**

Cited in *Hefner v. Fidler*, 58 W. Va. 159, 112 A. S. R. 961, 3 L.R.A. (N.S.) 138, 52 S. E. 513, holding one who gives note for purchase price cannot main-

tain detainee to recover such note, upon discovery of such fraud as would entitle him to rescind the sale; *Kaul v. Henke*, 2 Pa. Dist. R. 236, holding that remedy at law exists for recovery of papers.

Cited in reference note in 112 A. S. R. 963, on detainee to recover note evidencing debt to which plaintiff has right of property and immediate right of possession.

Cited in notes in 55 A. D. 433, as to when detainee will lie; 3 L.R.A.(N.S.) 139, on replevin or detainee for promissory note.

19 AM. DEC. 122, REED v. RICE, 2 J. J. MARSH. 44.

Construction of Constitution.

Cited in *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865, holding contemporaneous exposition of state Constitution, practised and acquiesced in for a long period fixes such construction.

Amendments to Constitution.

Cited in reference notes in 42 A. S. R. 887, on amendments to Constitution; 30 A. D. 456, on nature of amendments to Federal Constitution.

Applicability of Federal Constitution to states.

Cited in *Woodfolk v. Nashville & C. R. Co.* 2 Swan, 422, holding state governments not restricted by limitation of a power expressed in general terms in the Constitution of the United States.

Cited in reference notes in 35 A. D. 626, on inapplicability to state courts of amendment to Federal Constitution as to jury trial; 32 A. S. R. 841, on effect upon proceedings of state courts of articles 4 and 7 of Amendments to United States Constitution.

Cited in note in 32 A. S. R. 644 on right of person to protection of books and papers from examination.

Power of state as to searches and seizures.

Cited in *Com. v. Watts*, 84 Ky. 537, 2 S. W. 123, holding the Constitution impliedly recognizes the general power of the legislature to enact laws authorizing "seizures and searches;" *Lincoln v. Smith*, 27 Vt. 328, holding statute of state prohibiting traffic in intoxicating liquor as a drink, and subjecting it to seizure, forfeiture and destruction when kept for that purpose, does not contravene the Federal Constitution.

Cited in note in 101 A. S. R. 329, on security from unlawful search.

Sufficiency of search warrants.

Cited in *Re Horgan*, 16 R. I. 542, 18 Atl. 279, holding Constitution requires warrant to contain description reasonably definite, but does not require the complaint to contain such description; *Greene v. Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764, holding statute authorizing a search and criminal prosecution upon a complaint against no person in particular is inoperative.

Cited in reference note in 86 A. S. R. 355, on essentials of search warrant.

Cited in note in 40 A. D. 666, on search warrants; 101 A. S. R. 331, 332, on designation of place as requisite of search warrant.

Liability for executing illegal process.

Cited in *Hunt v. Ballew*, 9 B. Mon. 390, holding that, where warrant issues by legal authority, having jurisdiction, the officer and those acting under him, are protected in its execution, if they act within their duty; *Rodman v. Harcourt*, 4 B. Mon. 224, holding a constable may justify under execution issued by

one who holds commission and has qualified as a justice of the peace, though such person be not a *de jure* officer, and could not himself justify issuing the execution as such; *Melcher v. Scruggs*, 72 Mo. 406, on the personal indignity inflicted under unlawful search warrant.

Cited in reference note in 49 A. D. 647, on personal liability of person acting as officer without color of right.

— Of persons assisting officer by compulsion.

Cited in *Firestone v. Rice*, 71 Mich. 377, 15 A. S. R. 266, 38 N. W. 885, holding response to call of known officer to assist in making an arrest, a good defense in suits for trespass and false imprisonment; *Watson v. State*, 83 Ala. 62, 3 So. 441, holding under statute that bystander assisting officer on demand is not criminally responsible where the officer is trespasser in making arrest.

Cited in notes in 67 A. S. R. 421, on arrest by private citizen aiding officer as false imprisonment; 14 L.R.A.(N.S.) 1126, on liability for assisting in unlawful arrest or subsequent detention; 44 A. S. R. 138, on power of sheriff to call *posse comitatus*; 61 A. D. 154, on relative power and duty of private persons and officers to effect arrest.

19 AM. DEC. 126, MARSHALL v. TENANT, 2 J. J. MARSH. 155.

Proof of bill pro confesso.

Cited in *Hazard v. Durant*, 12 R. I. 99, holding that if bill *pro confesso* in uncertain in its allegations, or requires the taking of an account, the court will not proceed to final decree without proof; *Harrison v. Kramer*, 3 Iowa, 543, holding all distinct and positive allegations are to be taken as true, but, if the allegations are indefinite, or demand uncertain, the certainty requisite to decree must be afforded by proof.

Cited in reference note in 81 A. D. 244, on confessed bill being no ground for decree if allegations are destitute of precision.

19 AM. DEC. 128, MORTON v. SANDERS, 2 J. J. MARSH. 192.

Possessory rights under levy on land.

Cited in *Addison v. Crow*, 5 Dana, 271, holding that by a levy, the officer acquires no possession of, and incurs no responsibility for, preservation of land.

Motion for restitution of possession of land.

Cited in *Frank v. Hickman*, 7 J. J. Marsh. 635, holding motion to restore possession improper, where judgment for plaintiff in ejectment has been reversed and tenant appears to be out of possession, if the record does not show *habere facias* issued, or eviction by a writ.

Doctrine of relation.

Cited in note in 58 A. D. 58, on relation back of sheriff's deeds.

19 AM. DEC. 131, FEEMSTER v. MARKHAM, 2 J. J. MARSH. 303.

Recovery back of payments made.

Cited in reference notes in 27 A. D. 641; 31 A. D. 619; 33 A. S. R. 689,—on right to recover back voluntary payments; 40 A. D. 581, as to whether payments voluntarily made can be recovered; 45 A. D. 171, on right to recover money paid under mistake of fact; 27 A. D. 489, on recovery back of money paid under mistake or in ignorance of essential fact.

19 AM. DEC. 135, TAYLOR v. LEWIS, 2 J. J. MARSH. 400.

Conclusiveness of officer's return as to service of process.

Cited in *Shoffet v. Menifee*, 4 Dana, 150, holding return conclusive as between the parties, unless procured by the fraud of one of them, and that its verity cannot be attacked collaterally; *May v. Jameson*, 11 Ark. 368, holding return conclusive; *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748, holding false and fraudulent return of service, not conclusive when no service was made; *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210, holding that, where record shows that defendant was before the court, he cannot show that he was not served with process or did not enter his appearance; *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481, holding return conclusive upon parties and not subject to attack in the case in which made, either before or after judgment; *Stewart v. Stewart*, 27 W. Va. 167, holding where sheriff has returned process served upon defendants, and final decree has been entered after bill confessed, one of such defendants cannot attack such return to show the process was served in another state.

Annotation cited in *Ruff v. Elkin*, 40 S. C. 69, 18 S. E. 220, holding return contradicable by infant as to service upon him.

Cited in reference note in 33 A. S. R. 662, as to conclusiveness of officer's return of process.

Cited in note in 124 A. S. R. 757, on conclusiveness of sheriff's return of service of summons and remedies of persons injured thereby.

Distinguished in *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306, holding in proceeding to set aside default judgment, plaintiff may show that summons was not served upon him, notwithstanding sheriff's return shows service by reading; *Bowyer v. Knapp*, 15 W. Va. 277, holding return of service of notice to take depositions, subject to contradiction by parol in the case in which such notice was returned.

—Impeachment in suit to avoid judgment.

Cited in *Thomas v. Ireland*, 88 Ky. 581, 21 A. S. R. 356, 11 S. W. 653, holding return cannot be impeached in a proceeding to set aside a judgment authorized by such return; *Bramlett v. McVey*, 91 Ky. 151, 15 S. W. 49; *Doty v. Deposit Bldg. & L. Asso.* 103 Ky. 710, 43 L.R.A. 551, 46 S. W. 219,—holding that by statute return cannot be attacked without allegation of fraud of party benefited thereby, or mistake by officer; *Francis v. Lilly*, 124 Ky. 230, 98 S. W. 996, holding in a direct attack upon judgment by suit to set it aside, the truth may be shown against sheriff's return of service.

Annotation cited in *Johnson v. H. P. Gregory & Co.* 4 Wash. 109, 31 A. S. R. 907, 29 Pac. 831, holding return may be assailed in proceeding to set aside judgment and execution sale against defendant by default, upon false return by sheriff, without forcing defendant to proceed directly against officer for damages.

Cited in reference note in 26 A. S. R. 821, on conclusiveness of recitals in judgments of service of process.

—Facts concluded by return.

Cited in *Splahn v. Gillespie*, 48 Ind. 397, holding return evidence of facts stated therein only when such facts are official acts done in usual course of proceedings; *McClung v. McWhorter*, 47 W. Va. 150, 81 A. S. R. 785, 34 S. E. 740, holding return cannot be contradicted by the parties or their privies as to facts stated therein, required by law, unless party colludes with the officer to make a false return.

Relief against judgment generally.

Annotation cited in *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, on granting equitable relief from judgment against one over whom the court never acquired jurisdiction, where there is an adequate remedy in the original case.

Cited in reference notes in 19 A. S. R. 218, on judgments void for want of jurisdiction; 43 A. S. R. 348, on vacation of judgment for want of jurisdiction; 31 A. S. R. 910, on action to set aside judgment rendered without service of process; 42 A. D. 669, on relief in equity against judgment at law without service on, or appearance of, defendant.

Cited in notes in 23 A. S. R. 117, on collateral attacks upon judgments; 54 A. S. R. 245, on effect of want of jurisdiction on right to equitable relief against judgment, decree, or other judicial determination.

— In case of false return of process.

Cited in *Graham v. Loh*, 32 Ind. App. 183, 69 N. E. 474, holding action to vacate judgment predicated on false return of officer serving the summons, but not charging holder of judgment with fraud in obtaining it, cannot be maintained.

Annotation cited with special approval in *Huntington v. Cronter*, 33 Or. 408, 72 A. S. R. 726, 54 Pac. 208, holding equity has jurisdiction to enjoin the enforcement of a judgment at law based on false return of service of summons.

Cited in reference notes in 32 A. D. 176, on judgment based on false return of service of process; 25 A. D. 239, on judgment at law based on false return of service of process; 3 A. S. R. 630, on conclusiveness of judgment based on false return of process; 40 A. S. R. 496, on vacation of judgment founded on false return of process; 13 A. S. R. 220, as to relief against judgments based on false return of officers.

Cited in note in 124 A. S. R. 766, on relief in equity from judgment or decree in absence of meritorious defense where jurisdiction depended on false return of service by officer.

— Injunction against.

Cited in notes in 31 L.R.A. 201, on injunctions against judgments for want of jurisdiction or which are void; 31 L.R.A. 209, on injunction against judgment void or without jurisdiction for lack of service required by law; 32 L.R.A. 327, on general equitable jurisdiction as to injunction against judgment where there is a remedy at law.

Record acts of officer concluding parties.

Cited in *Kelly v. Lank*, 7 B. Mon. 220, holding forfeited delivery bonds having the force of judgments cannot be questioned collaterally.

19 AM. DEC. 139, FITZHUGH v. CROGHAN, 2 J. J. MARSH. 429.

Followed without discussion in *Applegate v. Gracy*, 9 Dana, 215; *Gray v. Patton*, 2 B. Mon. 12.

Meaning and effect of covenant of seisin or warranty.

Cited in *Brandt v. Foster*, 5 Iowa, 287, holding it means seised of indefeasible estate and is regarded as covenant for title and right; *Coleman v. Clark*, 80 Mo. App. 339; *Allen v. Allen*, 48 Minn. 462, 51 N. W. 473,—holding it broken where covenantor has not the possession, right of possession, and the complete legal title; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230, holding it broken where land conveyed is held adversely to grantor; *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, holding it an assurance to vendee that vendor has the

very estate, in quantity and quality, which deed purports to convey, and, if not true, is instantly broken and immediate right of action accrues; *Mercantile Trust Co. v. South Park Residence Co.* 94 Ky. 271, 22 S. W. 314, holding it satisfied only by transfer of an indefeasible title, and is technically broken when made if title be defeasible; *Moore v. Johnston*, 87 Ala. 220, 6 So. 50, holding public easement or other equitable encumbrance not breach of covenant of seisin.

Cited in reference notes in 22 A. D. 784, on covenants of warranty; 43 A. D. 597, on effect of covenant of seisin.

Cited in notes in 47 A. D. 570, on covenants of seisin; 125 A. S. R. 444, on what is a covenant of seisin; 125 A. S. R. 445, on what satisfies a covenant of seisin; 125 A. S. R. 446, on covenant of seisin as synonymous with covenant of right to convey; 125 A. S. R. 448, as to covenant of seisin running with the land; 82 A. S. R. 685, on covenants of seisin and right to convey running with the land; 82 A. S. R. 687, 689, on covenants of warranty and of quiet enjoyment running with the land.

Validity of deed lacking attestation, acknowledgment, or record.

Cited in *Floyd v. Ricks*, 14 Ark. 286, 58 A. D. 374, holding a deed delivered, passes title as between parties, although neither acknowledged nor recorded; *Stirman v. Cravens*, 29 Ark. 548, holding unacknowledged and unattested deed, with possession, conferred equitable interest under which grantee was entitled to possession; *Bussing v. Crain*, 8 B. Mon. 593, holding by statute, a mortgage valid from time it is deposited for record, without actually recording it.

Cited in reference notes in 31 A. D. 283, on validity of unrecorded instruments as between the parties; 24 A. D. 556, on validity of deed as between parties without attestation, acknowledgment, or recordation.

Cited in notes in 4 L.R.A. 334, on necessity of acknowledging and attesting deed; 27 L. ed. U. S. 642, on record of deed and its necessity and effect.

Proof of attested instruments.

Cited in note in 35 L.R.A. 326, 328, on necessity of calling subscribing witnesses to prove attested instruments, where they cannot be procured.

Presumption of grant from lapse of time.

Cited in *Demeyer v. Legg*, 18 Barb. 14, presuming grant from contract to sell land, possession thereunder by vendee, and payment of the purchase money.

Cited in reference notes in 69 A. D. 504, as to how title by prescription may be established; 39 A. D. 686, on presumption of grant from long continued adverse possession; 61 A. D. 304, on adverse possession for time prescribed by statute of limitations tolls owner's right of entry and gives title.

Covenants of general warranty or for quiet enjoyment.

Cited in *Price v. Hubbard*, 8 S. D. 92, 65 N. W. 436, holding them prospective and not broken without eviction.

— Breach of.

Cited in reference notes in 26 A. D. 190; 50 A. D. 766,—on what constitutes breach of covenant of seisin; 25 A. D. 221; 36 A. D. 352; 39 A. D. 322; 49 A. D. 447,—on necessity for eviction to maintenance of action for breach of covenant of warranty; 20 A. D. 685, as to when covenant of warranty is broken and damages on breach.

Cited in notes in 125 A. S. R. 451, 452, as to what constitutes a breach of covenant of seisin; 125 A. S. R. 453, on existence of encumbrance as breach of covenant of seisin; 125 A. S. R. 453, on existence of dower right as breach

of covenant of seisin; 125 A. S. R. 450, on breach of covenant of seisin as nonassignable chose in action; 17 L.R.A.(N.S.) 1183, on necessity of eviction to maintenance of action for breach of covenant of seisin or right to convey; 53 A. S. R. 119, on breach of covenant for quiet enjoyment in deed.

Possession of land as notice.

Cited in *Moreland v. Lemasters*, 4 Blackf. 383, holding occupancy of estate by third person, with or without knowledge of it by purchaser of title, is constructive notice to him.

Record or judgment as evidence.

Cited in reference notes in 43 A. D. 180, on record of former suit as evidence against one not a party; 37 A. D. 620, on judgment in ejectment as evidence against warrantor.

19 AM. DEC. 152, ROBBINS v. TREADWAY, 2 J. J. MARSH. 540.

Discretion of court as to amendments.

Cited in *Emanuel v. Cocke*, 6 Dana, 212, holding decisions of inferior courts as to filing or withdrawing pleas and making up issues will not be overruled on appeal, unless there has been an obvious abuse of sound discretion.

Cited in reference notes in 34 A. D. 105, on amendments; 35 A. D. 735, on amendment of pleadings; 56 A. D. 350; 64 A. D. 355; 71 A. S. R. 68,—on discretion of court as to allowing amendments; 58 A. D. 392, on amendments being largely within discretion of *nisi prius* court.

Words actionable per se.

Cited in reference note in 64 A. S. R. 177, on what constitutes libel.

—Respecting officers.

Cited in *Augusta Evening News v. Radford*, 91 Ga. 494, 44 A. S. R. 53, 20 L.R.A. 533, 17 S. E. 612, holding libelous newspaper articles charging constable with soliciting business for the magistrates' courts, by inducing persons tried in recorders' courts to sue out unnecessary warrants, for the corrupt purpose of increasing his fees as constable; *Cotulla v. Kerr*, 74 Tex. 89, 15 A. S. R. 819, 11 S. W. 1058, holding as to publication attacking an officer that the charge must be such that, if true, it would be cause for his removal from office; *Spiering v. Andrae*, 45 Wis. 330, 30 A. R. 744, holding words characterizing a justice of the peace as "a damned fool of a justice" are actionable *per se*.

Cited in reference notes in 37 A. D. 36, on libel by publications concerning public officials; 76 A. D. 282, as to when publications concerning public officers are libelous.

Cited in note in 116 A. S. R. 815, on character of words imputing corruption or unfitness for office as libelous *per se*.

Admissibility of opinion or repute.

Cited in *Sullivan v. Hugly*, 32 Ga. 316, holding a witness will not be permitted to prove the opinions of others on any question; *Barker v. Pope*, 91 N. C. 165, holding opinions of persons not witnesses incompetent as to one's capacity to make will.

Damages for libel.

Cited in note in 15 A. S. R. 350, on elements increasing or mitigating damages for newspaper libel.

19 AM. DEC. 157, CRAIG v. MARTIN, 3 J. J. MARSH. 50.**Specific performance against purchaser in possession after default.**

Cited in *Boyce v. Pritchett*, 6 Dana, 231, holding that the vendee being in possession, equity will, upon application of administrator and heirs of vendor, decree a specific performance, although time fixed in contract for conveying has elapsed, where the vendor was prevented by insanity and death from conveying, and his heirs have been prevented from doing so by their infancy.

Cited in reference note in 34 A. D. 112, as to when default of negligence is ground for refusal of specific performance.

Cited in note in 28 A. D. 429, as to when specific performance will be decreed against vendee.

Time as of essence of contract.

Cited in reference notes in 28 A. D. 615, as to when time is not of the essence of a contract; 43 A. D. 58; 54 A. D. 490,—on time as of essence of contract in equity.

Cited in note in 50 A. D. 676, on time as of essence of contract for sale of land.

Right to rescind purchase of land.

Cited in *Fletcher v. Wilson*, *Snedes & M. Ch.* 376, holding rescission of a contract for alleged defect of title will not be granted, where a perfect title may be had and no fraud is proved; *Browne v. Starke*, 3 Dana, 316, holding that vendor seeking relief against a judgment on his title bond cannot rely on the delinquency of his adversary; he must show that he was not in default himself, or, if in default, that it has been caused by act of defendants.

Allowance for rents or improvements on rescission.

Cited in *Prather v. Foote*, 1 Disney (Ohio), 434, on right of bona fide purchaser who has increased value of estate by improvements to compensation therefor.

Cited in reference notes in 96 A. D. 168, as to when one in possession of land is liable for rents; 78 A. D. 53, on right of vendee to recover for improvements.

Cited in notes in 81 A. S. R. 191, on improvements on property sold at private sale and allowance therefor; 81 A. S. R. 191, on improvements on property sold at private sale and allowance therefor.

19 AM. DEC. 162, READING v. PRICE, 3 J. J. MARSH. 61.**Validity and conclusiveness of judgment.**

Cited in reference notes in 73 A. S. R. 524, on judgment as a bar; 35 A. D. 421, as to when judgments are void.

Cited in notes in 11 A. S. R. 821, on validity of judgments rendered without jurisdiction; 48 A. D. 270, on necessity of notice in judicial proceedings.

19 AM. DEC. 164, BULLOCK v. POTTINGER, 3 J. J. MARSH. 94.**Breach of contract.**

See *McCreery v. Green*, 38 Mich. 172, holding inability to perform a contract caused by party's own default, not a release from his obligation; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862, holding that purchasers of a business who agreed to pay a certain sum out of moneys collected on transferred accounts, but who sold same before collection, became at once liable to pay.

19 AM. DEC. 166, PHILLIPS v. HARRISS, 3 J. J. MARSH. 122.

Followed without discussion in *McKee v. Walker*, 3 J. J. Marsh. 195.

When replevin maintainable.

Cited in reference note in 20 A. D. 606, on right to maintain replevin.

Cited in note in 80 A. S. R. 743, as to when replevin or claim and delivery is sustainable.

Replevin of property in custody of law.

Cited in *Reynolds v. Sallee*, 2 B. Mon. 18, holding defendant in execution cannot bring replevin, although property may be exempt.

Annotation cited in *Prescott v. Starkey*, 71 Vt. 118, 41 Atl. 1021, on right of stranger to writ of execution to replevy property from sheriff.

Cited in reference notes in 88 A. D. 734, on replevin for goods taken in execution or attachment; 40 A. D. 204, on replevin against officer for goods taken under legal process; 54 A. D. 245, on replevin against sheriff for property taken on execution from possession of judgment debtor; 91 A. D. 432, on trespass, trover, and replevin as concurrent remedies for wrongful taking of goods.

Cited in notes in 13 L.R.A. 408, on right to replevin property in legal custody; 9 A. D. 107, on replevin of goods in officer's hands; 75 A. D. 646, on replevin by debtor whose exemption rights have been disregarded.

Liability for wrongful levy.

Cited in notes in 39 A. D. 512, on sheriff's liability for levying on stranger's goods; 95 A. S. R. 125, on remedies available against sheriffs, constables, and marshals for seizing property of third persons.

What constitutes a contempt.

Cited in reference notes in 42 A. D. 162, on what is contempt of court; 44 A. D. 780, on contempt of execution defendant in replevying property levied upon; 66 A. S. R. 642, on replevin of property in custody of law as a contempt.

Possession of bailee.

Cited in reference note in 82 A. D. 147, as to when possession of bailee is possession of bailor.

Liability of bailee.

Cited in reference note in 69 A. D. 121, on liability of bailee for using bailed property contrary to bailment.

Effect of verdict of sheriff's jury on trial of right of property.

Cited in *Capital Lumbering Co. v. Hall*, 9 Or. 93, holding that under statute verdict adverse to claimant is a bar to subsequent action by him against the sheriff to recover possession of the property.

Depreciation of property seized.

Cited in note in 69 L.R.A. 286, on depreciation of property seized under replevin

19 AM. DEC. 175, BAILEY v. TAYLOR, 8 MART. N. S. 124.**Forcible entry and detainer.**

See *Luling v. Sheppard*, 112 Ala. 588, 21 So. 352, holding it no defense in forcible entry and unlawful detainer that defendant acted as agent and not in his own right; *Oklahoma City v. Hill*, 4 Okla. 521, 46 Pac. 568, holding that forcible entry and detainer lies against a city, though owner of the premises, where its officials took possession thereof while plaintiffs were under arrest after being wrongfully ejected by sheriff.

19 AM. DEC. 176, BRAND v. DAUNOY, 8 MART. N. S. 159.**Inconsistent description in deed.**

Cited in *Gormley v. Oakey*, 7 La. 452, holding that known and definite boundaries will control statement of quantity; *Riley v. Griffin*, 16 Ga. 141, 60 A. D. 726, holding that monuments prevail over courses and distances; *Prejean v. Giroir*, 19 La. 422; *Ragan v. Gwinn*, 19 La. Ann. 133; *Saulet v. Trepagnier*, 2 Rob. (La.) 357,—holding that, when a sale is made with reference to known and definite boundaries, a deficiency in quantity does not entitle purchaser to a rescission of sale or administration of price.

Cited in reference notes in 31 A. D. 227, on inconsistent descriptions in deed; 42 A. D. 410, on repugnant clauses in description in deed.

Cited in note in 4 L.R.A. 426, on descriptions in deeds.

Parol evidence to show mistake in description.

Cited in *Levy v. Ward*, 33 La. Ann. 1033, holding parol evidence admissible to establish a clerical error in the description of property.

19 AM. DEC. 177, MILES v. ODEN, 8 MART. N. S. 214.**What law governs contracts.**

Cited in reference notes in 31 A. D. 270, on law governing contract; 37 A. D. 420, on what law governs validity of contract; 27 A. D. 141, on law governing construction of contract; 26 A. D. 491, on law governing interpretation, construction, and validity of contracts; 10 A. S. R. 698, as to what law governs the construction and enforcement of contracts; 25 A. D. 178, on conflict of laws as to transfers; 28 A. S. R. 435, on law governing contracts respecting personality; 61 A. D. 172, on rights and liabilities of parties to contract governed by law of place of contract.

Cited in note in 64 L.R.A. 360, on conflict of laws as to necessity of refileing or rerecording chattel mortgage in state to which property is removed.

Protection of purchaser by recording act.

Cited in *Zollikoffer v. Briggs*, 19 La. 521, holding a slave held by a deed of trust not recorded in this state, to which the slave is removed, is liable to seizure by a creditor of the original owner.

Distinguished in *Beaulieu v. Monin*, 50 La. Ann. 732, 23 So. 937, holding a possessor under a title void on its face, because violative of a prohibitory law, not entitled to protection of recording act.

Bona fide purchaser from fraudulent vendor.

Cited in *Blanchard v. Castille*, 19 La. 362, holding that a bona fide purchaser without notice is not affected by the fraud of his vendor, who has legal title to property.

Cited in reference notes in 28 A. D. 207, on protection of bona fide purchaser under fraudulent conveyance; 83 A. D. 122, on protection of bona fide purchasers for valuable consideration; 25 A. D. 108, on protection of bona fide purchaser without notice of fraud from one who was a party to the fraud.

Cited in notes in 25 A. D. 613, on right of bona fide purchaser from fraudulent purchaser; 23 A. D. 614, on protection of bona fide purchaser from fraudulent purchaser at sheriff's sale.

Purchaser at execution sale.

Cited in *Frost v. McLeod*, 19 La. Ann. 69, holding title of purchaser at execution sale not divested by reversal of judgment on which execution issued.

Interest allowable on money withheld.

Cited in *Jiovellina v. Minor*, 1 La. 72, holding that, where property producing fruits is sold on credit, the vendee owes no interest until after a delay of payment.

Cited in note in 51 A. D. 277, on allowance of interest.

Distinguished in *Ball v. LeBreton*, 19 La. 147, holding that, where property producing fruit is sold and payment of purchase price is suspended until certain defects in title are cured, interest will be allowed, where vendee enjoys fruits during such suspension of payment; *Morris v. Cain*, 39 La. Ann. 712, 2 So. 418, holding that under the statute a purchaser of mortgaged property at a judicial sale, under proceedings taken for the collection of one of a series of mortgage notes, not liable for interest on surplus until after demand.

— Payment withheld because of doubt as to payee.

Cited in *Rowlett v. Shepherd*, 4 La. 86, holding tender of money to creditor not necessary to enable debtor to resist the payment of interest, in case of such doubt.

Distinguished in *Rightor v. Slidell*, 3 Rob. (La.) 375, where maker of a note denied indebtedness and was held not exempt from interest on ground of uncertainty as to payee.

Taking advantage of own error.

Cited in *Newman v. Scarborough*, 115 La. 860, 112 A. S. R. 278, 40 So. 248, holding that a person cannot visit upon another the consequences of his own error.

19 AM. DEC. 184, REELS v. KNIGHT, 8 MART. N. S. 267.**Evidence of fraud.**

Cited in *Lamprey v. Donacour*, 58 N. H. 376, holding that the whole conduct of the party whose acts are assailed before and after, as well as at the time of a sale, may be inquired into; *Cook v. Perry*, 43 Mich. 623, 5 N. W. 1054, holding proof of matters occurring after the consummation of a wrong, admissible, to identify the agency which produced it or to fortify the antecedent indications.

Cited in reference notes in 53 A. D. 94, on evidence that conveyance is fraudulent; 79 A. D. 717, on competency of evidence of conduct of parties to sale on question of bona fides; 61 A. D. 318, on right to inquire into conduct of parties to fraudulent sale of land.

19 AM. DEC. 185, BALLIO v. POISSET, 8 MART. N. S. 336.**Claims on community property.**

Cited in *Childs v. Lockett*, 107 La. 270, 31 So. 751, holding that the mortgage rights of minors upon community property of their natural tutrix are not greater than the rights of the mother herself in that community.

Cited in reference note in 65 A. D. 168, on rights of spouses in community property.

19 AM. DEC. 187, THOMAS v. MEAD, 8 MART. N. S. 341.**Bona fide purchaser from fraudulent vendor.**

Cited in *Blanchard v. Castille*, 19 La. 362, holding bona fide purchaser without notice, not affected by fraud in his vendor who has a legal title to the property sold.

Cited in reference notes in 28 A. D. 207, on protection of bona fide purchaser under fraudulent conveyance; 25 A. D. 108, on protection of bona fide purchaser without notice of fraud from one who was a party to the fraud.

Distinguished in *Mercier v. Canonge*, 8 La. Ann. 37 (dissenting opinion), on revocatory actions.

Taking advantage of own error.

Cited in *Newman v. Scarborough*, 115 La. 860, 112 A. S. R. 278, 40 So. 248, holding that a person cannot visit upon another the consequences of his own error.

19 AM. DEC. 189, WARREN v. PIERCE, 6 ME. 9.

Presumption of proper execution of document.

Cited in *Lawson on Law of Presumptive Evidence*, page 85, in support of rule 18, that documents regular on their face are presumed to have been properly executed.

19 AM. DEC. 191, HAWKS v. BAKER, 6 ME. 72.

Testimony of a witness not sworn.

Cited in *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247, holding that an omission of the oath is ground for a reversal; *Langford v. United States*, 4 Ind. Terr. 567, 76 S. W. 111, 4 A. & E. Ann. Cas. 1021; *State v. Lugar*, 115 Iowa, 268, 88 N. W. 333,—granting a new trial in a criminal case where one of the state's witnesses, who gave damaging evidence, was not sworn and the omission was not discovered until after verdict; *License Comrs. v. O'Connor*, 17 R. I. 40, 19 Atl. 1080, holding that an omission to object to the testimony of an unsworn witness cannot be regarded as a waiver, where party did not understand his right; *People ex rel. Niebuhr v. McAdoo*, 184 N. Y. 304, 77 N. E. 260, 6 A. & E. Ann. Cas. 56, holding that the testimony of an unsworn witness may be permitted to stand, where consent thereto is implied from circumstances.

Distinguished in *State v. Williams*, 49 W. Va. 220, 38 S. E. 495, holding omission to swear witness waived where court instructs jury to disregard his evidence and prisoner makes no objection and does not rely on such omission.

19 AM. DEC. 194, DANA v. COOMBS, 6 ME. 89.

Nature of infant's contracts.

Cited in note in 18 A. S. R. 575, on infant's contracts as void or voidable.

Ratification of contract of an infant.

Cited in *Fant v. Cathcart*, 8 Ala. 725, holding that a voidable contract may be confirmed by a promise of payment; *Davis v. Dudley*, 70 Me. 236, 35 A. R. 318, holding same where infant receives benefits from contract or by virtue of it, or does an act which is an injury to other party; *Boody v. McKenney*, 23 Me. 517, holding that where infant will receive a benefit by silent acquiescence he must make his election within a reasonable time after he arrives at full age; *Hoit v. Underhill*, 9 N. H. 436, 32 A. D. 380, holding that a declaration to persons having no interest in or agency as to note, of an intention of payment, was no ratification; *Hale v. Gerrish*, 8 N. H. 374, holding declaration that "the plaintiff would get his money," not a ratification where note refused; *Hazleton v. Batchelder*, 44 N. H. 40, holding possession of property under a mortgage for indemnity for the signing of a note, with a full knowledge of the facts, was a ratification of the contract.

Cited in reference note in 36 A. D. 298, on ratification of contract by infant.

Cited in notes in 18 A. S. R. 718, on infant's ratification by sale or conveyance of property; 23 A. D. 361, on ratification of infant's sale or purchase

of land; 26 L.R.A. 179, on effect of parting with property after reaching majority to prevent disaffirmance of infant's contract.

— Of purchase-money obligation by retaining property.

Cited in *Young v. McKee*, 13 Mich. 552; *Robbins v. Eaton*, 10 N. H. 561; *Kennedy v. Baker*, 159 Pa. 146, 33 W. N. C. 498, 28 Atl. 252, 24 Pittsb. L. J. N. S. 441; *Ready v. Pinkham*, 181 Mass. 351, 63 N. E. 887,—holding that a minor cannot affirm deed without ratifying purchase-money mortgage; *American Freehold Land Mortg. Co. v. Dykes*, 111 Ala. 178, 56 A. S. R. 38, 18 So. 292, holding that where an infant borrows money to pay purchase price of land, and mortgages land therefore, retaining land is a ratification of contract; *Baker v. Kennett*, 54 Mo. 82, holding that where infant abandoned premises a few days after coming of age, so that vendor could occupy them any time he saw fit, it was a good disaffirmance; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509, on retaining possession of property as a ratification of contract, under the common law; *Lawson v. Lovejoy*, 8 Me. 405, 23 A. D. 526, holding a sale of oxen after coming of age, a ratification of a promissory note given while an infant for their purchase price.

Distinguished in *Thing v. Libbey*, 16 Me. 55, holding that acts, to amount to ratification, ought to be unequivocal, establishing clear intention to affirm after coming of age and with full knowledge.

Disaffirmance in part by infant.

Cited in notes in 18 A. S. R. 660, on disaffirmance by infant of part of transaction; 62 A. D. 738, on right of infant to avoid mortgage while affirming deed.

Delegation of authority by infant.

Cited in reference note in 18 A. S. R. 629, on delegation of authority by infant.

Deed and purchase-money mortgage as one contract.

Cited in *Newbegin v. Langley*, 39 Me. 200, 63 A. D. 612, holding conveyance of land and mortgage to secure purchase price constitute one contract, though of different dates.

19 AM. DEC. 197, BOWDOINHAM v. RICHMOND, 6 ME. 112.

Power of court to declare an act unconstitutional.

Cited in *Bank of St. Mary's v. State*, 12 Ga. 475; *Beall v. Beall*, 8 Ga. 210,—holding that where an act is a plain, and palpable violation of the Constitution, it is the duty of the court to declare it so; *Sedgley v. Bowdoinham*, 10 Me. 266, to point that the act of February 5, 1825, had been declared unconstitutional.

Constitutional protection of contracts as applicable to municipal corporations.

Cited in *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 A. R. 622; *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56,—holding that rights held by a municipal corporation under its charter are beyond legislative control; *Atkins v. Randolph*, 31 Vt. 226, holding same so far as a municipal corporation is endowed with the power of contracting and of acquiring and disposing of property.

Cited in reference notes in 33 A. D. 157; 54 A. D. 393,—on statutes impairing obligation of contracts; 42 A. D. 728, on legislative grant as a contract the obligation of which cannot be impaired; 30 A. D. 274, on statutes impairing vested rights or obligation of contracts.

Cited in note in 8 L.R.A.(N.S.) 547, on increase in proportion of tax or assessment imposed on property as impairment of vested rights.

Legislative control over municipalities.

Cited in *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267, holding an act creating a board to be appointed by the legislature, to have exclusive control of the police and fire departments of each city of a certain size, unconstitutional as depriving cities of self-government.

Cited in notes in 48 L.R.A. 491, on power of legislature as to property and franchises of municipalities; 13 A. S. R. 133, on appointment of officers as executive function; 1 L.R.A. 758, on exemption of lands annexed to towns.

— To divide property and apportion debts.

Cited in *Board of Education v. Board of Education*, 30 W. Va. 424, 4 S. E. 640, holding that on the division of public corporations the legislature may divide property of corporation and apportion debts.

Disapproved in *Johnson v. San Diego*, 109 Cal. 468, 30 L.R.A. 178, 42 Pac. 249, sustaining the power of the legislature to change and readjust the burden of municipal indebtedness after division of a city and the adjustment of the debt; *Perry County v. Conway County*, 52 Ark. 430, 6 L.R.A. 665, 12 S. W. 877, holding that legislature may impose the debt of one county upon another, depending upon a moral obligation of the new county to pay part of the old debt.

Power of legislature as to local affairs.

Distinguished in *Mills v. Charleton*, 29 Wis. 400, 9 A. R. 578, holding that legislature has power to direct a reassessment and relevy of taxes and assessments where first levy was declared void.

19 AM. DEC. 200, COTTLE v. COTTLE, 6 ME. 140.**Misconduct of jurors as ground for new trial.**

Cited in *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, granting a new trial where party in interest treated jurors to liquor and cigars; *Palmer v. Utah & N. R. Co.* 2 Idaho, 315, 13 Pac. 425, holding same where plaintiff was a liberal and frequent patron of the saloon of one of the jurors during trial and he entertained there large numbers of his friends, calculating to influence the juror; *Mobile & O. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850, same where prevailing party's attorney was seen drinking and "clinking glasses" in a public saloon with one of jurors.

Cited in notes in 48 A. R. 348, on misconduct of jurors; 21 A. D. 717, on setting aside verdict for improper conduct of jurors; 35 A. D. 260, on misconduct of jurors in receiving favors from party as ground for new trial.

Distinguished in *Gale v. New York C. & H. R. R. Co.* 53 How. Pr. 385; *Hilton v. Southwick*, 17 Me. 303, 35 A. D. 253,—denying new trial where juror, being in want of a passage home, was taken by the plaintiff, it not appearing that the plaintiff sought the juror or attempted to influence him.

19 AM. DEC. 201, FARRAR, v. STACKPOLE, 6 ME. 154.**What regarded as a fixture.**

Cited in *Bircher v. Parker*, 43 Mo. 443, holding that a tenant could remove erections placed on premises for his more beneficial enjoyment, unless removal would work injury to the inheritance; *Hensley v. Brodie*, 16 Ark. 511, on what constitutes a fixture as between landlord and tenant.

Cited in notes in 17 A. D. 694; 21 A. D. 732; 23 A. D. 219, 386; 28 A. D.

293; 30 A. D. 367; 6 L.R.A. 249,—on what constitutes fixtures; 17 A. D. 691; 40 A. D. 659,—as to what are fixtures when erected by owner of freehold.

Distinguished in *Ruckman v. Outwater*, 28 N. J. L. 581, holding that manure lying in and around a barnyard is personal property.

— **Things annexed constructively by adaptability to the use of the land.**

Cited in *Fechet v. Drake*, 2 Ariz. 239, 12 Pac. 694, holding that, if the thing be essential to the use of the real estate and has uniformly been used with it, then it passes, though not fastened to it; *Hooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 111 Fed. 81, holding that property essential to the use to which the realty is applied is part of realty, whether it can be removed without physical injury to realty or not; *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587, holding that adaptation to use is one of the tests of a fixture; *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320, 43 N. W. 576, holding piles in a mill dock, to which booms for the storage of logs are attached, are real estate; *Farmers' Loan & T. Co. v. Hendrickson*, 25 Barb. 484, holding the rolling stock of a railroad company to be fixtures; *Louisville & N. R. Co. v. State*, 8 Heisk. 663, on rolling stock of a railroad company as part of the realty.

Cited in note in 69 L.R.A. 894, as to whether things constructively annexed to the land are fixtures.

Questioned in *Rogers v. Prattville Mfg. Co. No. 1*, 81 Ala. 483, 60 A. R. 171, 1 So. 643, holding that mere use of article in connection with a business does not necessarily render it a fixture; *Beardsley v. Ontario Bank*, 31 Barb. 618; *Stevens v. Buffalo & N. Y. City R. Co.* 31 Barb. 590,—holding that rolling stock of a railroad company is personal property.

— **Machinery generally.**

Cited with special approval in *Equitable Guarantee & T. Co. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961, holding all machinery in manufacturing plant, necessary to constitute it and without which it would not be a plant, passes as part of freehold, whether attached by physical annexation or by being connected with motive power; *Voorhis v. Freeman*, 2 Watts & S. 116, 37 A. D. 490, holding certain iron rolls part of the machinery of an iron-rolling mill.

Cited in *Corliss v. McLagin*, 29 Me. 115, holding a shingle machine and apparatus attached to it, part of the realty; *Parsons v. Copeland*, 38 Me. 537, holding belts, looms, cording machines, and others suited and designed for a woolen factory and placed therein by owners, to be fixtures; *Baker v. Davis*, 19 N. H. 325, holding same as to a carding machine nailed to the floor and operated by a band by other machines, and which could not be got out of the building without being taken to pieces; *Tate v. Blackburne*, 48 Miss. 1, holding same as to a cotton gin; *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249, holding same as to machinery operated by belting and gearing from motive power of plant and necessary to prosecute business of factory; *Dudley v. Hurst*, 67 Md. 44, 1 A. S. R. 368, 8 Atl. 901, holding same as to machinery used in a canning business parts of which are attached to the soil and other parts are necessary to use of parts so attached; *Spruance Opinion*, 8 Del. Ch. 539, holding same as to spar beams, belting, and grinders in a cotton mill; but that working spools, bobbins, heddles, reeds, and cord cans would be personal property; *Gulick v. Heermans*; 6 Luzerne Leg. Reg. 225, holding machinery occasionally detached part of freehold; *Hamilton v. Huntley*, 78 Ind. 521, 41 A. R. 593, holding same as to machinery of a flour mill, though annexed in a temporary manner by manufacturer of the machinery, so as to admit removal; *Great Western Mfg. Co. v. Bathgate*, 15 Okla.

37, 79 Pac. 903, holding same as to machinery of a grist mill, attached by cleats and bolts; *Stillman v. Flenniken*, 58 Iowa, 450, 43 A. R. 120, 10 N. W. 842, holding same as to a smutter in a grist mill; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 A. D. 780, holding same as to a cider press temporarily detached from the building; *Capen v. Peckham*, 35 Conn. 88, holding same as to a windlass used in a slaughterhouse, which was firmly secured to the building; *Strickland v. Parker*, 54 Me. 263, holding same of marine railway, consisting of rails and sleepers, endless chain, gear, wheels, and ship cradle; *Burnside v. Twitchell*, 43 N. H. 390, holding that, as between mortgagor and mortgagee, certain saws and belting actually used in sawmill passed, but that saws which had not been set did not pass.

Cited in reference note in 59 A. D. 658, on machinery as fixture.

Distinguished in *Pope v. Jackson*, 65 Me. 162, holding an embossing press weighing about 5,000 pounds, standing on floor without attachment, not a fixture, where placed in building by leasee of mortgagor; *Hancock v. Jordan*, 7 Ala. 448, 42 A. D. 600, holding a cotton gin not part of freehold.

Questioned in *Walker v. Sherman*, 20 Wend. 636, holding that machinery, to be fixture, must be attached to, or mechanically fitted to, a building; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 A. D. 634, holding that carding machines and spinning machines in a woolen factory, in no wise attached except by cleats, is chattel property; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 A. D. 621, holding that a chattel, to be a fixture, must be so affixed to the freehold as to be incapable of severance without violence or injury; *Hill v. Wentworth*, 28 Vt. 428, holding machinery not part of freehold, where it can be removed without injury to the freehold or the articles themselves.

—Engines and motive machinery.

Cited in *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 A. R. 719, holding machinery used in operating woolen mill passes on foreclosure sale; *Lapham v. Norton*, 71 Me. 83, holding water wheel and gearing put into a mill, to be used permanently for operating it, belongs thereto as realty; *M'Kim v. Mason*, 3 Md. Ch. 186, holding same as to a steam engine and boiler placed by owner in, and affixed to, a cotton factory, and constituting a part of motive power; *Merritt v. Judd*, 14 Cal. 59, holding same as to a steam engine and boiler fastened to a frame of timber bedded in the ground, in a shed, and used in working a ledge of quartz; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 A. D. 203, holding same as to a steam engine in a printing works, although not attached to any fastenings which could not be removed without taking down part of building; *State Security Bank v. Hoskins*, 130 Iowa, 339, 8 L.R.A. (N.S.) 376, 106 N. W. 764, holding same as to a gasoline engine placed on a solid stone foundation in a permanent building and used for grinding feed for stock; *Winslow v. Merchants Ins. Co.* 45 Mass. 306, 38 A. D. 368, holding an engine, boilers, and machines for working iron, upon which the engine operated, where fitted and adapted to the mill, to pass by a mortgage.

—Dwelling house fixtures detachable therefrom.

Cited in *Johnson v. Wiseman*, 4 Met. (Ky.) 357, 83 A. D. 475, holding chandeliers or gas-burners in a house are fixtures; *Canning v. Owen*, 22 R. I. 624, 84 A. S. R. 858, 48 Atl. 1033, holding same as to electric light fixtures; *Tuttle v. Robinson*, 33 N. H. 104, holding same as to a heavy stove set in brick work, which could not be removed without disturbing brickwork; *State v. Elliot*, 11 N. H. 540, holding same as to windows placed in a dwelling house.

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Appurtenances to land or other property.

Cited in *Richardson v. Clark*, 15 Me. 421, holding a bill of sale of the hull of a vessel does not include a chronometer on board at the time; *Walker v. Wilson*, 13 Wis. 523, holding that in a grant of certain lands and mill, and "right to raise dam sufficient to raise water 7 feet," covenant of seisin embraced the right to raise dam to height specified.

Cited in reference note in 28 A. D. 708, on what pass as appurtenances.

Cited in notes in 81 A. S. R. 770, on personalty passing as appurtenance; 15 L.R.A. 654, on corporeal appurtenances to realty.

Distinguished in *Peck v. Brown*, 5 Nev. 81, holding cordwood cut on public land is personal property; *Tabor v. Bradley*, 18 N. Y. 109, 72 A. D. 498, holding that, where land is conveyed by metes and bounds, without mention of a dam or water privileges, and grantors did not know of the existence of the dam, the right to flood the land of the grantor was not thereby conveyed.

Rights of parties as affected by local custom.

Cited in *Ledyard v. Hibbard*, 48 Mich. 421, 42 A. R. 474, 12 N. W. 637, holding that usage can never change the written stipulations of parties, though it may aid in the explanation of their terms and ambiguities; *Leach v. Perkins*, 17 Me. 462, 35 A. D. 268, on usages of trade as affecting the construction of contracts.

Parol evidence to vary written contract.

Distinguished in *Sigsworth v. McIntyre*, 18 Ill. 126, holding parol evidence inadmissible to show the extent to which a contract to build bound contractor.

— Parol evidence as to usage.

Cited in reference note in 54 A. D. 321, on admissibility of evidence of usage to explain or control express contract.

Cited in notes in 25 A. D. 372, on admissibility of evidence of usage; 14 E. R. C. 698, on right to show usage to interpret or expound ancient instrument; 11 A. S. R. 632, on admissibility of evidence of custom or usage to explain technical expressions in contract or to disclose intention of parties.

19 AM. DEC. 206, EMERSON v. FISK, 6 ME. 200.**Rights of conditional seller against person claiming under buyer.**

Cited in *Tibbetts v. Towle*, 12 Me. 341, holding that where vendee permitted goods to pass into possession of a third person vendor could maintain trover for them without waiting the expiration of the term of credit.

— Sale of timber reserving lien or title.

Cited in *Homans v. Newton*, 4 Fed. 880, holding under logging permit where grantor reserves all rights in logs and timber until fully paid for, that a bona fide purchaser acquires no better title than grantee had.

Distinguished in *Bicknell v. Hill*, 33 Me. 297, holding that a lien reserved upon lumber which grantee might cut is postponed to the lien given by statute to laborers who aid him in getting the lumber.

Nature of license.

Cited in reference notes in 57 A. D. 294, on nature and incidents of license; 27 A. D. 681, on ownership of building erected on another's land under license.

Cited in note in 10 A. D. 41, on nature of license.

Revocable licenses.

Cited in *Pitman v. Poor*, 38 Me. 237, holding parol license to build a dam revocable.

Nonassignability of license.

Cited in *Dark v. Johnston*, 55 Pa. 164, 93 A. D. 732, 24 Phila. Leg. Int. 164, holding personal license not assignable; *Putnam v. White*, 76 Me. 551, holding permit to cut timber not assignable.

Cited in reference notes in 93 A. D. 739, on nonassignability of license; 59 A. S. R. 909, on assignability of license to cut timber.

Right of assignee from bailee.

Cited in *Bailey v. Colby*, 34 N. H. 29, 66 A. D. 752, holding that bailor may bring trespass against bailee's assignee.

Cited in reference notes in 35 A. S. R. 874, on sale of property by bailee; 48 A. D. 651, on title acquired by bona fide purchaser at unauthorized sale by bailee.

Cited in notes in 66 A. D. 758, on power of bailees to make absolute sale of property bailed; 3 A. S. R. 202, on effect of purchase of chattels from bailee for special purpose as pledgee; 80 A. S. R. 756, on what property is repleviable.

Liability of bailee.

Cited in reference note in 69 A. D. 121, on liability of bailee for using bailed property contrary to bailment.

Distinction between bailment and conditional sale.

Cited in *McClelland v. Scroggin*, 35 Neb. 536, 53 N. W. 469, holding a lease of property with right to purchase on payment of a certain amount and rent was bailment, and not a conditional sale; *Sargent v. Gile*, 8 N. H. 325, holding one a bailee who receives goods on a contract to keep them a certain period and if, in that time, he pays for them he is to become owner, but otherwise he is to pay rent for them.

Accrual of right of action for conversion.

Cited in *Jillson v. Wilbur*, 41 N. H. 106, holding where property is wrongfully sold that no demand is necessary before action of conversion.

Rights of parties as affected by local custom.

Cited in *Leach v. Perkins*, 17 Me. 462, 35 A. D. 268, on usage of trade as effecting the construction of contracts.

Notice to produce an instrument at a trial.

Cited in *Tilton v. Wright*, 74 Me. 214, 43 A. R. 578, holding that the nonproduction of an instrument can only be a matter of comment, when upon notice to produce it party has refused; *Lowell v. Flint*, 20 Me. 401, holding that Court Rule as to notice, to produce papers at trial as prerequisite to secondary evidence does not bind magistrate.

19 AM. DEC. 210, BANGOR BANK v. TREAT, 6 ME. 207.**Several actions against makers of a joint and several obligation.**

Cited in *State v. Chandler*, 79 Me. 172, 8 Atl. 553, holding that a *scire facias* against two of three persons jointly and severally liable on a recognizance cannot be sustained while the third remains liable; *Suydam v. Barker*, 18 N. Y. 468, 75 A. D. 254 (dissenting opinion), on effect of a recovery against one of several obligors.

Cited in note in 43 L.R.A. 164, 171, on effect of judgment in action against part of obligors on a joint and several obligation to release or limit liability of other obligors.

Motion in arrest of judgment.

Cited in *State v. Bangor*, 38 Me. 592, holding that a motion in arrest can be entertained only for matters apparent upon an inspection of the record.

19 AM. DEC. 211, WILKINS v. REED, 6 ME. 220.

Liability of owners of vessel for supplies.

Cited in reference note in 39 A. D. 76, on liability of owner of vessel for supplies.

— Of joint owners.

Cited in reference notes in 55 A. D. 456, on liability of joint owners of vessels for supplies or repairs; 32 A. D. 359, on invalidity of note given for supplies by one of two joint owners of vessel, who was also master.

Cited in note in 90 A. S. R. 395, on liability of part owner of vessel for negotiable instruments made by co-owner.

Promissory note as payment.

Cited in *Kidder v. Knox*, 48 Me. 551, holding a note not an extinguishment of the original liability, where a contrary intention is apparent; *Mehan v. Thompson*, 71 Me. 492, holding the acceptance of a negotiable paper for a debt and giving a receipt in discharge is an extinguishment of debt unless parties intended otherwise; *Carter v. Byzantium*, 1 Cliff. 1, Fed. Cas. No. 2,473; *Bunker v. Barron*, 79 Me. 62, 1 A. S. R. 282, 8 Atl. 253,—holding that such prima facie payment may be rebutted by evidence that such was not the intention of the parties; *Albright v. Griffin*, 78 Ind. 182, holding the taking a second note and the surrender of the first not a payment of the first note.

Cited in note in 11 A. D. 54, on presumption of payment from acceptance of promissory note.

— Taking note of agent.

Cited in *Paige v. Stone*, 51 Mass. 160, 43 A. D. 420, holding a party dealing with an agent who takes his promissory note with knowledge of his agency, discharges the principal; *Ames Packing & Provision Co. v. Tucker*, 8 Mo. App. 95, holding same where creditor has knowledge of principal's liability and takes no steps indicative of his intention to hold principal at time of taking agent's note.

Assumpsit by payee of void promissory note.

Cited in *Parker v. Hollis*, 50 Ala. 411, holding where a promissory note is void the plaintiff may resort to the common counts applicable to the debt.

Promissory note as evidence on a money count.

Cited in *Brown v. Noyes*, 2 Woodb. & M. 75, Fed. Cas. No. 2,023, holding a promissory note good evidence under the money counts in a suit by an indorsee; *Bank of United States v. Moss*, 6 How. 31, 12 L. ed. 331, on same point.

19 AM. DEC. 213, PAWSON v. DONNELL, 1 GILL & J. 1.

Question for jury where evidence contradictory.

Cited in reference notes in 11 A. S. R. 829, on credibility and weight of evidence as question for jury; 55 A. D. 425, on right of jury to determine facts where evidence is contradictory.

Rights of supercargo.

Cited in note in 66 A. D. 326, on who are supercargoes, and their rights, duties and liabilities.

Jurisdiction of equity.

Cited in *Columbus v. Rodgers*, 10 Ala. 37, holding that it is sufficient to the jurisdiction of equity that the remedy in equity is more adequate than at law, and better adapted to reach justice, and more complete and effectual.

19 AM. DEC. 225, TIERNAN v. POOR, 1 GILL & J. 216.**What pleadings must show.**

Cited in reference notes in 25 A. D. 313, on liberality of rules of pleading in equity; 52 A. D. 190, on necessity that plaintiff's claim to relief in equity appear from pleadings.

Enforcement of an equitable conveyance by court of equity.

Cited in *Price v. McDonald*, 1 Md. 403, 54 A. D. 657, holding that an equitable claim founded on a deed not acknowledged will be enforced except against a bona fide purchaser; *Carson v. Phelps*, 40 Md. 73, holding an unrecorded deed valid and enforceable in equity as against the general creditors of the grantor.

Cited in reference note in 45 A. D. 411, on degree of certainty necessary to obtain specific performance.

Cited in note in 26 A. D. 662, on certainty in contract as essential to specific performance.

— Conveyances of feme covert.

Cited in *Gelston v. Frazier*, 26 Md. 329, holding that such a contract will not be carried into effect unless the contract is within the limits of her *juri disponendi*; *Cooke v. Husbands*, 11 Md. 492, holding that in equity a *feme covert* is allowed to deal with her separate property; *Hall v. Eccleston*, 37 Md. 510, sustaining in equity a contract by which husband and wife bound themselves to execute a mortgage of the separate estate of the wife; *Brown v. Pechman*, 53 S. C. 1, 30 S. E. 586, holding where a married woman joining with her husband executed an invalid release of inheritance, equity will not compel her to return purchase money as a condition precedent to bring action for recovery of land.

Annotation cited in *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3, holding that the deed of a married woman defectively executed cannot be perfected in equity.

Cited in note in 23 A. D. 777, on enforcement in equity of defectively executed instrument by married woman.

— Voluntary conveyances.

Cited in *Burton v. Leroy*, 5 Sawy. 510, Fed. Cas. No. 2,217, holding a want of consideration a good defense to a bill to rectify or enforce a voluntary conveyance.

Insufficiency of married woman's acknowledgment.

Cited in reference notes in 55 A. D. 413, as to when deed of married woman is void for want of proper acknowledgment; 52 A. D. 519, on invalidity of deed of married woman not acknowledged in statutory mode.

Cited in note in 21 A. D. 256, on married women's conveyances which are not acknowledged pursuant to statute.

Reformation of instruments.

Cited in reference notes in 5 A. S. R. 531, on reforming deed of married woman; 49 A. D. 451; 71 A. D. 259,—on power of equity to reform deed of mar-

ried woman; 36 A. D. 90, on correction of defectively executed instruments of married women.

Cited in notes in 65 A. S. R. 514, on reformation of deeds; 41 A. D. 184, on amendment of certificate of acknowledgment; 52 A. D. 522, on power of courts to amend certificates of acknowledgment.

Power of married woman over her separate estate.

Cited in *Whitesides v. Cannon*, 23 Mo. 457, holding that over her own separate property, in contradistinction of her legal estate, which exists only in contemplation of equity, she may contract as a *feme sole*; *Miller v. Williamson*, 5 Md. 219, holding that a *feme covert* has no right to dispose of her separate estate unless that power is given her by the instrument making the settlement; *Emerrick v. Coakley*, 35 Md. 188, holding that a wife may assign and encumber her separate property for her husband's debts; *Swift v. Castle*, 23 Ill. 209, holding that a married woman can only convey her trust property in the manner authorized and for the purpose specified in the instrument creating the trust; *Gardner v. Moore*, 75 Ala. 394, 51 A. R. 454, holding that a married woman possesses no authority to convey except in the mode prescribed by statute; *Abrams v. Sheehan*, 40 Md. 446, holding that husband with the wife's consent can manage wife's separate property; *Cooke v. Husbands*, 11 Md. 492, on the providing of a mode of alienation or appointment by a married woman as negating any other mode.

Distinguished in *Shonk v. Knight*, 13 W. Va. 667, holding that the wife's separate estate cannot be made liable for the payment of any debt of her husband or any third person unless by a contract in writing signed by her; *Conn v. Conn*, 1 Md. Ch. 212, holding that, before the separate estate of a married woman can be charged, it must be shown that she made contract with direct reference to separate estate; *Tyson v. Latrobe*, 42 Md. 325, holding a mortgage executed by a married woman as trustee in violation of terms of trust deed to be of no effect.

19 AM. DEC. 235, TURNER v. EGERTON, 1 GILL & J. 430.

Recovery of money paid to use of another.

Cited in *Stephens v. Brodnax*, 5 Ala. 258; *Childress v. Vance*, 1 Baxt. 406,—holding mere voluntary payment of another's debt without obligation or necessity will not make the person paying his creditor.

Cited in reference notes in 9 A. S. R. 580, on liability to repay imposed by voluntarily paying money for use of another; 27 A. D. 390, on assumpsit to reach money of which defendant has received the benefit; 93 A. D. 620, on right of administrator to recover debt of intestate, which he paid after distribution of estate without notice of it.

19 AM. DEC. 237, CRANE v. MEGINNIS, 1 GILL & J. 463.

Power of court to declare legislative act void.

Cited *Wilson v. Hardesty*, 1 Md. Ch. 66, holding courts bound to pronounce act void if in excess of legislative power; *Beall v. Beall*, 8 Ga. 210; *Bank of St. Mary's v. State*, 12 Ga. 475; *Ex parte Pollard*, 40 Ala. 77,—holding same where act is clearly and palpably a violation of the Constitution.

Source of sovereign power of state.

Cited in *Campbell's Case*, 2 Bland, Ch. 209, 20 A. D. 360, holding that the sovereignty belongs altogether and exclusively to the people of the state.

Bill of rights as limitation of power.

Cited in *Anderson v. Baker*, 23 Md. 531, holding Declaration of Rights is regarded as limitation on power of government in cases of doubt as to construction, but not to control Constitution; *State v. Cumberland & P. R. Co.* 40 Md. 22, holding that limitations of power provided by the Declaration of Rights are mainly directory; *Daly v. Morgan*, 69 Md. 460, 1 L.R.A. 757, 16 Atl. 287 (dissenting opinion), on Declaration of Rights as fundamental principals in administration of powers of government.

Separation of co-ordinate departments of government.

Cited in *Baltimore v. Howard*, 15 Md. 376, holding that each branch of the government is forbidden to use powers allotted to the co-ordinate departments; *Baltimore v. Howard*, 15 Md. 376, 74 A. D. 572, holding that the legislature has the power of appointment, to any office it may create, unless expressly or impliedly forbidden; *McCrea v. Roberts*, 89 Md. 238, 44 L.R.A. 485, 43 Atl. 39, holding act giving judge of circuit court authority to hear and determine objections to the issuing of a license to sell liquor does not impose an executive function on the judge; *United States v. Hatch*, Fed. Cas. No. 15,158, sustaining power of Congress to confer quasi legislative power on an agency; *Hooper v. Creager*, 84 Md. 195, 35 L.R.A. 202, 35 Atl. 1103 (dissenting opinion), on authority of legislature.

Legislative exercise of judicial power.

Cited in *Miller v. State*, 8 Gill, 145, holding an act requiring a named county court to grant an appeal in a named case, and to embody in the record certain exceptions and points of law, is unconstitutional; *Sanders v. Cabaniss*, 43 Ala. 173, holding same as to "An Act to Declare Void Certain Judgments and to Grant New Trials" in certain mentioned cases; *Dorsey v. Gary*, 37 Md. 64, holding same as to an act authorizing the reopening and rehearing of certain enumerated cases; *Baltimore v. Horn*, 26 Md. 194, holding an act directing the grading of a certain street and the collection of the costs thereof from owners of property adjoining street, an exercise of judicial power.

Cited in reference notes in 30 A. D. 445, on unconstitutionality of legislative acts which are judicial in character; 25 A. D. 705, as to when statutes are unconstitutional as assumptions of judicial function.

Distinguished in *Davis v. Helbig*, 27 Md. 452, 92 A. D. 646, holding an act giving a county court jurisdiction to decree a sale of certain property in certain named proceedings to be an exercise of a legislative power.

Authority of legislature over marriages and divorces.

Cited in *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548, holding that legislature has authority to legislate on subject of divorce; *Harrison v. State*, 22 Md. 468, 85 A. D. 658, holding that the legislature has authority to determine the status of the issue of marriage; *Whitmore v. Hardin*, 3 Utah, 121, 1 Pac. 465, holding sustaining a statute granting jurisdiction to the probate courts in cases of divorce.

— Authority of legislature to grant divorces.

Cited in *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723, sustaining a territorial statute of Oregon granting a divorce; *Wright v. Wright*, 2 Md. 429, 56 A. D. 723 (dissenting opinion); *Lewis v. Tapman*, 90 Ind. 294, 47 L.R.A. 385, 45 Atl. 459,—on legislative power to grant divorces.

Cited in reference notes in 56 A. D. 732, on power of legislature to grant divorces; 49 A. D. 474, on legislative divorces in Maryland.

Cited in note in 18 L.R.A. 95, on granting divorces as rightful subject of legislation.

Disapproved in *Ponder v. Graham*, 4 Fla. 23, holding that the legislature has not the power to dissolve a marriage contract.

Nature of a judgment for alimony.

Cited in *Lytle v. Lytle*, 48 Ind. 200, holding that a personal judgment for alimony, without personal service but only on constructive notice, there being no appearance by defendant, is of no validity; *Cox v. Cox*, 19 Ohio St. 502, 2 A. R. 415, holding a divorce granted husband in another state, on constructive service, she having no actual notice, no defense to a petition by her for alimony in her domicil state; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1, holding decree for divorce not based on personal service and without personal jurisdiction of wife not bar to a suit by wife where personal service is had on husband; *Alexander v. Alexander*, 13 App. D. C. 334, 45 L.R.A. 806, holding alimony as allowed under the statute in cases of divorce from the bond of matrimony is placed on the same basis as alimony in divorce from bed and board under the common law; *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, holding alimony not barred by a discharge in bankruptcy.

Cited in note in 53 A. S. R. 184, on validity of decree for alimony against a nonresident.

Alimony as dependent on granting of divorce.

Cited in *Dunnock v. Dunnock*, 3 Md. Ch. 140, holding that alimony cannot be granted except as a consequence of the exercise of granting of a divorce.

Cited in notes in 60 A. D. 666, on allowance of alimony without divorce; 21 L.R.A. 679, on suit for alimony after legislative divorce; 88 A. D. 658, on alimony on separate proceedings after divorce; 77 A. S. R. 231, on right to maintain separate suit for maintenance independent of suit for divorce.

Authority of chancery to decree alimony.

Cited in *Jamison v. Jamison*, 4 Md. Ch. 289, holding that chancery has authority, during separation, to make a suitable allowance out of the property of the husband for the maintenance of the wife.

Cited in reference note in 28 A. D. 55, 442, on jurisdiction to grant alimony.

19 AM. DEC. 243, BALTIMORE v. HUGHES, 1 GILL & J. 480.

Presumption as to benefit from local improvements.

Cited in *Baltimore v. Scharf*, 54 Md. 499, holding charge on owners of property along street paved, will be presumed to be for benefit to their property.

Assessment of particular district for benefit of whole city.

Cited in *Burns v. Baltimore*, 48 Md. 198, holding paving which appears by the ordinance to be for the general benefit of the city, and not for the particular district, not a proper special tax on that district; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1, holding that the legality of levy of tax does not depend on whether the paving was in fact a benefit to a particular district taxed, but upon the object and motive of corporation.

Distinguished in *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 (dissenting opinion), on presumption of benefit to particular district.

Prerequisites of special assessment.

Distinguished in *Clemens v. Baltimore*, 16 Md. 208, holding presentation of a

bill for paving and acquiescence of person therein and promise by him to pay is an admission by him that preliminary steps had been taken and that paving had been done.

Validity of assessment.

Cited in note in 55 A. D. 286, on constitutionality of assessments by municipality for improvements.

Apportionment of assessments.

Cited in note in 55 A. D. 289, on apportionment of taxes and assessments.

Limitations on ordaining power of city.

Cited in *Mississippi, O. & Red River R. Co. v. Camden*, 23 Ark. 300, holding that a corporation must act within the limits of its delegated authority; *Wheeling v. Baltimore*, 1 Hughes, 90, Fed. Cas. No. 17,502; *Meinzer v. Racine*, 68 Wis. 241, 32 N. W. 139,—holding that a common council has only such powers as are expressly granted or necessarily implied; *Ex parte Burnett*, 30 Ala. 461, holding that a municipal corporation has power to pass all laws necessary or proper to carry into effect any given power; *Mobile v. Allaire*, 14 Ala. 400, holding a court is not to scrutinize the necessity or propriety of an ordinance, but the means of accomplishing the object.

Cited in reference notes in 55 A. D. 386, on powers of municipal corporations; 28 A. D. 265, on validity of municipal by-laws and ordinances; 90 A. D. 283, on necessity of municipal corporation acting within limits of its delegated authority.

Cited in note in 1 L.R.A. 169, on power and authority of municipal corporations.

Power of municipality as to nuisances.

Cited in reference notes in 26 A. D. 102, on remedies for public nuisances; 22 A. D. 425, on manner of declaring particular thing a nuisance; 28 A. D. 191, on power of municipal corporation to declare certain thing a nuisance; 30 A. D. 572, on power of municipal corporations to abate nuisances and to declare what is a nuisance.

Cited in notes in 40 A. D. 344, on power of municipal corporations to prohibit and prevent nuisances; 24 A. D. 197, on power of municipal corporations to abate nuisances and to declare what is a nuisance; 27 A. D. 98, on power of municipal corporations to remove nuisances and to determine what is a nuisance.

Voluntary payment of debt due from another.

Cited in *Stephens v. Brodnax*, 5 Ala. 258; *Hearn v. Cullin*, 54 Md. 533,—holding voluntary payment made of a debt due by another, without his request creates no liability on his part.

Cited in reference notes in 50 A. D. 167, on voluntary or involuntary payment of another's debt; 91 A. D. 657, on recovery from debtor by one paying his debt; 51 A. D. 706, on right to recover where one is compelled to pay another's debt.

Cited in note in 23 L.R.A. 128, on subrogation of volunteer or stranger paying debt by special agreement.

Liability for debt of another.

Cited in *Pope v. Randolph*, 13 Ala. 214, holding a promise to one party to pay a third person a sum of money founded on a sufficient consideration may be enforced by party to whom payment is to be made.

19 AM. DEC. 250, ALDRIDGE v. WEEMS, 2 GILL & J. 36.

Assignment of mortgage.

Cited in reference note in 49 A. D. 189, on assignment of mortgage.

Reformation of contracts.

Cited in note in 65 A. S. R. 501, on effect of statute of frauds on reformation of contract.

Trusts, how created.

Cited in Carson v. Phelps, 40 Md. 73, holding that a trustee of property may be created by any formal instrument which passes legal title to the trust estate and contains a proper declaration of trust.

19 AM. DEC. 253, WINCHESTER v. UNION BANK, 2 GILL & J. 73.

Acts qualifying assignee of insolvent to sue.

Cited in Wilson v. Ireland, 4 Md. 444, holding that trustee of insolvent debtor must first establish that he has been appointed and bonded; Stewart v. Stone, 3 Gill & J. 510, holding in a suit in chancery, trustee must show that he has filed bond with security.

Distinguished in Speed v. Smith, 4 Md. Ch. 299, in a sale under a decree of a court wherein the court is the vendor acting under the instrumentality of its trustee.

Proof of authority of an assignee to sue.

Cited in Hall v. Sewell, 9 Gill, 146, holding that an assignee in bankruptcy must show himself clothed with that character and authority; Foster v. Smith, 16 Ala. 192, holding that where the trustee of an insolvent brings assumpsit, the general issue does not supersede the necessity of proving he is such trustee.

General issue as admission of plaintiff's right to sue.

Cited in Strickland v. Burns, 14 Ala. 511, on the plea to the general issue as an admission of the character in which plaintiff sues.

19 AM. DEC. 255, WINCHESTER v. UNION BANK, 2 GILL & J. 79.

Bond as prerequisite to suit by an assignee in insolvency.

Cited in Wilson v. Ireland, 4 Md. 444, holding trustee of insolvent debtor must establish that he has been appointed and bonded before he can maintain suit.

Source of authority of an administrator.

Cited in Citizens' Nat. Bank v. Sharp, 53 Md. 521, holding that an administrator derives his title and authority entirely from the letters of administration.

19 AM. DEC. 258, JENNISON v. HAPGOOD, 7 PICK. 1.

Jurisdiction of administration of estates.

Cited in Re Cilley, 58 Fed. 977, holding proceeding to probate will not removable to Federal courts.

Distinguished in Goodell v. Goodell, 173 Mass. 140, 53 N. E. 275, holding guardian responsible in equity for abuse of power imposed by probate court.

— **Settlement of accounts.**

Cited in Probate Judge v. Lane, 51 N. H. 342, holding probate court alone has original jurisdiction of settlement of administration accounts; Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758, holding agreement by heirs for settlement of

estate did not oust probate court of jurisdiction to settle account; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560, holding trustees appointed by probate have right to have their accounts settled in probate court.

— **Jurisdiction of chancery.**

Cited in *Wilson v. Leishman*, 12 Met. 316, holding court of equity has no power to require administrator to render account.

Cited in reference notes in 73 A. D. 558, on how far jurisdiction of chancery is divested by probate system; 50 A. D. 813, on jurisdiction of chancery over settlement of executor's account.

Finality of decrees of probate court.

Cited in *Hartsel v. People*, 21 Colo. 296, 40 Pac. 567, holding decree of county court in probate matters conclusive upon all matters directly before court; *Vertner v. McMurrin*, Freem. Ch. (Miss.) 136, on conclusiveness of orders and decisions of probate court; *Bassett v. Fidelity & D. Co.* 184 Mass. 210, 100 A. S. R. 552, 68 N. E. 205, holding decree of probate court allowing account of executor binding on executor's surety.

Cited in reference notes in 35 A. D. 516; 48 A. D. 119,—on conclusiveness of decrees of orphans' court.

Cited in note in 48 A. D. 747, 748, on conclusiveness of decrees of distribution and power of chancery to correct or set aside settlement of accounts in probate court.

Opening, surcharging, and falsifying account.

Cited in *Davis v. Cowdin*, 20 Pick. 510, holding probate court may open administrator's account on ground of fraud; *Paine v. Stone*, 10 Pick. 75, holding fraud in account of administrator settled in probate court cannot be tried in action on administrator's bond; *Griffith v. Vertner*, 5 How. (Miss.) 736, holding decrees of orphans and county court cannot be set aside in chancery proceeding except for fraud; *Sever v. Russell*, 4 Cush. 513, 50 A. D. 811, holding chancery has no jurisdiction of fraud in executor's account rendered to probate.

Necessity of notice of accounting.

Cited in reference note in 75 A. D. 753, on necessity of citing executor on re-settlement of his account for fraud.

Cited in notes in 63 L.R.A. 108, on remedy of distributee as to accounting of which he had no notice, by proceeding against those who have received fund; 63 L.R.A. 98, on remedy of distributee by appeal from judgment or decree as to accounting of which he had no notice and on which he did not appear.

Exclusiveness of probate jurisdiction.

Cited in *Pierce v. Irish*, 31 Me. 254, holding court of probate only tribunal competent to pass upon accounts of guardians.

Adequate legal remedy as defense in equity.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding equity will not enforce collateral agreement or trust still executory where there is remedy at law.

Distinguished in *Hull v. Dills*, 19 Fed. 657, holding equity jurisdiction of Federal courts not subject to restraint by state legislation.

Purchases by persons in fiduciary capacity.

Cited in *Sowles v. Lewis*, 75 Vt. 59, 52 Atl. 1073, holding purchase by assignee in insolvency of property of estate valid except for fraud; *Joyner v. Farmer*, 78 N. C. 196, holding purchase by mortgagee at sale made by himself voidable

by mortgagor, or his privies; *New York C. Ins. Co. v. National Protection Ins. Co.* 20 Barb. 468, holding contract by agent who is also acting in behalf of other party, voidable; *McKean & E. Land & Improv. Co. v. Clay*, 149 Pa. 277, 24 Atl. 211, 10 Pa. Co. Ct. 490, holding action to enforce trust arising from purchase by agent of land of principal must be brought within statutory time.

Cited in notes in 80 A. S. R. 556, on purchase by agent of property of principal; 80 A. S. R. 563, on validity and ratification of purchase by agent of principal's property at unauthorized sale.

— By administrator.

Cited in *Blood v. Hayman*, 13 Met. 231, holding purchase by administrator of intestate's realty sold by him under license, voidable; *Litchfield v. Cudworth*, 15 Pick. 23, holding sale to himself of lands voidable; *Mallett v. Dexter*, 1 Curt. C. C. 178, Fed. Cas. No. 8,988, holding equity will not interpose in case of fraud by administrator; *Deans v. Wilcoxson*, 25 Fla. 980, 7 So. 163, holding conveyances to administrator of land of which he has charge, voidable; *Remick v. Butterfield*, 31 N. H. 70, 64 A. D. 316, holding heirs of intestate may avoid illegal sale made by administrator.

Cited in reference note in 33 A. D. 581, on power of administratrix to avoid purchase made at her own sale.

— By trustees.

Cited in *Hayes v. Hall*, 188 Mass. 510, 74 N. E. 935, holding trustee not permitted directly or indirectly to benefit himself from trust property; *Ten Eyck v. Craig*, 2 Hun, 452, holding purchase by trustee of trust property will stand if *cestui que trust* acquiesces; *Haywood v. Ellis*, 13 Pick. 272, holding trustee shall not buy trust property so as to make profit himself; *Hayward v. Ellis*, 13 Pick. 272, holding trustee who purchases trust property entitled to expenses of sale, where *cestui que trust* affirms; *Burlingame v. Hobbs*, 12 Gray, 367, holding trustees who disposed of trust property for their own use liable in equity to *cestui que trust*.

Cited in reference notes in 21 A. D. 466; 22 A. D. 302; 30 A. D. 530,—on trustee's right to purchase at his own sale; 39 A. D. 187, on validity of trustee's purchase at sale of trust property; 25 A. D. 399, on invalidity of purchase by trustee at his own sale.

Cited in note in 19 A. S. R. 289, on sales and conveyances by trustee.

Laches in disaffirming.

Cited in *Skelding v. Dean*, 141 Mich. 143, 104 N. W. 410, holding disposal of trust funds with acquiescence of beneficiary could not be disturbed after unreasonable time; *Taggart v. Reilly*, 3 Phila. 196, 15 Phila. Leg. Int. 316, holding bill to set aside sale by executor thirty-three years after made too late.

Lapse of time as curing defective sale.

Cited in *Campau v. Van Dyke*, 15 Mich. 371, holding bill to impeach decree establishing title to real estate must be brought within reasonable time; *Myers v. Bolton*, 157 N. Y. 393, 28 N. Y. Civ. Proc. Rep. 397, 52 N. E. 114, on what constituted acquiescence in care of property by executors.

Confirmation of administrator's deed.

Cited in *Thomas v. Le Baron*, 10 Met. 403, holding voidable deed of administrator confirmed by heirs acquiescing in settlement of administrator's account in which they were credited with purchase money.

19 AM. DEC. 262, RE WAIT, 7 PICK. 100.

Title to produce, as rent.

Cited in *Turner v. Bachelder*, 17 Me. 257, holding title to portion of produce reserved as rent remains in lessee until division; *Smith v. Wheeler*, 4 Okla. 138, 44 Pac. 203, denying right to distrain for rent.

Cited in note in 51 A. D. 278, on rent payable in produce or services.

— When passes to vendee.

Cited in *Stone v. Peacock*, 35 Me. 385, holding purchase and payment of growing crops passes no title until possession or delivery be had.

19 AM. DEC. 264, MILLER v. MILLER, 7 PICK. 123.

Action for money had and received.

Cited in *Hall v. Huckins*, 41 Me. 574, holding plaintiff in action on money counts need not show that money has actually been received; *Brigham v. Winchester*, 6 Met. 460, holding action for money had and received for land will not lie when title is in controversy.

Cited in note in 89 A. D. 429, on assumpsit not being proper action to try title.

— For proceeds of conversion or wrongdoing.

Cited in *Mann v. United States*, 32 Ct. Cl. 580, holding one whose goods have been wrongfully taken and sold may waive tort and sue for money had and received; *Strickland v. Burns*, 14 Ala. 511, holding assumpsit may be maintained for proceeds of notes disposed by agent for own use; *Linton v. Walker*, 8 Fla. 144, 71 A. D. 105, on right of master to sue in assumpsit for work and labor of apprentices enticed away; *Hathaway v. Burr*, 21 Me. 567, 38 A. D. 278, holding plaintiff in action for money had and received for goods taken and sold, need prove only receipt of payment; *Pickman v. Trinity Church*, 123 Mass. 1, 25 A. R. 1, holding money had and received will lie for price of land wrongfully sold; *Lord v. Staples*, 23 N. H. 448, holding payment need not be made in money, to allow action for money had and received.

— By tenant in common.

Cited in *Hudson v. Coe*, 79 Me. 83, 1 A. S. R. 288, 8 Atl. 249, holding one tenant in common may maintain action for money received by cotenant above his share; *Dickinson v. Williams*, 11 Cush. 258, 59 A. D. 142; *Miller v. Miller*, 9 Pick. 33,—holding money taken by tenant in common for common property, recoverable in assumpsit; *Bigelow v. Jones*, 10 Pick 161, holding cotenant disseised from common property may not maintain assumpsit for money received from wood cut therefrom.

Cited in reference note in 59 A. D. 144, on right of tenant in common to sue cotenant in assumpsit when account authorized.

Cited in notes in 14 A. D. 587, on assumpsit by one cotenant against another for his share of rents and profits; 28 L.R.A. 845, 846, on remedy by action in assumpsit to compel cotenants to account for use and occupation, and rents and profits.

Criticized in *Richardson v. Richardson*, 72 Me. 403, holding tenant in common may maintain assumpsit against cotenant who has received more than his share of rents and profits.

Election of remedies.

Cited in *Doe ex dem. Duval v. McLoskey*, 1 Ala. 708, holding mortgagee of land may prosecute all or either of his remedies at same time to satisfaction.

Commencement of limitations.

Cited in *Woolbright v. Sneed*, 5 Ga. 167, holding limitations do not commence to run until right of action accrues.

Cited in reference note in 68 A. D. 493, on limitation of action by tenant against his cotenant.

Cited in note in 16 E. R. C. 261, on when statute of limitations runs against cause of action for fraud.

— On wrongful receipt of money.

Cited in *Hunt v. Nevers*, 15 Pick. 500, 26 A. D. 616; *Currier v. Hallowell*, 158 Mass. 254, 33 N. E. 497,—holding that limitations begin to run, in case of money wrongfully received, at time of receipt; *Robinson v. Robinson*, 173 Mass. 233, 53 N. E. 854, on claim of one tenant in common against another for profits as affected by statute of limitations.

Reduction of wife's choses in action to possession.

Cited in reference note in 28 A. D. 137, on survival to wife of her choses in action not reduced to possession by her husband during his life.

19 AM. DEC. 266, BOSTON TYPE & STEREOTYPE FOUNDRY CO. v. MORTIMER, 7 PICK. 166.**Amount of liability of garnishee.**

Cited in *Swamscot Mach. Co. v. Partridge*, 25 N. H. 369, holding trustee may retain amount to cover reasonable costs in trustee proceedings; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710, holding garnishee who is also creditor to principal debtor in unliquidated damages may obtain relief in equity; *Donnell v. Portland & O. R. Co.* 76 Me. 33, on liability of trustee in trustee process for amount due principal defendant; *Eddy v. O'Hara*, 132 Mass. 56, holding owners of vessel summoned as trustees by seaman not charged as such for amount paid on judgment in admiralty; *St. Louis v. Regenfuss*, 28 Wis. 144, holding garnishee liable to judgment creditor no further than to attachment debtor before process served.

— Right to set-off.

Cited in *Lannan v. Walter*, 149 Mass. 14, 20 N. E. 196, holding debt due trustee by principal defendant may, before final answer in trustee process, be set off by trustee; *Van Camp Hardware & Iron Co. v. Plimpton*, 174 Mass. 208, 75 A. S. R. 296, 54 N. E. 538, holding trustee may not be put in worse position by attachment than he would have otherwise occupied; *Boardman v. Cushing*, 12 N. H. 105, holding trustee has right of set-off for claims contracted before service of process; *Brown v. Warren*, 43 N. H. 430; *Smith v. Stearns*, 19 Pick. 20,—holding trustee may set off any demand which statutory or common-law proceedings allowed; *McLaughlin v. Swann*, 18 How. 217, 15 L. ed. 357, holding defenses of garnishees may be set up by bill of interpleader against plaintiffs in attachment; *Marrett v. Equitable Ins. Co.* 54 Me. 537, holding trustee who has contingent claim against principal defendants may continue action till there is certainty of claim; *Wheeler v. Emerson*, 45 N. H. 526, holding trustee may retain of funds of debtor amount he might legally or equitably set off; *Lamb v. Stone*, 11 Pick. 527, on equitable set-off to trustee process.

Cited in reference note in 100 A. D. 512, on right of garnishee to make offset against claim.

19 AM. DEC. 268, HAYWARD v. LEONARD, 7 PICK. 181.**Entirety of contracts.**

Cited in reference notes in 51 A. D. 629, on contracts held to be indivisible; 78 A. S. R. 521, on entirety of contracts for personal services; 72 A. S. R. 869, on servant's breach of entire contract.

Recovery on contracts not fully performed.

Cited with special approval in *Malbon v. Birney*, 11 Wis. 107, holding contractor who performed but small part of work under contract, then abandoned it, could recover nothing.

Cited in *Goldsmith v. Hand*, 26 Ohio St. 101, on right of recovery on uncompleted contract; *Higby v. Upton*, 3 Met. 409, on construction of rule as to part performance of contract; *Allen v. Mayers*, 184 Mass. 486, 69 N. E. 220, holding owner cannot take advantage of breach of contract, when work is accepted with knowledge thereof; *Wheeden v. Fiske*, 50 N. H. 125, holding express agreement to rescind contract need not be shown.

Cited in reference notes in 65 A. D. 564, on employee's right to reasonable value of services where contract is not completed; 56 A. D. 98, on recovery for services where work is beneficial to defendant.

Cited in notes in 59 A. S. R. 287, as to when complete performance is essential to cause of action on building and analogous contracts; 59 A. S. R. 291, as to when complete performance is essential to cause of action on contract for personal services; 58 A. D. 622, on apportionment of contracts and recovery for part performance thereof.

Distinguished in *Carpenter v. Gay*, 12 R. I. 306, denying remedy to contractor who has voluntarily abandoned work; *Mason v. Heyward*, 3 Minn. 182, Gil. 116 holding defendant who sets up counterclaim for failure to perform contract admits right of action on contract; *Pickering v. Greenwood*, 114 Mass. 479, holding recovery improper on contract not performed before certain time as stipulated.

— Substantial performance.

Cited in *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686, holding substantial performance of contract sufficient to allow recovery for work done thereunder; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740, holding substantial performance of every material covenant in contract necessary to allow recovery of contract price; *Preston v. Finney*, 2 Watts & S. 53, holding slight deviation from contract will not prevent recovery where there has been honest intention to perform; *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 72 A. S. R. 822, 31 S. E. 965, holding builder does not lose mechanics' lien because of minor missions or defects.

Distinguished in *Mehurin v. Stone*, 37 Ohio St. 49, holding substantial performance of contract essential to right to recover agreed price or any part thereof.

Disapproved in *Manning v. School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356, holding "substantial performance" is strict performance in all essentials necessary to full accomplishment of purposes of contract.

Action on implied contract for quantum meruit.

Cited in *Britton v. Turner*, 6 N. H. 481, 26 A. D. 713, holding law implies a promise to pay for benefits acquired under contract not fully performed; *Smith v. First Cong. Meeting-house*, 8 Pick. 178, holding debt or assumpsit will lie on implied promise for work under special contract not fully performed; *Bassett v. Sanborn*, 9 Cush. 58; *Snow v. Ware*, 13 Met. 42,—holding value of work

performed, but not completed according to contract, may be recovered on implied promise; *Walker v. Orange*, 16 Gray, 193, holding one who believed road completed according to contract could recover reasonable value of services; *Hunt v. Test*, 8 Ala. 713, 42 A. D. 659, holding there was implied contract to pay for value of services actually rendered; *Gillis v. Cole*, 177 Mass. 584, 59 N. E. 455, holding recovery proper for value added to defendant's land, even though contract had not been fulfilled; *Atkins v. Barnstable County*, 97 Mass. 428, holding plaintiff might recover on "*quantum meruit*" for benefits done by work for county; *Wadleigh v. Sutton*, 6 N. H. 15, 23 A. D. 704, holding same as to work done for town under contract not fully performed; *Blood v. Enos*, 12 Vt. 625, 36 A. D. 363, holding one who had performed labor on owner's land entitled to recover to extent of benefits; *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942, holding non-performance of contract in full, no bar to action for value of labor and materials.

Cited in reference notes in 41 A. S. R. 705, on recovery on *quantum meruit*; 28 A. D. 529, on *quantum meruit* on entire contract; 20 A. D. 479; 23 A. D. 662, 705,—on *quantum meruit* under special contract; 25 A. D. 263; 26 A. D. 722; 28 A. D. 185, 341; 29 A. D. 584; 39 A. D. 535,—on *quantum meruit* on special contract; 112 A. S. R. 314, on recovery upon *quantum meruit* on special contracts; 56 A. D. 98, on recovery for services rendered where special contract not completed.

Cited in notes in 30 A. D. 142; 59 A. S. R. 277,—on *quantum meruit* under special contract; 59 A. S. R. 284, on recovery on *quantum meruit* or *quantum valebat*; 5 L.R.A. 707, on action to recover reasonable value of services; 6 E. R. C. 638, on right to recover upon *quantum meruit* for work done under contract for an entire service.

Distinguished in *PHELPS v. Sheldon*, 13 Pick. 50, 23 A. D. 659, holding one who received contract price for work performed cannot recover further on *quantum meruit*; *Eyser v. Weissgerber*, 2 Iowa, 463, holding plaintiff who sues on special agreement may not recover on implied liability without common counts.

— Completion prevented by other party or by rescission.

Cited in *Fitzgerald v. Allen*, 128 Mass. 232, holding recovery would lie on *quantum meruit* for work performed, upon cancelation of contract; *Bush v. Brooks*, 70 Mich. 446, 38 N. W. 562, holding assumpsit on common counts lies for labor and materials furnished under contract voided for fraud and deceit; *Long v. Athol*, 196 Mass. 497, 17 L.R.A. (N.S.) 96, 82 N. E. 665, holding same where canceled for mistake; *Eastern Expanded Metal Co. v. Webb Granite & Constr. Co.* 195 Mass. 356, 81 N. E. 251, 11 A. & E. Ann. Cas. 631, holding contractor who disaffirmed contract when he found it illegal could recover for labor and materials furnished.

— Culpable or accidental noncompletion.

Cited in *Powell v. Sammons*, 31 Ala. 552, holding one will not be permitted to gain by his fault in violating contract; *Haslack v. Mayers*, 26 N. J. L. 284, holding one who, without excuse fails to complete contract, cannot recover for part performance; *Pullman v. Corning*, 9 N. Y. 93 (affirming 14 Barb. 174), holding one who had done work in negligent and unskilful manner could recover nothing for work done; *Sipley v. Stickney*, 190 Mass. 43, 112 A. S. R. 309, 5 L.R.A. (N.S.) 469, 76 N. E. 228, 5 A. & E. Ann. Cas. 611, holding recovery would not lie on contract, if there is intentional nonperformance of a part

of it; *Adams v. Nichols*, 19 Pick. 279, holding recovery will not lie for labor and materials in house burned before completion of contract.

Distinguished in *Givhan v. Dailey*, 4 Ala. 336, holding representatives of overseer might not recover *pro rata* compensation, for part of contract for year performed; *Olmstead v. Beale*, 19 Pick. 528, holding one who without reason broke agreement to work for definite period cannot recover on *quantum meruit*.

Disapproved in *Smith v. Coe*, 2 Hilt. 365, holding contractor who abandons work before completion, under special contract, can recover nothing.

— Deviation from contract.

Cited in *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264, holding unintentional deviation from contract will not prevent recovery for labor and materials furnished.

Cited in note in 54 A. D. 479, on recovery for work and materials when not furnished in time or manner required by special contract.

— Accepted partial or defective performance.

Cited in *Bailey v. Woods*, 17 N. H. 365, holding deviation from contract acquiesced in by defendant would not bar action in *quantum meruit*; *Norris v. Windsor School Dist.* No. 1, 12 Me. 293, 28 A. D. 182; *White v. Oliver*, 36 Me. 92; *Taylor v. Williams*, 6 Wis. 365; *Tunno v. Robert*, 16 Fla. 738,—holding value of work performed and materials furnished and accepted though not according to contract, may be recovered; *United States use of Hudson River Stone Supply v. Molloy*, 11 L.R.A. (N.S.) 487, 75 C. C. A. 283, 144 Fed. 321, holding contractor may recover for stone delivered and used with knowledge of breach; *Thomas v. Ellis*, 4 Ala. 108, holding same for value of labor on house accepted and used; *Horn v. Batchelder*, 41 N. H. 86, allowing recovery for defective materials delivered on special contract, where they had been used; *Katz v. Bedford*, 77 Cal. 319, 1 L.R.A. 826, 19 Pac. 523, holding contractor may recover on *quantum meruit*, for work partly performed but accepted; *Hancock v. Ross*, 18 Ga. 364, holding assumpsit will lie for goods supplied, but not according to agreement, if they are retained and enjoyed; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, holding one who has enjoyment of labor and materials of another must make compensation; *Blackeslee v. Holt*, 42 Conn. 226, holding defendant who took benefit of work performed bound to pay for it; *Reed v. Scituate*, 7 Allen, 141, on acceptance of work performed under special contract; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510, holding use of bridge by public not acceptance of work on it by contractor, who voluntarily failed to perform contract.

Distinguished in *Knowlton v. Plantation No. 4*, 14 Me. 20, holding one who built bridge without authority cannot recover value on implied contract though it was used.

Disapproved in *Smith v. Brady*, 17 N. Y. 173; 72 A. D. 442, holding builder who substantially failed to perform his contract could recover nothing for labor and materials.

Measure of quantum meruit.

Cited in *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295, holding contractor could recover reasonable value of materials furnished substantially as specified in contract; *Cardell v. Bridge*, 9 Allen, 355; *Skowhegan Water Co. v. Skowhegan Village Corp.* 102 Me. 323, 68 Atl. 714,—holding one who has departed from contract may still recover on common counts for reasonable value of services; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650; *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911,—holding measure of Am. Dec. Vol. III.—43.

damages for breach of building contract difference between present worth of building and worth if contract performed; *Connolly v. Sullivan*, 173 Mass. 1, 53 N. E. 143, on amount recoverable on contract not fully performed; *Bishop v. Price*, 24 Wis. 480, holding contract price governs in action on *quantum meruit* where contract has been partially performed; *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686, holding recovery for labor and materials on *quantum valebat* limited to benefits conferred.

Cited in reference note in 34 A. S. R. 430, on amount of recovery on *quantum meruit*.

— Deductions and offsets.

Cited in *Noble v. James*, 2 Grant, Cas. 278, holding in action on *quantum meruit* defendant may set off damages arising from nonperformance of contract; *Jewett v. Weston*, 11 Me. 346, holding in suit on *quantum meruit*, deduction should be made for injuries through nonperformance of special contract; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Veazie v. Bangor*, 51 Me. 509,—holding one who has endeavored to fulfil contract, entitled to value of services, less damage caused by deviation; *Cullen v. Sears*, 112 Mass. 299, on measure of damages to be deducted for failure to perform contract as stipulated; *Bertrand v. Byrd*, 5 Ark. 661, holding defective performance of contract ground for mitigation of damages only where defendant has derived benefit.

Cited in note in 40 A. D. 333, on right to recoupment on action for goods or services as dependent on whether contract is entire or not.

Measure of damages for breach of contract.

Cited in *Doolittle v. McCullough*, 12 Ohio St. 360, holding measure of damages for breach of contract, loss sustained thereby; *Moulton v. McOwen*, 103 Mass. 587, holding measure of damages for negligence in building cellar, difference between value of work as done and as it should have been done.

Implied acceptance of work.

Cited in *Demos v. Noble*, 6 Iowa, 530, holding actions of one for whom house was built tended to show compliance with contract.

Contracts implied from retention of benefits.

Cited in *Florence Gas Electric Light & P. Co. v. Hanby*, 101 Ala. 15, 13 So. 343, holding law implies promise on part of one who has accepted work to pay its reasonable value; *Van Deusen v. Blum*, 18 Pick. 229, 29 A. D. 582, holding one who gains labor and acquires property of another must make reasonable compensation for same; *Taylor v. Finnigan*, 189 Mass. 568, 2 L.R.A. (N.S.) 973, 76 N. E. 203, holding lessee could recover from lessor for making building meet demands of inspector.

Cited in note in 1 L.R.A. 827, on estoppel of party by receipt of benefit.

Common assumpsit on special agreement.

Cited in *Blair v. Asbury*, 4 Port. (Ala.) 435, holding special contract might be waived and trial had on common counts; *Holden Steam Mill Co. v. Westervelt*, 67 Me. 446, holding one who furnished goods under express agreement may not abandon it and sue on implied one.

19 AM. DEC. 282, SWAN v. NESMITH, 7 PICK. 220.

Liability of del credere factor.

Cited in *Bradley v. Richardson*, 23 Vt. 720, holding undertaking of a factor merely to guarantee payment of debts due from buyers; *Vinal v. Richardson*, 13 Allen, 521, holding principal not bound to undertake collection and notify

factor of failure before action on guaranty; *Blakely v. Jacobson*, 9 Bosw. 140, on nature of factor's liability in *del credere* agency; *Pugh v. Porter Bros. Co.* 118 Cal. 628, 50 Pac. 772, holding liability of factor to principal for fixed amount agreed becomes absolute upon sale for cash; *Cushman v. Snow*, 186 Mass. 169, 71 N. E. 529, holding contract should show guarantee of sales and of solvency of purchasers by factor.

Cited in note in 58 A. D. 171, on *del credere* factors.

— *Assumpsit* as remedy.

Cited in *Lewis v. Brehme*, 33 Md. 412, 3 A. R. 190, on liability of *del credere* agent for proceeds of sale, in *assumpsit*.

Statute of frauds as to contracts to answer for another.

Cited in *Fullam v. Adams*, 37 Vt. 391, holding promise to pay debt of another within the statute of frauds; *Beaman v. Russell*, 20 Vt. 205, 49 A. D. 775, on promise of indemnity not collateral as affected by statute of frauds; *Walker v. Richards*, 39 N. H. 259, on necessity of written undertaking in aid of liability of another; *Holmes v. Knights*, 10 N. H. 175, holding promise to indemnify another for becoming surety to third party not within statute.

— Contract of *del credere* factor.

Cited in *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 2 Denio, 368, 43 A. D. 751 (affirming 5 Hill, 458),—holding contract of factor binding him in terms implied by *del credere* commission not within statute; *Suman v. Inman*, 6 Mo. App. 384, holding same of agreement of factor to sell under *del credere* commission; *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786, holding undertaking of factor not within statute.

Cited in reference note in 43 A. D. 754, on right to prove by parol contract of factor selling under *del credere* commission.

Amendment of pleadings.

Cited in *Stevenson v. Mudgett*, 10 N. H. 338, 34 A. D. 155, holding declaration may be amended so long as identity of cause of action is preserved; *Davis v. Hill*, 41 N. H. 329, holding amendment properly allowed which stated same sufficient cause of action in different way; *Brown v. Howe*, 3 Allen, 528, holding adding count for work done and materials found to declaration on written contract did not introduce new cause of action; *Wood v. Denny*, 7 Gray, 540, holding declaration on money counts might be amended by adding counts upon promissory notes; *Smith v. Palmer*, 6 Cush. 513, holding new counts for enforcement of claim growing out of same transaction upon which declaration founded not new cause of action; *McConnell v. Leighton*, 74 Me. 415, holding new counts in case may be added by amendment to action originally trover; *Prater v. Snead*, 12 Kan. 447, allowing amendment of petition where cause of action was not changed.

Cited in reference notes in 33 A. D. 681; 35 A. D. 735,—on amendment of pleadings; 39 A. D. 68, on amendments varying cause or form of action.

19 AM. DEC. 264, *WEBB v. PEELE*, 7 PICK. 247.

Liability of assignee for creditors to garnishment or trustee process.

Cited in *Gore v. Clisby*, 8 Pick. 555, holding choses in action and land assigned not liable in hands of assignee; *Tucker v. Clisby*, 12 Pick. 22, holding assignee not liable for those lands not sold and paid for; *Sanford v. Bliss*, 12 Pick. 116, holding assignee not chargeable for proceeds of land sold after process served; *Fall River Iron Works Co. v. Croade*, 15 Pick. 11, on liability of funds in hands of assignee of debtor, to attachment.

Cited in note in 59 L.R.A. 372, on garnishment of unliquidated claims to surplus on assignment for creditors.

— Of administrator or trustee.

Cited in *Wheeler v. Bowen*, 20 Pick. 563, holding interest of heir in estate of intestate, in hands of administrator liable to trustee process; *Bissell v. Strong*, 9 Pick. 562, holding grantee not liable in attachment for value of land he may hold in trust or as security.

Effect of recital of consideration.

Cited in *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103, holding consideration clause in deed open to explanation by parol proof; *Paige v. Sherman*, 6 Gray, 511, holding grantor not absolutely bound by consideration expressed in deed; *Belden v. Seymour*, 8 Conn. 304, 21 A. D. 661, holding only operation of consideration clause in deed is to prevent resulting trust in grantor; *Emmons v. Bradley*, 56 Me. 333, holding bill of sale of chattels absolute in terms, but intended as security, not conclusive of fraud.

19 AM. DEC. 286, PEELE v. SUFFOLK INS. CO. 7 PICK. 254.

Election of insurer to repair and return abandoned vessel.

Cited in *Marmaud v. Melledge*, 123 Mass. 173; *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142,—holding underwriters may repair stranded ship, if at expense less than one half her value, and avoid payment of total loss.

— Diligence in effecting repairs.

Cited in *Northwestern Transp. Co. v. Continental Ins. Co.* 24 Fed. 171, holding underwriters who take possession of stranded vessel to repair her must proceed with diligence; *Copelin v. Phoenix Ins. Co.* 9 Wall. 461, 19 L. ed. 739 (affirming *Woolw.* 278, Fed. Cas. No. 3,210), holding underwriters must proceed expeditiously to make repairs; *Copelin v. Phoenix Ins. Co.* 46 Mo. 211, 2 A. R. 504, holding insurer forfeits right to return injured vessel unless repairs are made within reasonable time.

Cited in reference note in 33 A. D. 733, on necessity of making repairs within reasonable time.

Right to abandon damaged vessel for total loss.

Cited in *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 541, holding insured may abandon as for total loss, if repairs would exceed half value.

Acceptance of ship abandoned for total loss.

Cited in *Northwestern Transp. Co. v. Thames & M. Ins. Co.* 59 Mich. 214, 26 N. W. 336; *Hume v. Frenz*, 80 C. C. A. 320, 150 Fed. 502,—holding action of underwriters in failing to repair ship within reasonable time, acceptance of abandonment; *Reynolds v. Ocean Ins. Co.* 1 Met. 160, holding same of failure to remove stranded vessel within reasonable time; *Badger v. Ocean Ins. Co.* 23 Pick. 347, holding abandonment of ship sold by owners immediately after injury by stranding, not accepted by insurers.

Cited in note in 45 L. ed. U. S. 50, on taking possession of insured vessel to raise and repair as acceptance of abandonment.

Strain of vessel as element of loss.

Distinguished in *Giles v. Eagle Ins. Co.* 2 Met. 140, holding underwriters liable to extent of diminished value of ship caused by strain.

Value of insured vessel before and after repair.

Cited in *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 32 A. D. 271, holding

inadmissible, evidence as to relative value of ship before and after she was repaired by underwriters.

Burden of proof on marine policy.

Cited in *McColl v. Sun Mut. Ins. Co.* 2 Jones & S. 313, holding actual or constructive total loss of vessel must be proved by insured in action on marine policy.

19 AM. DEC. 289, LITTLE v. PEARSON, 7 PICK. 301.

Estates of vendor and purchaser.

Cited in *Willis v. Wozencraft*, 22 Cal. 607, holding equity treats vendor of land as equitable owner thereof and vendor as owner of money.

Liability of vendee for use and occupation.

Cited in *Kaas's Estate*, 2 Pa. Co. Ct. 55; *Bardsley's Appeal*, 20 W. N. C. 90; *Carpenter v. United States*, 6 Ct. Cl. 156,—holding one who enters premises under agreement to purchase not liable for rent prior to conveyance; *Jones v. Tipton*, 2 Dana, 295, holding assumpsit will not lie against vendee for use and occupation, under contract of sale afterwards rescinded; *Davidson v. Ernest*, 7 Ala. 817, holding assumpsit for use and occupation will lie by vendor against one who entered under verbal contract to purchase; *Knox v. Spratt*, 19 Fla. 817, holding purchaser who enters land under contract of sale, not liable for use and occupation till contract is off; *Lyon v. Cunningham*, 136 Mass. 532, holding entry of premises under agreement for written lease does not create tenancy at will when landlord refuses to execute lease; *Jones v. Hutchison*, 21 Tex. 370, holding defaulting vendee responsible for rents and profits to vendor, if latter disaffirms contract.

Cited in reference notes in 23 A. D. 407, on assumpsit for use and occupation; 20 A. D. 447; 22 A. D. 359,—as to when action for use and occupation lies; 34 A. D. 683, on action for use and occupation against vendee.

Obligation to pay rent.

Cited in *Doyle v. O'Neil*, 7 Mo. App. 138, holding tenant's obligation to pay rent arises from covenants in lease.

Cited in reference note in 96 A. D. 168, as to when one in possession of land is liable for rents.

19 AM. DEC. 290, ADAMS v. PEARSON, 7 PICK. 341.

Conclusiveness of judgment.

Cited in *Collins v. Butler*, 14 Cal. 223; *Ansley v. Pearson*, 8 Ala. 431,—holding judgment on merits in former action conclusive in subsequent action on same claim; *Rodgers v. Evans*, 8 Ga. 143, 52 A. D. 390, holding judgment of court having full jurisdiction binding until vacated or reversed; *Bath's Petition*, 22 N. H. 576, holding acceptance by court of road commissioners' report made matter "*res judicata*," *Pierce v. Kneeland*, 9 Wis. 23, holding final decision of supreme court upon order below, final and conclusive upon parties; *Dodge v. Gaylord*, 53 Ind. 365, holding decision of supreme court, though erroneous, binding upon parties and court upon second appeal; *Love v. Gibson*, 2 Fla. 598, holding surety having notice bound by judgment obtained against his cosurety; *Taylor v. Field*, 22 Ill. App. 436, holding former decree admissible to prove facts which must have been decided in former suit between same parties.

Cited in note in 7 L.R.A. 582, on rule that judgments, though erroneous, are binding until reversed.

Judgment for damages as merger of prescriptive right.

Cited in *Hersey v. Packard*, 56 Me. 395, holding judgment for damages by flowage devoted defendants of prescriptive rights acquired prior thereto.

19 AM. DEC. 292, BULLARD v. BRIGGS, 7 PICK. 533.**Nature of right of dower.**

Cited in *Re Alexander*, 53 N. J. Eq. 96, 30 Atl. 817, on nature of right of dower; *Chandler v. Hollingsworth*, 3 Del. Ch. 99, holding dower a legal right of wife, vested and indefeasible except by her own act; *Flynn v. Flynn*, 171 Mass. 312, 68 A. S. R. 427, 42 L.R.A. 98, 50 N. E. 650, holding wife not entitled to have proceeds of sale under eminent domain set apart by reason of right of dower; *Buzick v. Buzick*, 44 Iowa, 259, 24 A. R. 740, holding wife may maintain action to protect her dower.

Cited in reference note in 37 A. S. R. 893, on priority of dower as against other rights.

Bar or release of dower.

Cited in *Davis v. Wetherell*, 13 Allen, 60, 90 A. D. 177, holding right of dower will be protected in equity against extinguishment by foreclosure of mortgage.

Effect of joinder in husband's deed or mortgage.

Cited in *Nickell v. Tomlinson*, 27 W. Va. 697, holding effect of wife uniting with husband in conveying absolute fee simple is to relinquish contingent right of dower; *Gore v. Townsend*, 105 N. C. 228, 8 L.R.A. 443, 11 S. E. 160, holding wife who encumbers right of dower by joining in mortgage of husband's land becomes his surety.

Release of marital estate as consideration.

Cited in *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3, holding release by wife of right in exempt homestead good consideration for money paid her on sale; *McBreen v. McBreen*, 154 Mo. 323, 77 A. S. R. 758, 55 S. W. 463, holding husband may contract with wife for release of curtesy, in consideration of conveyance to him by wife.

Release of dower as consideration for settlement.

Cited in *Hollowell v. Simonson*, 21 Ind. 398; *Brown v. Rawlings*, 72 Ind. 505; *Bancroft v. Curtis*, 108 Mass. 47; *Singree v. Welch*, 32 Ohio St. 320; *Smith v. Seiberling*, 35 Fed. 677,—holding conveyance of land by husband to wife in consideration of release of dower, valid if without fraud; *Colburn v. Holland*, 14 Rich. Eq. 176, on relinquishment by wife of her rights, for valuable consideration; *Smith v. Kehr*, 2 Dill. 50, Fed. Cas. No. 13,071, holding postnuptial settlement in consideration of release of dower and maintenance, valid; *Patrick v. Patrick*, 77 Ill. 555; *Hershy v. Latham*, 46 Ark. 542,—holding relinquishment of dower by wife sufficient consideration for settlement upon her by husband; *Butterfield v. Stanton*, 44 Miss. 15; *Holmes v. Winchester*, 133 Mass. 140,—holding same as to transfer by husband to her of corporation stock; *Southern Loan & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435, holding same as to note executed by husband to her; *Rundlett v. Ladd*, 59 N. H. 15, holding it sufficient consideration for payment of sum of money to her by husband; *Nims v. Bigelow*, 45 N. H. 343, holding wife may convey right of dower in consideration of promissory note to herself; *Low v. Carter*, 21 N. H. 433, holding conveyance by husband to trustee, for wife and children, in consideration of release of dower by wife valid; *Halferty v. Scarce*, 135 Mo. 428, 37 S. W. 255, on conveyance by husband to wife in consideration of release of dower; *Dick v. Hamilton*, Deady, 322, Fed. Cas. No. 3,890,

holding conveyance of property to wife by third person in consideration of release of dower, valid against husband's creditors; *Powell v. Powell*, 9 Humph. 477, holding direct conveyance of property from husband to wife, in consideration of release of dower, vests property to her separate use; *Dailey v. Dailey*, 26 Ind. App. 14, 58 N. E. 1065, holding contract by wife with husband to join in deed to his separate estate for part of proceeds, enforceable.

Cited in 90 A. S. R. 527, on release of dower right as consideration for conveyance to wife.

Postnuptial contracts.

Cited in *Kesner v. Trigg*, 98 U. S. 50, 25 L. ed. 83, holding postnuptial contract upon sufficient consideration will be sustained in equity; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. Rep. 351, holding conveyance by husband to wife through third party, to repay loan by wife, valid; *Atlantic Nat. Bank v. Tavenner*, 130 Mass. 407, holding conveyance of land by husband to wife in payment of loan by her out of separate estate, valid; *Peirce v. Thompson*, 17 Pick. 391, holding postnuptial settlement not valid against creditors and purchasers, unless made upon valuable consideration; *Snow v. Paine*, 114 Mass. 520, holding return by husband to wife of money previously placed in his keeping not fraudulent as to creditors; *Wiley v. Gray*, 36 Miss. 510, holding devotion of her property by wife to use of husband will support postnuptial settlement by husband; *Strong v. Skinner*, 4 Barb. 546, holding wife may, by sale of separate property, purchase other property for her separate use from husband.

Cited in note in 24 E. R. C. 185, on validity of marriage settlement.

—Direct conveyances to wife.

Cited in *Burdeno v. Amperse*, 14 Mich. 91, 90 A. D. 225, holding husband can convey real estate to wife by deed without intervention of trustee; *Hunt v. Johnson*, 44 N. Y. 27, 4 A. R. 631, holding conveyance of real estate by deed from husband to wife may be enforced in equity.

Valuation of inchoate dower.

Cited in *Gordon v. Tweedy*, 71 Ala. 202, on estimation of value of inchoate right of dower, when consideration for deed.

Voluntary conveyances in fraud of creditors.

Cited in *Wright v. Campbell*, 27 Ark. 637; *Matthews v. Thompson*, 186 Mass. 14, 104 A. S. R. 550, 66 L.R.A. 421, 71 N. E. 93,—holding voluntary conveyance of property to hinder and delay creditors, fraudulent and void; *National Exch. Bank v. Watson*, 13 R. I. 91, 43 A. R. 132, holding conveyance in consideration of marriage, if bona fide, good against creditors.

Parol evidence as to consideration in deed.

Cited in *Coles v. Soulsby*, 21 Cal. 47; *Goward v. Waters*, 98 Mass. 596; *Audenreid v. Walker*, 11 Phila. 183, 33 Phila. Leg. Int. 82; *Bennett v. Solomon*, 6 Cal. 134,—holding consideration clause in deed may be explained by parol proof; *Peck v. Vandenberg*, 30 Cal. 11, holding parol evidence admissible to show deed given without money consideration; *Northington v. Tuohy*, 2 Tex. App. Civ. Cas. (Willson) 281, holding recital of consideration in deed only conclusive as to fact that there was consideration to deed; *Briggs v. Rice*, 130 Mass. 50, holding consideration expressed in deed not conclusive; *Paige v. Sherman*, 6 Gray, 511, holding grantor not absolutely bound by consideration expressed in deed.

Cited in reference note in 29 A. D. 730, on conclusiveness of acknowledgment of receipt of consideration in deed.

Cited in notes in 3 A. D. 306, on parol evidence to vary consideration; 23 A. D.

526, on parol evidence to show want of consideration; 30 A. D. 117, on parol evidence as to consideration clause of deed; 20 L.R.A. 111, on parol evidence as to consideration for deed in action by creditor to set it aside.

—To show true consideration.

Cited in *Droop v. Ridemour*, 11 App. D. C. 224, holding true consideration of deed may be shown by parol evidence; *Cox v. Henry*, 32 Pa. 18, holding true consideration other than that expressed in deed may be shown; *Graham v. Lockhart*, 8 Ala. 9, on same point; *Jack v. Dougherty*, 3 Watts, 151, holding parol admissible to show consideration other or greater than that expressed; *Belden v. Seymour*, 8 Conn. 304, 21 A. D. 661, holding greater consideration than that expressed in deed may be shown; *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103, holding same to show consideration in deed was other than money; *Hannan v. Oxley*, 23 Wis. 519, holding consideration of love and affection for deed may be shown though not expressed in deed; *Wintermute v. Snyder*, 3 N. J. Eq. 489, holding actual consideration for deed of assignment might be shown by parol; *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732, 90 N. W. 890, holding grantee may show by parol evidence actual consideration of deed assailed for fraud; *Gaffney v. Hicks*, 131 Mass. 124, holding mortgagor not bound to pay more than due on mortgage debt, though mortgage deed expresses different consideration; *McGehee v. Rump*, 37 Ala. 651, holding parol evidence admissible to show contract was exchange, and not a sale.

Cited in reference note in 53 A. D. 269, on parol evidence to show real consideration of deed.

—To show nonpayment.

Cited in *Beach v. Packard*, 10 Vt. 96, 33 A. D. 185, holding parol evidence admissible to show consideration for deed has not been paid; *Smith v. Howell*, 11 N. J. Eq. 349, holding grantor of deed may prove consideration was not paid; *Crowe v. Colbeth*, 63 Wis. 643, 24 N. W. 478, holding presumption of payment of purchase money as set out in deed may be rebutted.

19 AM. DEC. 298, WHITAKER v. SUMNER, 7 PICK. 551.

Liability of levying officer for neglect or fraud.

Cited in *Simmons v. Richards*, 171 Mass. 281, 50 N. E. 617; *Phillips v. Elwell*, 14 Ohio St. 240, 84 A. D. 373; *Barrows v. National Rubber Co.* 13 R. I. 48; *Franklin County Nat. Bank v. Kimball*, 152 Mass. 331, 25 N. E. 460,—holding attaching creditor whose lien is lost through negligence of officer may recover value of lien from officer; *Sexton v. Nevers*, 20 Pick. 451, 32 A. D. 225, holding purchaser at sale on execution, who loses title through neglect of officer, has remedy against officer; *Thayer v. Roberts*, 44 Me. 247; *Remick v. Wentworth*, 89 Me. 392, 36 Atl. 622,—holding officer who makes false return of sale upon execution, liable to attaching creditor who lost thereby; *Moulton v. Jose*, 25 Me. 76, holding action will not lie against officer by surety on poor debtor's bond for failure to return execution in time.

Distinguished in *Gregg v. Crawford*, 4 Ala. 180, 37 A. D. 739, holding United States marshal not liable to surety for omitting to levy on property of principal.

Conclusiveness of return to levy.

Cited in *Sykes v. Keating*, 118 Mass. 517, holding officer's return of acts in levy of execution conclusive upon parties and privies; *Campbell v. Webster*, 15 Gray, 28, holding return on levy on real estate conclusive of competency of appraisers; *Splahn v. Gillespie*, 48 Ind. 397, holding return on final process evidence of facts therein only when acts are official in usual course of proceedings; *Flaniken v.*

Neal, 67 Tex. 629, 4 S. W. 212, holding return conclusive until set aside in direct proceeding brought for purpose; Driver v. Cobb, 1 Tenn. Ch. 490, holding officer's return that he had executed summons *prima facie* evidence of its truth; Wilcox v. Emerson, 10 R. I. 270, 14 A. R. 683, holding defect in officer's return upon execution cannot be supplied by evidence *aliunde*.

Cited in reference notes in 24 A. D. 39, on officer's return as evidence; 25 A. D. 239, as to when and upon whom return of sheriff or other officer is conclusive; 80 A. D. 432, on conclusiveness of officer's return when collaterally called into question; 71 A. D. 308, as to whether description of land in return of attachment should be as certain as in case of deed.

Cited in notes in 23 A. D. 217, on conclusiveness of officer's return; 43 A. D. 531, on sheriff's return of process as evidence between parties.

Distinguished in Browning v. Flanagan, 22 N. J. L. 567, holding it inconclusive against the creditor suing the sheriff for an escape.

Estoppel in pais.

Cited in Page v. Wight, 14 Allen, 182, holding estoppel *in pais* does not work except by representations which are designed to be and are acted upon.

Conclusiveness of official certificate.

Cited in Hockett v. Alston, 3 Ind. Terr. 432, 58 S. W. 675, holding certificate of purchase of government lands *prima facie* evidence of title.

Necessity of notice of judicial sale.

Cited in note in 44 A. D. 240, on effect of execution or judicial sale in case of failure to advertise or properly give notice.

19 AM. DEC. 303, HOLLY v. HUGGEFORD, 8 PICK. 73.

Possession to support trespass.

Cited in Brackett v. Bullard, 12 Met. 308, holding that mortgagee of goods may maintain trespass; Sibley v. Brown, 15 Me. 185, holding that one who has let property to another may maintain trespass against an officer attaching it as property of such other party.

Cited in note in 18 A. D. 557, on right of owner of property bailed to another to maintain trespass. •

Common-law lien as personal privilege.

Cited in Stearns v. Dean, 129 Mass. 139, holding that lien for freight is a personal privilege which cannot be set up by a third person in defense to a claim against general owner; Rosencranz v. Swofford Bros. Dry Goods Co. 175 Mo. 518, 97 A. S. R. 609, 75 S. W. 445, holding lien of a common carrier not available as a defense to a creditor of a true owner who pays freight charges and has carrier's lien assigned to him; Ames v. Palmer, 42 Me. 197, 66 A. D. 271, holding the lien of a common carrier does not deprive general owner of right to immediate possession as against a wrongdoer; Glascock v. Lemp, 26 Ind. App. 175, 59 N. E. 342, holding the lien which the keeper of a livery stable has on animals fed and cared for by him is not assignable; Barnes Safe & Lock Co. v. Block Bros. Tobacco Co. 38 W. Va. 158, 45 A. S. R. 846, 22 L.R.A. 850, 18 S. E. 482, holding an agent's lien for commissions not transferable; Ruggles v. Walker, 34 Vt. 468, holding same as to the lien of a manufacturer for manufacturing an article.

Cited in notes in 35 A. D. 616; 58 A. D. 168; 65 A. D. 233; 23 L. ed. U. S. 65,—on factor's lien.

—Waiver of lien.

Cited in McCullough v. Roots, 19 How. 349, 15 L. ed. 681, holding that one

having a lien on goods waives it by a failure to assert it; *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* 106 Iowa, 245, 76 N. W. 673, holding that a commission merchant who voluntarily parts with possession loses his lien for advances; *Gayarre v. Tunnard*, 9 La. Ann. 254, holding that an artisan's lien is lost by a voluntary surrender of possession.

Liability of lienor's interest to attachment.

Cited in *Clark v. Dean*, 143 Mass. 292, 9 N. E. 651, holding that the interest of one having a lien on property cannot be attacked; *Kittredge v. Sumner*, 11 Pick. 50, holding that a pledgee of goods has not an attachable interest; *Lovett v. Brown*, 40 N. H. 511, holding same as to a manufacturer's lien.

Passing of title to goods bailed to seller.

Cited in *Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052, holding that a sale of chattels is not fraudulent as to creditors because the vendor is permitted to remain in possession after the sale as lessee of property sold; *Hotchkiss v. Hunt*, 49 Me. 213, holding that title will pass though by the terms of the agreement of sale the article sold is to remain in possession of vendor for a specific time or for a specific purpose as part of the consideration.

Protection of interests of party in suit.

Cited in *Owen v. Weston*, 63 N. H. 509, 56 A. R. 547, 4 Atl. 801, on power of a court to remove objections, and give specific protection and relief to a party to a suit.

Liability for wrongful levy.

Cited in reference note in 39 A. D. 627, as to when attaching officer is liable for trespass.

Cited in note in 43 A. D. 264, on sheriff's liability for seizure of one person's goods under attachment against another.

19 AM. DEC. 306, SARGEANT v. FRANKLIN INS. CO. 8 PICK. 90.

Shares of stock as personal property.

Cited in *Williams v. Lowe*, 4 Neb. 382; *Mobile Mut. Ins. Co. v. Cullon*, 49 Ala. 558,—holding that a share of stock is capable of alienation or succession in any of the modes by which personal property may be transferred; *Harris v. Stevens*, 7 N. H. 454, holding shares in corporation may be subject of a contract to sell.

Cited in reference note in 30 A. S. R. 668, on rights of holders of certificates of stock.

Validity and effect of restrictions on mode of transfer of stock or membership rights.

Cited in *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100, holding a by-law restricting a stockholder's right to dispose of his stock in the mode recognized by law is void; *Leyson v. Davis*, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500; *United States v. Cutts*, 1 Sumn. 133, Fed. Cas. No. 14,912; *Kellogg v. Stockwell*, 75 Ill. 68; *Bruce v. Smith*, 44 Ind. 1; *Black v. Zacharie*, 3 How. 483, 11 L. ed. 690,—holding transfer good to pass equitable title and to divest vendor of all interest, though not in conformity with charter; *Farmers & M. Bank v. Wasson*, 48 Iowa, 336, 30 A. R. 398, holding by-law providing that transfer must be on approval and acceptance by the directors is for protection of corporation, and not available to defeat rights of third persons; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249, holding that restrictions in transfer of stock must have their source in legislative action, the corporation itself cannot create these impediments; *Re Klaus*, 67 Wis.

401, 29 N. W. 582, holding a by-law requiring consent of all stockholders to a transfer of stock is void; Chouteau Spring Co. v. Harris, 20 Mo. 382, holding the power of a corporation to regulate transfer of stock does not give power to prescribe to whom transfer may be made; Victor G. Bloede Co. v. Bloede, 84 Md. 129, 57 A. S. R. 373, 33 L.R.A. 107, 34 Atl. 1127, holding a by-law restricting the transfer of stock without first giving other stockholders and corporation an option to purchase at price named, invalid; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Eq. Cas. 180, on validity of a by-law restricting transfer of stock; Church in Brattle Square v. Bullard, 2 Met. 363, holding that title to a pew could be proved by adverse possession notwithstanding by-laws of society require a deed.

Cited in notes in 27 L.R.A. 271, on restriction by by-law on right to sell shares of stock; 57 A. S. R. 380, on right of alienation, and restraint on transfer, of corporate stock.

Distinguished in Fisher v. Essex Bank, 5 Gray, 373, holding that shares in a bank whose charter provides that they shall "be transferable only at its banking house and on its books" cannot be effectually transferred by assignment of certificate as against an attaching creditor; Cunningham v. Alabama L. Ins. & T. Co. 4 Ala. 652, holding where charter provided certificates shall be assignable on books of corporation under such regulations as the trustees shall establish, that a by-law providing that a stockholder shall not transfer his stock while he is in default is valid.

Transfer of shares of stock without entry of transfer on books of corporation.

Cited in Boatmen's Ins. & T. Co. v. Able, 48 Mo. 136, holding a transfer of stock certificate without transfer on book conveys only an equitable title; Conant v. Reed, 1 Ohio St. 298, holding, that, although a transfer on books of company may be necessary to pass a legal title, an equitable title may be otherwise conveyed; Stone v. Hackett, 12 Gray, 227, holding that as between parties transfer need not be recorded in books of company; Reed v. Copeland, 50 Conn. 472, 47 A. R. 663, holding a delivery of certificate a transfer of title to stock; State Ins. Co. v. Gennett, 2 Tenn. Ch. 100, holding that in actual assignment of stock passes title as between the parties; Johnston v. Laffin, 103 U. S. 800, 26 L. ed. 532, holding transfer of certificate sufficient as between the parties; Hubbard v. Bank of United States, Fed. Cas. No. 6,815, holding assignment only formality requisite to vest full property in a purchaser; Noyes v. Spaulding, 27 Vt. 420, holding an assignment and delivery of certificates symbolical of delivery of stock; Orr v. Bigelow, 14 N. Y. 556, holding an assignment of stock authorizes assignee to obtain a transfer of stock on books of company; Boston Music Hall Asso. v. Cory, 129 Mass. 435, holding in the absence of an express provision in statute or charter of corporation, that a transfer of stock is valid as against a subsequent attaching creditor although no transfer is made in books of company; Sargent v. Essex Marine R. Corp. 9 Pick. 201, holding an assignment of shares of stock, valid as against a creditor of vendor, though no transfer is made on books of corporation as required by by-laws; Perkins v. Lyons, 111 Iowa, 192, 82 N. W. 486, holding that assignee must make a reasonable effort to obtain transfer on books of company to have transfer valid as against creditors.

Cited in reference notes in 3 A. S. R. 594, on assignability of shares of stock; 34 A. D. 329, on assignability of corporate shares notwithstanding by-law limiting transfer.

Cited in notes in 57 A. S. R. 388, 393, on validity of transfer of corporate stock

not made in manner prescribed; 67 L.R.A. 676, on effect of effort to secure transfer of stock on corporate books on validity of transfer as against attachments, executions, or subsequent transfers.

Distinguished in *Fiske v. Carr*, 20 Me. 301, holding a statute declaring that, until there is a transfer on corporate records, the title does not pass, must be complied with.

Duty of corporation to make proper transfer of stock.

Cited in *Thompson v. Hudgins*, 116 Ala. 93, 22 So. 632, holding a deed of stock carries with it authority and makes it the duty of the corporation to make proper transfer on books of corporation; *Haldeman v. Hillsborough & C. R. Co.* 2 Handy (Ohio) 101, holding that the assignee of a stock certificate on surrender of the same is entitled to a new certificate in his own name; *Bird v. Chicago, I. & N. R. Co.* 137 Mass. 428, holding corporation bound to transfer shares of stock standing in name of testator, on presentation of a certified copy of will and authority of trustee to make demand.

Remedy on refusal of corporation to give owner certificate of stock.

Cited in *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 A. S. R. 643, 35 N. W. 577; *Mount Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117; *Doty v. First Nat. Bank*, 3 N. D. 9, 17 L.R.A. 259, 53 N. W. 77; *Durham v. Monumental Silver Min. Co.* 9 Or. 41; *Kimball v. Union Water Co.* 44 Cal. 173, 13 A. R. 157,—holding that one entitled to stock in a private corporation has an action for damages on refusal of officers to make transfer to him; *Wyman v. American Powder Co.* 8 Cush. 168, holding where corporation refuses to give owner of shares of stock a certificate, he may recover of corporation in assumpsit the value of shares at time of demand; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 A. D. 317 (affirming 20 Wend. 94), on remedy on refusal to transfer stock by corporation; *Barrett v. King*, 181 Mass. 476, 63 N. E. 934, holding that assignee of certificate of stock may maintain assumpsit; *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 A. R. 402, holding that assignee has right to sue for refusing to transfer stock although the assignment was not made on books in pursuance of charter and by-laws; *Bank of State v. Harrison*, 66 Ga. 696, denying mandamus to compel an officer of a bank to transfer stock to a purchaser; *Baker v. Marshall*, 15 Minn. 177, Gil. 136, holding that mandamus will not lie to compel a bridge company to permit a transfer of stock on books of company; *People ex rel. Krohn v. Miller*, 39 Hun, 557, 9 N. Y. Civ. Proc. Rep. 149, refusing mandamus where a certificate of membership in a corporation was refused relator; *Allen v. South Boston R. Co.* 150 Mass. 200, 15 A. S. R. 185, 5 L.R.A. 716, 22 N. E. 917; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149,—holding value of stock at time of refusal to transfer stock, measure of damages; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, on liability of corporation refusing to permit transfer of stock.

Cited in reference notes in 26 A. S. R. 668, on right of assignee of stock to compel transfer; 30 A. S. R. 668, on action for refusing to transfer corporate stock.

Cited in note in 51 A. R. 801, on mandamus to compel transfer of corporate stock to purchaser.

Distinguished in *Sewall v. Eastern R. Co.* 9 Cush. 5, denying a bill in equity for specific performance of a contract to issue stock to complainant.

Rights of corporation in shares of stock where shareholder is a debtor of corporation.

Cited in *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Hagar v. Union*

Nat. Bank, 63 Me. 509,—holding that a corporation has no implied lien on shares of stock of its stockholder for debts due from him and cannot hold them against a purchaser or attaching creditor; *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183, holding that a manufacturing corporation has no lien of share of stock for money expended in behalf of owner of shares.

Cited in reference notes in 12 A. S. R. 152, on lien of corporation on shares; 40 A. S. R. 405, on corporation's right to lien on stock; 74 A. D. 541, on bank's lien on stock transferred by holder while indebted to bank.

Distinguished in *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146, holding under statute a transfer of stock in a railroad without payment of subscription to stock is void, without consent of board of directors.

Right of corporation to retain dividends due indebted stockholder.

Cited in *Merrill v. Cape Ann Granite Co.* 161 Mass. 212, 23 L.R.A. 313, 36 N. E. 797, holding that a corporation may set off dividends of a stockholder against his debt.

Cited in note in 99 A. D. 764, on application of dividend to debt of stockholder.

Measure of damages for taking of property.

Cited in *Hurd v. Hubbell*, 26 Conn. 389; *Ripley v. Davis*, 15 Mich. 75, 90 A. D. 262; *Suydam v. Jenkins*, 3 Sandf. 614,—holding in trover, that the current market value of property at the time of conversion, with interest from that time until trial, is measure of damages; *Parks v. Boston*, 15 Pick. 198, holding the estimated value at time of taking is to be taken in the assessment of damages for the taking of land; *Heywood v. Heywood*, 42 Me. 229, 66 A. D. 277 (dissenting opinion), on measure of damages on failure to deliver articles as agreed.

—Time as of which damages is to be assessed.

Cited in *New York Bank Note Co. v. Kidder Press Mfg. Co.* 192 Mass. 391, 78 N. E. 463, holding damages are to be taken as of the time the contract was broken, together with interest on the amount from that time; *Smith v. Dunlap*, 12 Ill. 184, holding in case of a breach of contract for the sale of a chattel the cash value of the article at the time it should have been delivered is the measure of damages.

Interest as damages.

Cited in *McCreery v. Green*, 38 Mich. 172, holding the allowance of damages under the name of interest is not a material error.

Validity of by-laws.

Cited in *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470, holding corporate by-law contrary to common law or statute is void; *State ex rel. Kennedy v. Union Merchants Exchange*, 2 Mo. App. 96, holding that every by-law must be reasonable and lawful.

Cited in note in 43 A. S. R. 155, on limitations on power of private corporations to enact by-laws.

Equitable rights of a vendee under a defective sale.

Cited in *Perry Mfg. Co. v. Brown*, 2 Woodb. & M. 449, Fed. Cas. No. 11,015, holding a defect in a sale of personal property which does not impair equity of sale, if known to creditor, is good as regards him.

19 AM. DEC. 311, BAKER v. BRIGGS, 8 PICK. 122.

Grounds for new trial or setting aside verdict.

Cited in *Alsop v. Commercial Ins. Co.* 1 Sumn. 451, Fed. Cas. No. 262, holding that a new trial will not be granted merely to let in new cumulative evidence;

Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109, holding that it must raise a strong presumption that jury either wantonly abused their powers or made some inadvertent mistake; Wendell v. Safford, 12 N. H. 171, holding verdict which twelve intelligent and honest men would not have returned, it is duty of court to set aside.

— **Insufficiency of evidence.**

Cited in Fearing v. DeWolf, 3 Woodb. & M. 185, Fed. Cas. No. 4,711; Weld v. Chadbourne, 37 Me. 221,—holding that verdict should not be set aside where there is evidence on both sides, unless it is manifest that the jury have mistaken or abused their trust.

Cited in reference notes in 23 A. D. 336; 39 A. D. 592; 76 A. D. 65,—on new trial on ground of verdict being against the evidence.

— **Excessiveness of damages.**

Cited in Treanor v. Donahoe, 9 Cush. 228, holding that court will not set aside a verdict on ground of excessive damages unless it evinces a mistake in principle or the influence of partiality or prejudice; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414, holding that damages awarded must be materially greater than the evidence will justify.

Admissibility of declarations.

Cited in Carle v. White, 9 Me. 104, holding that declarations of one who is a competent witness in the cause are not admissible to charge another; Coit v. Howd, 1 Gray, 547, holding declarations of a vendor inadmissible to prove a sale to defendant; Stetson v. New Orleans City Bank, 2 Ohio St. 167, holding admissions or declarations of principal not admissible as evidence against surety; Hunter v. Marlboro, 2 Woodb. & M. 168, Fed. Cas. No. 6,908, holding confessions made by an individual inhabitant of a town not competent evidence to bind town.

Cited in reference notes in 24 A. D. 395, on admissibility of declarations of third persons; 39 A. D. 656, on admissibility of declarations of competent witness to charge another.

Defenses available to surety.

Cited in Mariner's Bank v. Abbott, 28 Me. 280, holding that whatever will discharge a surety in equity will be a good defense at law; Springer v. Toothaker, 43 Me. 381, 69 A. D. 66, holding same where surety is sued alone; Fitchburg Sav. Bank v. Torrey, 134 Mass. 239; Guild v. Butler, 127 Mass. 386,—holding that the surety may avail himself of release of collateral security by creditor, in defense of an action at law against him; Jennings v. Moore, 189 Mass. 197, 75 N. E. 214, on allowance of equitable defense to surety in action at law.

Disapproved in Smith v. Clopton, 48 Miss. 66, holding that equitable defenses of surety may be availed of in a court of law though suit be against all promisors.

Right of surety to benefit of security held by creditor.

Cited in Adams Bank v. Anthony, 18 Pick. 238, holding that the creditor holds any security or means of payment, for the benefit of the surety as well as himself; Watriss v. Pierce, 32 N. H. 560; Mahurin v. Pearson, 8 N. H. 539,—holding that surety on payment by him is entitled to be substituted and, to have benefit of security which creditor has; Low v. Smart, 5 N. H. 353, holding that a surety is entitled to benefit of any security which his cosurety has; Taylor v. Morrison, 26 Ala. 728, 62 A. D. 747, holding one of several sureties receiving security is regarded as trustee for his cosurety; Brown v. First Nat. Bank, 56 L.R.A. 870, 50 C. C. A. 602, 112 Fed. 901; holding that surety may insist on an agreement with

principal that proceeds of certain collateral security shall be applied to his debt rather than other indebtedness.

Liability of surety.

Cited in *Atwood v. Wright*, 29 Ala. 346, holding a verdict and judgment against a principal not evidence against a surety not a party to suit; *Dorman v. Bigelow*, 1 Fla. 323, holding that a surety is liable though his contract state no consideration other than that to principal on face of note.

Discharge of surety.

Cited in *Curiac v. Packard*, 29 Cal. 194, holding a tender of full amount of debt held to release sureties; *Lowe v. Reddan*, 123 Wis. 90, 100 N. W. 1038, 3 A. & E. Ann. Cas. 431, holding where a bank fails to offset a depositor's credit against a note the surety is discharged only to extent of amount of credit.

Cited in reference note in 29 A. D. 226, on what acts of creditor discharge surety; 43 A. S. R. 358, on impairment of surety's remedy.

Cited in note in 115 A. S. R. 98, on duty of creditor to surety where he has property or funds of principal in his possession.

Distinguished in *Whitehouse v. American Surety Co.* 117 Iowa, 328, 90 N. W. 727, holding a surety on a contractor's bond not discharged because of failure of employee to prosecute an action to obtain a statutory lien; *Allen v. O'Donald*, 28 Fed. 17 (reversing 23 Fed. 573), holding surety not released where he is in no way prejudiced.

— By false statements of creditor misleading surety.

Cited in *Harmon v. Hale*, 1 Wash. Terr. 423, 34 A. R. 816, holding that fraudulent conduct on the part of the payee that lulls the surety into groundless confidence and prevents him from obtaining indemnity will discharge surety; *Franklin Bank v. Steward*, 37 Me. 519; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 A. R. 68; *Carpenter v. King*, 9 Met. 511, 43 A. D. 405,—holding surety discharged where creditor informs him untruly that debt is paid, and surety releases security, though creditor did not intend to deceive or mislead surety; *La Farge v. Herter*, 11 Barb. 159, holding same where creditor has taken other security and had released a judgment and had told surety he was "out;" *Fitchburg Sav. Bank v. Rice*, 124 Mass. 72, holding same as to false statements made by creditor as to existing conditions of the debt which put surety off his guard and thereby causes his loss, though innocently made; *Goodin v. State*, 18 Ohio, 6, holding same where principal debtor produced a complete discharge from creditor, and creditors allows it to go unquestioned for five years.

Cited in reference note in 43 A. D. 408, on discharge of surety by assurance that debt is paid.

Distinguished in *Winthrop v. Soule*, 175 Mass. 400, 56 N. E. 575, holding true representations by creditor not intended to deceive surety does not release him; *Bond v. Ray*, 5 Humph. 492, holding surety not discharged where creditor made no representations and had no agency in falsehoods told surety by principal.

— By neglect or delay of creditor.

Cited in *Hawkins v. Mims*, 36 Ark. 145, 38 A. R. 30; *Lumsden v. Leonard*, 55 Ga. 374; *Commercial Bank v. French*, 21 Pick. 486, 32 A. D. 280,—holding that mere delay or voluntary forbearance to collect or prosecute on a security will not discharge surety; *Lindsey v. Thompson*, 1 Baxt. 463, holding that the fact that a case is dismissed by principal will not discharge stayor; *Sandy River Nat. Bank v. Miller*, 82 Me. 137, 19 Atl. 109, holding delay of bank in notifying surety on note of forged renewal precludes recovery.

Cited in reference notes in 42 A. D. 529; 46 A. D. 434,—on surety's release by indulgence to principal; 13 A. D. 461, on effect of delay in proceeding against principal upon liability of surety.

Cited in note in 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal.

Distinguished in *Pearl v. Wellman*, 11 Ill. 352, holding mere delay to proceed against principal will not discharge surety; *Schroeppel v. Sham*, 5 Barb. 580, holding mere delay in prosecution of principal debtor not to discharge.

—By release of security.

Cited in *Guild v. Butler*, 127 Mass. 386, holding release of security by creditor without consent of surety releases surety; *Wilson v. Bryant*, 134 Mass. 291, holding that any act of creditor which impairs value of right of subrogation releases surety; *Monroe v. De Forest*, 53 N. J. Eq. 264, 31 Atl. 773, holding same as to a material alteration in collateral security to the prejudice of surety; *Maquoketa v. Willey*, 35 Iowa, 323, holding same where creditor who has acquired a lien on property of debtor by attachment or execution and relinquishes the same; *City Bank v. Young*, 43 N. H. 457, holding same where creditor disposes of personal property mortgaged to him by principal; *Strauss v. Masonic Sav. Bank*, 89 Ky. 61, 11 S. W. 769, holding where cancellation of a note upon which a surety is bound is obtained by fraud of principal that laches of creditor after he has notice of fraud or release of indemnity received releases surety; *Fuller v. Loring*, 42 Me. 481; *Springer v. Toothaker*, 43 Me. 381, 69 A. D. 66; *Stewart v. Davis*, 18 Ind. 74,—holding same where creditor surrendered property pledged, the surety not consenting thereto; *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906; *Denny v. Seeley*, 34 Or. 364, 55 Pac. 976; *White v. Life Asso.* 63 Ala. 419, 35 A. R. 45,—holding surety discharged to extent in which securities are lost by negligence of creditor; *Hoffman v. Habighorst*, 38 Or. 261, 53 L.R.A. 908, 63 Pac. 610; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 A. D. 685,—holding same where creditor surrenders collateral security without consent of surety; *Allen v. Greene*, 19 Ala. 34; *Boston Penny Sav. Bank v. Bradford*, 181 Mass. 199, 63 N. E. 427,—holding liability of surety diminished only to extent of loss from release of security.

Cited in reference notes in 30 A. S. R. 339, on release of surety by creditor's parting with securities; 49 A. D. 461, on release of surety by creditor surrendering collateral securities or property in his hands.

Cited in note in 32 A. S. R. 728, on remedy of holder of collateral security by suit on principal debt.

Distinguished in *Worcester Sav. Bank v. Thayer*, 136 Mass. 459, holding act of creditor which surrenders securities discharges surety only to amount he has been injured; *Cogswell v. Eames*, 14 Allen, 48, holding that property not transferred for the sole purpose of indemnifying a party against loss from official acts, but for other legitimate objects, may be appropriated to that object without affecting the liability of sureties on official bond; *Davenport v. State Bkg. Co.* 126 Ga. 136, 115 A. S. R. 68, 8 L.R.A. (N.S.) 944, 54 S. E. 977, 7 A. & E. Ann. Cas. 1000; *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 A. R. 368,—denying right of surety on an independent debt due from principal to bank to be subrogated to right of bank in a check account in the bank.

Estoppel to hold surety liable.

Cited in *Ayer v. Tilton*, 42 N. H. 407, holding that a cosurety is estopped from claiming contribution where by his own acts he led cosureties to give up certain security which they held.

Cited in notes in 12 A. R. 75, on estoppel to hold surety liable; 13 L.R.A.(N.S.) 577, on estoppel to enforce contract of suretyship or guaranty released through mistake.

Promissory note as payment of debt.

Cited in *Lee v. Fontaine*, 10 Ala. 755, 44 A. D. 505, holding evidence admissible to show intent of parties as to payment, on receiving promissory note for a debt due on simple contract.

Parol evidence as to writing.

Cited in *Bank of St. Marys v. Mumford*, 6 Ga. 44 (dissenting opinion), on parol evidence to vary terms of a note.

— As to character of party.

Cited in *Carpenter v. King*, 9 Met. 511, 43 A. D. 405, holding as to one signing as a joint obligor, evidence *aliunde* is admissible to show he was surety; *Pierce v. Irvine*, 1 Minn. 369, Gil. 272, holding parol evidence admissible to show the facts on which liability of one indorsing note at its inception depends.

Distinguished in *Archer v. Douglass*, 5 Denio, 509, holding in an action at law on a bond that it may be shown that both obligors were sureties and that principal was not a party to bond.

Liability of one who indorses note at time it is made.

Cited in *Union Bank v. Willis*, 8 Met. 504, 41 A. D. 541, holding one whose name is indorsed on back of a note above that of payee is to be regarded as an original promisor; *Colburn v. Averill*, 30 Me. 310, 50 A. D. 630; *Sturtevant v. Randall*, 53 Me. 149; *Butler v. Gamba*, 1 Mo. App. 466; *Powell v. Thomas*, 7 Mo. 440, 38 A. D. 465; *Lewis v. Harvey*, 18 Mo. 74, 59 A. D. 286; *Cook v. Southwick*, 9 Tex. 615, 60 A. D. 181; *Bright v. Carpenter*, 9 Ohio, 139, 34 A. D. 432; *Powell v. Com.* 11 Gratt. 822; *Martin v. Boyd*, 11 N. H. 385, 35 A. D. 501,—holding that one who places his name on the back, of a note at the time of its inception is an original promisor; *Wells v. Jackson*, 6 Blackf. 40, holding that such indorsement may be explained; *Stoney v. Beaubien*, 2 McMull. L. 313, 39 A. D. 128, holding that a stranger who writes his name on the back of a note not yet due will be treated as an original promisor unless it is shown contract was intended otherwise; *Thompson v. High*, 13 Ga. 311, on effect of an indorsement of a note at time of its inscription; *Ellis v. Brown*, 6 Barb. 282 (dissenting opinion), on liability of one indorsing contemporaneously with making of note.

Cited in reference notes in 56 A. D. 359, on irregular indorser as original promisor or maker; 36 A. D. 342, on liability of one writing name on back of note at time of making; 41 A. D. 548, on person writing his name on back of note at time of execution as an original promisor; 35 A. D. 503, on declaring against one writing name on back of note at time of execution as an original promisor; 39 A. D. 132, on one writing name on note not being holder or payee, being treated as maker or original promisor.

Cited in note in 72 A. S. R. 678, on effect of indorsement by stranger before delivery.

Distinguished in *Quinn v. Sterne*, 26 Ga. 223, 71 A. D. 204, holding that in a note payable to bearer it cannot be assumed that the payee's name will be first indorsed.

Liability of an indorser in blank.

Cited in *Camden v. McKay*, 4 Ill. 437, 38 A. D. 91, holding that an indorsement in blank operates as an authority to fill up indorsement.

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Cited in note in 13 A. D. 56, on effect of blank indorsement of non-negotiable note.

—Before inception.

Cited in *Castle v. Candee*, 16 Conn. 223, on effect of an indorsement in blank by one not a party on face of instrument; *Benton v. Willard*, 17 N. H. 593; *Massey v. Turner*, 2 Houst. (Del.) 79,—holding one who indorses in blank on back of note, before delivery to payee, is a joint maker; *Orrick v. Colston*, 7 Gratt. 189, holding that one who indorses a note signed in blank leaves it in the power of the payee to elect whether he will hold him on a direct promise to pay or on a collateral guaranty.

Distinguished in *Coburn v. Parker*, 11 Gray, 335, holding one who was not expected by anyone or intended to become principal to transaction, but is treated as an indorser, does not become a joint promisor by writing his name in blank on note at time of its inception.

Liability of a guarantor.

Cited in *Studabaker v. Cody*, 54 Ind. 586, holding that a guarantor contracts to pay without any condition or contingency.

What constitutes equitable estoppel.

Cited in *Monroe County v. Otis*, 62 N. Y. 88, holding that equitable estoppel is ordinarily based upon some act or declaration of a party intended to influence the other's actions and because of which loss would ensue if a different position should be taken.

19 AM. DEC. 319, NAYLOR v. DENNIE, 8 PICK. 198.

Effect of stoppage in transitu.

Cited in *Morris v. Shryock*, 50 Miss. 590, holding that the effect is not to rescind the sale but to reinstate the vendor's lien.

Grounds for stoppage in transitu.

Cited in *Keeler v. Goodwin*, 111 Mass. 490, holding that the insolvency of the purchaser is a sufficient justification for a stoppage *in transitu*, though the sale is an unconditional one upon a credit of ten days; *Bender v. Bowman*, 2 Pearson (Pa.) 517, 2 Legal Gaz. 178, holding that vendee need not be declared a bankrupt or discharged under the insolvent laws; *Rogers v. Thomas*, 20 Conn. 53 (dissenting opinion), on insolvency sufficient to give right of stoppage *in transitu*.

Cited in notes in 3 L.R.A. 647, on right of stoppage *in transitu*; 23 A. D. 614, as to when right of stoppage *in transitu* exists.

How stoppage in transitu effected.

Cited in note in 29 A. D. 394, on how stoppage *in transitu* is effected.

When right of stoppage ceases.

Cited in *Inslee v. Lane*, 57 N. H. 454, holding that right exists until goods are delivered to vendee; *Harding Paper Co. v. Allen*, 65 Wis. 576, 27 N. W. 329, holding that purchaser cannot regard carrier as warehouseman until carrier has no right to retain possession as against the buyer.

Cited in reference note in 28 A. D. 550, on termination of right of stoppage *in transitu*.

Cited in notes in 60 A. R. 53, on end of transit as terminating right of stoppage *in transitu*; 29 A. D. 389, on right of stoppage *in transitu* after goods have arrived at destination.

Distinguished in *Sawyer v. Joslin*, 20 Vt. 172, 49 A. D. 768, holding that right of stoppage ceased where goods were placed on wharf which was ultimate destination intended by consignor.

Effect of an attachment on right of stoppage.

Cited in *Seymour v. Newton*, 105 Mass. 272, holding that an attachment cannot interfere with the right; *Cox v. Burns*, 1 Iowa, 54; *O'Neil v. Garrett*, 6 Iowa, 480; *Morris v. Shryock*, 50 Miss. 590; *Holbrook v. Vose*, 6 Bosw. 76; *Monille v. Hays*, 4 Clark (Pa.) 413; *Stuart v. Mau*, 2 Tex. App. Civ. Cas. (Willson), 688; *Durgy Cement & Lumber Co. v. O'Brien*, 123 Mass. 12,—holding that an attachment before the transit is at an end will not defeat right of vendor; *O'Brien v. Norris*, 16 Ind. 122, 77 A. D. 284, holding same in vendor's right existed at time of attachment; *Chicago, B. & Q. R. Co. v. Painter*, 15 Neb. 394, 19 N. W. 438, holding vendor's right of stoppage *in transitu* not defeated by service of process of garnishment upon the carrier.

Cited in reference note in 35 A. D. 210, on effect of attachment on right of stoppage *in transitu*.

Cited in note in 29 A. D. 393, on effect of attachment, execution, or other lien against purchaser to defeat right of stoppage *in transitu*.

Effect of assignment.

Cited in *Loeb v. Peters*, 63 Ala. 243, 35 A. R. 17, holding a transfer of a bill of lading by purchaser of goods, as collateral security for a pre-existing debt, does not defeat vendor's right of stoppage *in transitu*; *Skilling v. Bollman*, 73 Mo. 665, 39 A. R. 537, on same point; *Ware River R. Co. v. Vibbard*, 114 Mass. 447, holding that the right of a vendor to a lien for purchase money is not defeated or changed by a transfer of bill of parcels without assent or notice to vendor; *Wickersham v. Orr*, 9 Iowa, 253, 74 A. D. 348, on irrevocability of parol licenses after expenditure of money pursuant thereto and transfer to another.

Necessity of actual possession to effect a valid attachment.

Cited in *Gates v. Bushnell*, 9 Conn. 530; *Hollister v. Goodale*, 8 Conn. 332, 21 A. D. 674,—holding that to have a valid attachment of goods the officer must have the actual possession and custody of goods; *Slate v. Barker*, 26 Vt. 647, holding that officer must keep control in such a way as to exclude all other persons, so as to afford unequivocal notice of his own custody; *Lyon v. Rood*, 12 Vt. 233, holding that an attachment may be made by such means as will exclude all others from the custody or will give unequivocal notice of custody of attaching officer.

Cited in reference note in 30 A. D. 168, on what necessary to constitute attachment of property.

Cited in note in 25 A. D. 413, on what is necessary to constitute an attachment of personality.

Change of possession of goods not susceptible of manual taking.

Cited in *Birge v. Edgerton*, 28 Vt. 291, holding that there might be a change in possession of logs without a change of site of property.

Cited in reference note in 36 A. D. 738, on keeping possession of personalty attached.

19 AM. DEC. 322, PARKS v. BOSTON, 8 PICK. 218.

Certiorari to review proceedings of governmental boards.

Cited in *Jordon v. Hayne*, 36 Iowa, 9, allowing certiorari to action of township trustees in calling an election on presentment of a petition; *Re Fay*, 15

Pick. 243, holding that certiorari will lie to review the proceedings of the mayor and alderman in relation to the granting of a license for a ferry; *State, Times, Prosecutor, v. Newark*, 25 N. J. L. 399, holding same as to the proceedings of a municipal corporation in making assessments for public improvements; *People ex rel. Griffing v. Brooklyn*, 9 Barb. 535, holding same to review proceeding of common council in confirming assessments made for grading and paving streets; *Wright v. Tukey*, 3 Cush. 290, on issuance of certiorari to selectmen of Boston to review their acts under special law of June 22, 1799.

Cited in notes in 12 A. D. 536, on tribunals to which certiorari may issue; 40 A. S. R. 39, on application of certiorari to boards of supervisors and common councils of municipalities.

— Road and street proceedings.

Cited in *Stone v. Boston*, 2 Met. 220, ordering certiorari to mayor and aldermen of Boston, to review their proceedings on a petition for the extension of a street; *Dwight v. Springfield*, 4 Gray, 107, holding same as to proceeding of a city council in laying out streets and ways; *Barnes v. Springfield*, 4 Allen, 488, holding certiorari proper remedy to vacate illegal location of street; *Longfellow v. Quimby*, 29 Me. 196, 48 A. D. 525, holding that writ lies where there are important irregularities in the location of a road, or in the assessment of taxes to build it; *Boston & M. R. Co. v. Folsom*, 46 N. H. 64, holding same to remove the records of the laying out of a highway by a board of selectmen; *Robbins v. Bridgewater*, 6 N. H. 524, holding power of court of sessions in laying out a highway is judicial and conclusive until quashed upon a certiorari; *Re John & Cherry Streets*, 19 Wend. 659, on certiorari to review proceedings for improvement of streets.

Distinguished in *Robbins v. Lexington*, 8 Cush. 292, holding that certiorari will not lie to review proceeding of a town in the location and establishment of a town or private way.

Criticized in *Re Mt. Morris Square*, 2 Hill, 14, denying writ to review proceeding of city of New York in appropriating lands for opening and improving streets.

Office of writ of certiorari.

Cited in *Locke v. Lexington*, 122 Mass. 290, holding that a writ of certiorari lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts and of officers acting judicially; *People ex rel. Agnew v. New York*, 2 Hill, 9, holding that certiorari only lies to inferior courts and officers who exercise judicial powers; *People ex rel. Haskin v. Westchester County*, 57 Barb. 377, 8 Abb. Pr. N. S. 277, holding same to correct an erroneous tax; *Atty. Gen. v. Northampton*, 143 Mass. 589, 10 N. E. 450, holding that writ does not lie to review an administrative act; *Iske v. Newton*, 54 Iowa, 586, 7 N. W. 13; *Pine Bluff Water & L. Co. v. Pine Bluff*, 62 Ark. 196, 35 S. W. 227,—holding a purely legislative ordinance not reviewable on certiorari; *Peters v. Peters*, 8 Cush. 529, holding that certiorari will not lie from this court to the probate court; *Morewood v. Hollister*, 6 N. Y. 309, holding that on certiorari court may proceed to examine and correct any erroneous decision upon a question of law.

Criticized in *Re Saline County Subscription*, 45 Mo. 52, 10 A. D. 337, holding writ will not lie to review action of a county court in subscribing to railroad stock and issuing bonds for payment thereof.

Authority to award certiorari.

Cited in *People ex rel. Loomis v. Wilkinson*, 13 Ill. 660, holding that circuit courts have power to award a writ of certiorari to all inferior tribunals.

Superintending control.

Cited in notes in 51 L.R.A. 34, on superintending control and supervisory jurisdiction of superior over an inferior or subordinate tribunal; 51 L.R.A. 36, on existence of inherent power of supervisory or superintending control of highest law court of original jurisdiction; 51 L.R.A. 52, on constitutional and statutory grants of superintending control, general supervision, etc., over inferior tribunal; 51 L.R.A. 94, on superintending control and supervisory jurisdiction over subordinate tribunal in states having no express constitutional or statutory grants of the power.

Effect of private contribution to invalidate proceeding for public improvement.

Cited in *Atkinson v. Newton*, 169 Mass. 240, 47 N. E. 1029, holding that voluntary private contributions do not invalidate acts of the authorities in adjudging whether an improvement of a public way should be made; *Crocket v. Boston*, 5 Cush. 182, holding that a stipulation on the part of a petitioner to give his land without compensation therefor on the widening of a certain street does not make proceedings before mayor and alderman on that question illegal; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224,—holding same as to a contribution toward the laying out of a street; *Kelley v. Kennard*, 60 N. H. 1, holding same as to a donation to build a public bridge; *State ex rel. Curtis v. Geneva*, 107 Wis. 1, 82 N. W. 550, holding contributions toward the construction of a road does not vitiate decision of board to lay out road, unless decision was thus produced; *Pillsbury v. Augusta*, 79 Me. 71, 8 Atl. 150, holding same where a railroad company was authorized to improve a street for use and convenience of foot passengers.

Validity of contribution toward public improvement.

Cited in *Charlotte Twp. v. Piedmont Realty Co.* 134 N. C. 41, 46 S. E. 723, holding a promise of a land company to pay a portion of the expense of a public improvement not void for want of a consideration, where company has a peculiar interest in improvement.

Cited in note in 14 L.R.A. 64, on bribery by gift for street improvements.

Distinguished in *Dudley v. Butler*, 10 N. H. 281, holding a note given to aid in making a highway, which is made the condition of the laying out of a highway, is without consideration and void.

What constitutes public way.

Cited in *Proctor v. Andover*, 42 N. H. 348, holding that, though a road is laid primarily for the accommodation of individuals, yet all persons have the right to use it, and the town must keep it in repair; *Denham v. Bristol County*, 108 Mass. 202, holding that any "way" which a town is authorized to lay out is subject to be used by the public.

Necessity and occasion for highway.

Cited in *Aspinwall v. Boston*, 191 Mass. 441, 78 N. E. 103, holding that a street can be laid out and constructed only upon an adjudication of a tribunal acting officially and determining that the public convenience and necessity require it to be laid out as a street; *Dudley v. Cilley*, 5 N. H. 558, holding where public exigency will justify taking of individual land and the burden of keeping highway in repair, there is an occasion for a highway; *Kelley v. Kennard*, 60 N. H. 1, holding the fact of number of people benefited by a highway does not change question of necessity of highway to one of law.

Presumption in favor of highway.

Cited in *Hancock v. Worcester*, 62 Vt. 106, 18 Atl. 1041, holding that every presumption is to be made in favor of the regularity of proceedings establishing a highway.

Compensation for land taken for public use.

Cited in *Peabody v. New York*, N. H. & H. R. Co. 187 Mass. 489, 73 N. E. 649, on awarding damages for land taken under right of eminent domain.

What constitutes a judicial act.

Cited in *Noble v. Indianapolis*, 16 Ind. 506, holding the power to hear and decide complaints in relation to assessments is a judicial power; *Bellevue v. Bellevue Improv. Co.* 65 Neb. 52, 90 N. W. 1002, holding that under the statute only jurisdictional irregularities will render proceedings by a village board in vacating streets and alleys void; *State v. Richmond*, 26 N. H. 232, holding the laying out of a highway by selectmen, in cases where they have general jurisdiction of the subject, is not void, though course prescribed by statute was not followed; *Brown v. Brown*, 50 N. H. 538, on the power of selectman to lay out a highway as a judicial power; *Emery v. Bradford*, 29 Cal. 75, holding the act of examining, approving, and accepting work is of a judicial nature; *State, Vanatta, Prosecutor, v. Morristown*, 34 N. J. L. 445, holding ordinance laying out new street is judicial act; *Norfolk City v. Ellis*, 26 Gratt. 224 (dissenting opinion), on alteration of streets as a judicial act.

Cited in reference note in 69 A. D. 589, on laying out of streets, etc., by municipal council, as judicial act.

Power of court to interfere with exercise of discretionary power.

Cited in *Richmond v. McGirr*, 78 Ind. 192, holding that a grant of a general power to a city to purchase real estate for the purpose of constructing public buildings gives, by, implication, the exclusive right to determine the expediency of the purchase; *Wilkes-Barre v. Troxell*, 5 Luzerne Leg. Reg. 133, holding determination of city council as to what streets shall be opened or widened conclusive, unless it exceeds its powers.

Taxation of cost of a public improvement.

Cited in *Uhrig v. St. Louis*, 44 Mo. 458, holding that the imposition of one tenth of the cost of opening a street on the city at large under an act of the legislature, not ground for an adjoining property owner to complain.

Validity of assessments for local improvements.

Cited in *Ridenour v. Saffin*, 1 Handy (Ohio) 464, sustaining the power of city authorities to make an assessment for local improvements.

Power of municipal corporations.

Cited in reference note in 28 A. D. 264, on validity of municipal by-laws and ordinances.

Cited in note in 13 L.R.A. 481, on municipal control over erection of wooden buildings.

19 AM. DEC. 326, BOYNTON v. REES, 8 PICK. 329.**Practical construction of grant by parties.**

Cited in *Dryden v. Jepherson*, 18 Pick. 385, holding what parties did immediately after grant by way of fixing limits of grant admissible as extrinsic evidence to explain terms of description.

— Of water-power grant.

Cited in *Hogg v. Bailey*, 5 Pa. Super. Ct. 426, 41 W. N. C. 168, holding same

as to grant of right to erect dam and to back up waters on grantor's land where dam was constructed and water backed to a certain limit and uninterruptedly so continued for fifty years; *Sweetland v. Grants Pass Power Co.* 46 Or. 85, 79 Pac. 337, holding grantor of a right to construct dam, who has acquiesced in a change of the point of use of the water whereby large sums of money have been expended, cannot afterwards object to making of repairs at new point of use.

Presumption as to consideration for deed.

Cited in *Frost v. Missionary Soc.* 56 Mich. 62, 22 N. W. 189, holding that a sealed instrument imports a consideration; *Stover v. Herrington*, 7 Ala. 142, 41 A. D. 86, holding that every deed imports a consideration though none is stated; *O'Donnell v. Smith*, 142 Mass. 505, 8 N. E. 350, holding presumption is that consideration of a grant was received.

Implied notice of a conveyance.

Cited in *Lawrence v. Tucker*, 7 Me. 195, holding in cases of implied notice, facts must be of such a nature as to leave no doubt of truth of transaction; *Rogers v. Jones*, 8 N. H. 264, holding that possession, to be notice, must be coupled with some manifest act of ownership.

Cited in notes in 13 L.R.A.(N.S.) 92, on possession of land as notice of title; 13 L.R.A.(N.S.) 60, on possession of land as putting purchaser on inquiry as to title; 104 A. S. R. 333, on possession of real property as notice of rights in drains and dams.

Title conveyed by a bona fide purchaser to one having notice.

Cited in *Suffolk Sav. Bank v. Boston*, 149 Mass. 364, 4 L.R.A. 516, 21 N. E. 665; *Bell v. Twilight*, 18 N. H. 159, 45 A. D. 367; *Hill v. McNichol*, 76 Me. 314,—holding where a bona fide purchaser conveys to one having notice, the latter takes title of former unimpaired by notice; *Ryan v. Staples*, 23 C. C. A. 551, 40 U. S. App. 748, 78 Fed. 563, holding that one who buys from a bona fide purchaser is protected by the innocence of his grantor; *Piper v. Hilliard*, 52 N. H. 209, holding that a purchaser with notice, from a purchaser without notice of an encumbrance, holds estate discharged of encumbrance.

Cited in reference note in 45 A. D. 371, on right of purchaser without notice of encumbrance to sell to one having notice.

Rights of bona fide purchaser.

Cited in note in 21 E. R. C. 725, on rights of purchaser for value without notice.

Admissibility of secondary evidence to show contents of an instrument.

Cited in *Kimball v. Bellows*, 13 N. H. 58, holding that, before secondary evidence can be given, nonproduction must be accounted for and, due diligence shown to obtain the writing.

19 AM. DEC. 329, WOODRUFF v. HALSEY, 8 PICK. 333.

Possession to maintain trespass.

Cited in *Codman v. Freeman*, 3 Cush. 306, holding that right to possession is sufficient to maintain trespass; *Westgate v. Wixon*, 128 Mass. 304, holding that title to and right to immediate possession is sufficient; *Loeb v. Chicago, St. L. & N. O. R. Co.* 60 Miss. 933, holding that wrongdoer cannot set up an outstanding title in defense to an action by possession; *Staples v. Smith*, 48 Me. 470, holding that a bailor of property "till called for" may maintain trespass without demand from one who wrongfully takes it from bailee; *Clark v. Wilson*, 103 Mass. 219, 4

A. R. 532, holding a bill of sale of a vessel, though intended merely as a collateral security, gives vendee right to maintain action for conversion of the property.

Cited in reference note in 56 A. D. 673, on maintenance of trespass by bailee.

Cited in notes in 18 A. D. 553, on sufficiency of constructive possession to maintain trespass; 18 A. D. 547, on necessity of actual or constructive possession to maintenance of trespass in case of chattels; 18 A. D. 558, on right of mortgagee of chattels to maintain trespass.

Rights of mortgagee.

Cited in *Hall v. Page*, 4 Ga. 428, 48 A. D. 235, holding that collateral securities pledged bona fide for the payment of a debt are not subject to garnishment at the suit of other creditors; *Champlin v. Johnson*, 39 Barb. 606, holding that after forfeiture mortgagor has no interest in the mortgaged property which is liable to be sold on execution.

—To protect mortgaged property.

Cited in *Abbott v. Goodwin*, 20 Me. 408, sustaining trespass where mortgagor misappropriated property; *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357, sustaining right of mortgagee to enjoin a judgment of foreclosure rendered on a mortgage executed to defraud him, though his mortgage debt is not yet due; *Byrom v. Chapin*, 113 Mass. 308, holding that mortgagee can maintain an action against mortgagor for substantial and permanent injury to mortgaged estate; *Brown v. Cook*, 3 E. D. Smith, 123, holding demand not necessary as between mortgagee and a wrongdoer to maintain trespass.

—To possession of mortgaged chattels.

Cited in *Holmes v. Sprowle*, 31 Me. 73; *Boise v. Knox*, 10 Met. 40,—holding that right to possession of personal property is in mortgagee, unless it is otherwise stipulated; *Stewart v. Hanson*, 35 Me. 506, holding that mortgagor cannot retain property against will of mortgagee.

Constructive possession defined.

Cited in *McRaeny v. Johnson*, 2 Fla. 520, holding that constructive possession is where the general owner, although the chattel is in the possession of another, has the right to reclaim it immediately.

Trespass de bonis for severing things from soil.

Cited in *Wadleigh v. Janvrin*, 41 N. H. 503, 77 A. D. 780, sustaining trespass *de bonis asportatis* for taking and carrying away fixtures.

Damages for impairment of mortgagee's security.

Cited in note in 43 A. S. R. 436, on damages to mortgagee for impairment of his security.

19 AM. DEC. 330, FARNUM v. PLATT, 8 PICK. 339.

Definition of word "expire."

Cited in *Bonsack Mach. Co. v. Smith*, 70 Fed. 383, holding that word "expire" means to cease to exist because of termination of the duration of the original grant.

Effect of a reservation in a deed.

Cited in *Moore v. Griffin*, 72 Kan. 164, 4 L.R.A.(N.S.) 477, 83 Pac. 395, holding the effect of a reservation of "all oil and gas privileges in and to said premises" was to reserve title to and ownership of oil and gas in lands to grantors; *Hudson Iron Co. v. Stockbridge Iron Co.* 107 Mass. 290, holding the reservation of the right to mine on granted premises saves no title to ore before it is mined.

Cited in reference note in 99 A. D. 85, on what is included in reservation of timber in deed.

Right of dominant owner of way.

Cited in reference note in 100 A. D. 118, on right of grantee of private way to deviate from it.

Cited in notes in 88 A. D. 281, on use of private ways; 85 A. D. 675, on ways from necessity; 95 A. S. R. 325, on rights and obligations of owner of private way as to its use.

— On its obstruction.

Cited in *Bass v. Edwards*, 126 Mass. 443; *Leonard v. Leonard*, 2 Allen, 543,—holding that one having the right to enter and go over land may, where owner obstructs such land, go over adjoining land of same owner doing no unnecessary damage; *Pratt v. Sanger*, 4 Gray, 84, holding that one entitled to a way cannot be compelled by mere caprice of the owner to go by a circuitous and indirect route.

Cited in reference note in 54 A. D. 734, on right to go *extra viam* over another's land where private way is impassable.

Cited in note in 85 A. D. 679, on right of deviation where way of necessity is obstructed and action for obstruction.

19 AM. DEC. 332, CLARK v. LAMB, 8 PICK. 415.

Amendment of pleadings.

Cited in reference note in 35 A. D. 735, on amendment of pleadings.

Amendment of verdict.

Cited in *Morris v. Callanan*, 105 Mass. 129, holding that court has power to allow amendments of verdicts so as to express in legal form the issue actually tried and necessarily found by the jury; *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198, holding where there can be no doubt or dispute, and the defect is merely formal or made through inadvertence, the court may amend the verdict; *Law v. Chicago Sanitary Dist.* 197 Ill. 523, 64 N. E. 536; *Harvey v. Head*, 68 Ga. 247,—holding where the intention of a verdict, not explicit in its terms, is apparent from the pleadings and evidence, it may be construed with reference thereto; *Acton v. Dooley*, 16 Mo. App. 441, holding that manifest errors both in form and substance may be corrected by amendment; *Chaffee v. Pease*, 10 Allen, 537, holding that, court may insert nominal damage in a verdict for plaintiff in an action for trespass, the jury having omitted to assess damages; *McKean v. Cutler*, 48 N. H. 370, holding same in an action for replevin; *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53, inserting value of plaintiff's property in claim and delivery where jury omitted to find it in verdict, where value alleged was not controverted; *Jones v. Kennedy*, 11 Pick. 125, holding that a verdict for plaintiff on one of several counts and silent as to others may be amended from judge's minutes so as to be for defendant on other counts; *Clapp v. Martin*, 33 Ill. App. 438, sustaining court in adding amount of interest to a verdict assessing plaintiff's damages "at the sum of \$500, with 6 per cent per annum;" *Peabody v. Hewett*, 52 Me. 33, 83 A. D. 486, holding where a deed conveyed but a part interest, and defect is not discovered at trial, and jury return verdict for entire premises, the court may amend verdict to facts; *Murphy v. Stewart*, 2 How. 263, 11 L. ed. 261, allowing an amendment on evidence of record and an uncontroverted affidavit of plaintiff's attorney; *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897, on power of trial court to correct irregularities in a verdict; *D. M. Osborne & Co. v. Morris*, 21 Or. 367, 28 Pac. 70, on right to amend verdict after jury is

discharged; *Sanford v. Sanford*, 28 Conn. 6 (dissenting opinion), on amendment of verdicts.

Cited in note in 14 A. D. 518, on amendment of verdicts.

Distinguished in *Coffin v. Jones*, 11 Pick. 45, holding that a verdict cannot be altered so as to conform to explanation made by foreman of jury; *Rowell v. Bruce*, 5 N. H. 381, holding that the want of a material allegation in a declaration cannot be supplied by amendment after verdict.

Amendment of judgment.

Cited in note in 12 A. D. 353, on evidence necessary to authorize amendment of judgment after term.

Amendments of record.

Cited in *Palmer v. Thayer*, 28 Conn. 237, allowing an officer to amend his return to conform with facts; *Catherwood v. Kohn*, 7 Pa. 392, holding that where the original declaration was mislaid and another filed, and case tried on its merits, and judgment arrested because of defect in declaration, and the original one is subsequently found which contained proper averments, judgment could be entered on original.

— In what court.

Cited in *Rowell v. Bruce*, 5 N. H. 381, holding that amendment must be made in the court where the record remains; *Dennison v. Willson*, 16 N. H. 496, allowing an amendment to an officer's return after error brought and joinder.

Verdict on one of several counts.

Cited in *Hall v. Briggs*, 18 Pick. 503, holding where declaration was on two counts, that plaintiff might discontinue second and have judgment entered upon the verdict on the first.

19 AM. DEC. 334, OXFORD BANK v. HAYNES, 8 PICK. 423.

Indorsement of note before negotiation.

Cited in *Union Bank v. Willis*, 8 Met. 504, 41 A. D. 541, holding that to hold a party as promisor where the name alone is written on the back of a note, it must appear that he made the promise at the time when the note itself was made; *Wilson v. Foot*, 11 Met. 285, holding that all the signers of a note stand in the light of joint principals; *State ex rel. Citizens' Bank v. Funding Board*, 28 La. Ann. 249; *Miller v. Gaston*, 2 Hill, 188; *Wetherwax v. Paine*, 2 Mich. 555,—holding an indorsement made at the time of the making of the note makes indorser an original promisor; *Kearnes v. Montgomery*, 4 W. Va. 29; *Orrick v. Colston*, 7 Gratt. 189,—holding that such indorser may be treated either as a direct or collateral promisor without proof of consideration; *Castle v. Candee*, 16 Conn. 223, holding that law implies contract in case of a blank indorsement; *Irish v. Cutter*, 31 Me. 536, holding indorser of note for value at a subsequent time presumed to intend to become guarantor.

Cited in reference note in 56 A. D. 359, on liability on indorsement of negotiable paper by one not holder or payee.

Disapproved in *Luqueer v. Prosser*, 1 Hill, 256, holding a guarantor of a promissory note by indorsement made at delivery becomes in legal effect a joint and several maker.

Liability of indorser of a nonnegotiable note.

Cited in *Ford v. Mitchell*, 15 Wis. 305, holding the liability absolute and unconditional.

Contract and liability of guarantor.

Cited in *Cabot Bank v. Bodman*, 11 Gray, 134, holding the liability of a guarantor is not absolute and unconditional; *Allen v. Herrick*, 15 Gray, 274, holding that the contract of the guarantor is to pay if the principal does not; *Lane v. Levillian*, 4 Ark. 76, 37 A. D. 769, holding a demand on and a failure of principal to perform, is indispensable to perfect liability of guarantor; *Tinker v. McCauley*, 3 Mich. 188, holding that a guaranty of a promissory note is not negotiable; *How v. Kemball*, 2 McLean, 103, Fed. Cas. No. 6,748, holding that contract of guaranty by enlarged indorsement can only be enforced between the parties to it; *Neal v. Smith*, 5 Ala. 568, on the contract of a guarantor.

Cited in reference note in 45 A. D. 235, on nature of liability of guarantor.

What constitutes a guaranty of note or like writing.

Cited in *Bunker v. Ireland*, 81 Me. 519, 17 Atl. 706, holding a promise to pay "within note" written on back of note is a guaranty of note; *National Loan & Bldg. Assn. v. Lichtenwalner*, 100 Pa. 100, 45 A. R. 359, 12 W. N. C. 145, 39 Phila. Leg. Int. 289, holding the words, "I hereby guarantee the payment of the within certificate," indorsed and signed on back of a bank certificate of deposit, to be a contract of guaranty.

Distinction of guarantor from surety or indorser of note.

Cited in *Fuller v. McDonald*, 8 Me. 213, 23 A. D. 499, holding that if the payee of a negotiable note indorses his name in blank on the back of a note, he assumes only the liability of an indorser; *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 A. R. 323, holding notice of default of principal not required to fix liability of a guarantor, as in case of an indorser; *Harris v. Newell*, 42 Wis. 687, holding surety bound equally with the principal.

Cited in note in 105 A. S. R. 505, on guaranty distinguished from suretyship.

Necessity of demand on principal and notice to charge guarantor.

Referred to as a leading case in *Bickford v. Gibbs*, 8 Cush. 154, holding that if, in consequence of want of demand and notice of nonpayment within a reasonable time, the guarantor suffers loss, he is exonerated.

Cited in *Beebe v. Dudley*, 26 N. H. 249, 59 A. D. 341, holding where guarantor's undertaking is collateral, notice must be given within a reasonable time, or it must appear that no damage resulted from want of notice; *McDougal v. Calef*, 34 N. H. 534, holding that notice should be given within a reasonable time; *Newton Wagon Co. v. Diers*, 10 Neb. 284, 4 N. W. 995; *Lemmert v. Guthrie Bros.* 69 Neb. 499, 111 A. S. R. 561, 62 L.R.A. 954, 95 N. W. 1046; *Perry v. Barret*, 18 Mo. 140,—holding that, unless notice is received within a reasonable time, guarantor may defend to extent he has been injured by want of notice; *Wildes v. Savage*, 1 Story, 22, Fed. Cas. No. 17,653; *Bushnell v. Church*, 15 Conn. 406; *Vinal v. Richardson*, 13 Allen, 521,—holding that, to discharge guarantor, the omission to make demand and to give notice must be attended with some loss to the guarantor; *Farmers' & M. Bank v. Kercheval*, 2 Mich. 504, holding same where, by terms of guaranty, demand and notice is required, on omission to give; *Protection Ins. Co. v. Davis*, 5 Allen, 54; *Bashford v. Shaw*, 4 Ohio St. 263,—holding guarantor not discharged where he has sustained no damage or loss; *Hernandez v. Stilwell*, 7 Daly, 360, holding one guaranteeing "ultimate payment" of a bond entitled to reasonable demand and notice; *Craft v. Isham*, 13 Conn. 28, holding a reasonable notice should be given to a guarantor of advances upon expiration of agreed credit; *Dole v. Young*, 24 Pick. 250, holding a notice given within five or six days after credit expired was sufficient to charge guarantor;

Parkman v. Brewster, 15 Gray, 271, holding guarantor is liable where there is no unreasonable delay or negligence on the part of the holder to give notice,

Cited in reference note in 45 A. D. 236, on necessity of demand and notice to charge guarantor.

Cited in notes in 20 L.R.A. 263, on necessity of notice of default to bind guarantor of payment of note; 5 L.R.A. 535, on necessity of presentment and demand, and notice of default on demand notes.

Distinguished in *Salisbury v. Hale*, 12 Pick. 416, holding guarantor of covenants of lease liable for rent, not having been prejudiced for want of notice; *Welch v. Walsh*, 177 Mass. 555, 83 A. S. R. 302, 52 L.R.A. 782, 59 N. E. 440, holding a guarantor of rent not entitled to demand and notice of nonpayment, where sum to be paid and time of payment is definite; *Sigourney v. Wetherell*, 6 Met. 553, holding guarantor by paying interest on a note, with knowledge of laches of holder in not giving him notice, waived his defense; *Cooper v. Page*, 24 Me. 73, 41 A. D. 371, holding absolute promise of guarantor that note shall be paid at time stipulated after it becomes payable by maker, requires no demand or notice.

Disapproved in *Donley v. Camp*, 22 Ala. 659, 58 A. D. 274, holding notice not necessary to perfect the guarantor's liability; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Partridge v. Davis*, 20 Vt. 499; *Thrasher v. Ely*, 2 Smedes & M. 139,—holding demand and notice not necessary to fix liability of guarantor; *Read v. Cutts*, 7 Me. 186, 22 A. D. 184, holding same as to a guarantor of an absolute and original undertaking; *Pleasantville Mut. Loan & Bldg. Soc. v. Moore*, 70 N. J. L. 306, 57 Atl. 1034, holding same to charge guarantor of a non-negotiable instrument; *Pool v. Roberts*, 19 Ill. App. 438; *Pfaelzer v. Kau*, 207 Ill. 116, 69 N. E. 914,—holding one who unconditionally guarantees payment of a promissory note not entitled to notice of nonpayment; *Brown v. Curtiss*, 2 N. Y. 225, holding it no part of contract of guaranty that holder of note should give notice of nonpayment, or to use any diligence to get money from maker.

— As dependent on solvency of principal.

Cited in *Whinton v. Mears*, 11 Met. 563, 45 A. D. 233; *Talbot v. Gay*, 18 Pick. 534,—holding guarantor of a promissory note discharged by neglect of holder to make demand and give notice of nonpayment, provided the maker was solvent when the note fell due and afterwards became insolvent; *Smith v. Bainbridge*, 6 Blackf. 12, holding same as to letter of credit; *Clark v. Remington*, 11 Met. 361, holding same where there is good reason to suppose that guarantor might have obtained security had he been notified of nonpayment; *Rankin v. Childs*, 9 Mo. 665, holding same as to guarantee of payment of a bill; *Lewis v. Brewster*, 2 McLean, 21, Fed. Cas. No. 8,318, holding where payee of a note is insolvent at maturity, notice to guarantor need not be given; *Knight v. Dunsmore*, 12 Iowa, 35, holding notice of nonpayment not necessary where principal was insolvent at maturity of note; *Beebe v. Dudley*, 26 N. H. 249, 59 A. D. 341, holding where principal is insolvent before expiration of term of credit that notice is unnecessary; *Globe Bank v. Small*, 25 Me. 366, holding where laches of creditor continues until principal, who was solvent, becomes insolvent, the loss should fall on creditor; *Gammage v. Hutchins*, 23 Me. 565, holding same where holder neglected to make any attempt to collect a note for two years, during which time maker was solvent.

Writing waiver of demand over blank indorsement.

Cited in *Long v. Smyser*, 3 Iowa, 266, upholding right of holder of promissory note not negotiable to write over a blank indorsement a waiver of demand and notice.

Discharge of secondary party by nonpresentment to primary one.

Cited in *Re Brown*, 2 Story, 502, Fed. Cas. No. 1,985, holding that want of due presentment of a check and notice of nonpayment only exonerates the drawer in so far as actual damages have resulted to him; *Blachly v. Andrew*, 1 Disney (Ohio) 78, holding that drawer of a check is not discharged from liability by holder's failure to present in due time, unless he has sustained actual prejudice.

Cited in note in 4 E. R. C. 489, on discharge of guarantor of note not presented for payment.

Presumption as to participation in consideration of a negotiable paper.

Cited in *Nabb v. Koontz*, 17 Md. 283, holding one who guarantees payment of a note at time note is executed is liable though no separate consideration is given him; *Clopton v. Hall*, 51 Miss. 482, holding that there is no presumption of participation in consideration of paper where name is placed upon paper after its date and delivery.

Indulgence as affecting debtor's co-obligor.

Cited in *Neel v. Harding*, 2 Met. (Ky.) 247, holding that the holder of a note does not discharge one joint maker by indulgence to others without his assent; *Davenport v. King*, 63 Ind. 64, holding that extension of time will not release a surety, where suretyship is not apparent on instrument and notice thereof is not averred.

Right of recourse of surety on note.

Cited in *Pratt v. Thornton*, 28 Me. 355, 48 A. D. 492, holding one who places his name on a note as surety unaware that another surety is to be obtained, can claim no benefit of obtaining another surety.

19 AM. DEC. 340, SHUMWAY v. RUTTER, 8 PICK. 443.**Sufficiency of delivery of goods sold as against third persons.**

Cited in *Stinson v. Clark*, 6 Allen, 340; *Hymann v. Cook*, How. App. Cas. 419,—holding slight acts of delivery sufficient in sale otherwise executed; *Gilbert v. Decker*, 53 Conn. 401, 4 Atl. 685; *Ingalls v. Herrick*, 108 Mass. 351, 11 A. R. 360,—holding transfer complete if bona fide buyer with consent of seller obtains possession before any attachment or second sale; *Dempsey v. Gardner*, 127 Mass. 381, 34 A. R. 389, holding a delivery of a bill of sale of a horse not sufficient evidence of delivery of horse as against an attaching creditor; *Wade v. Moffett*, 21 Ill. 110, 74 A. D. 79, holding that a party becomes a buyer when goods are knocked down to him at an auction; *Clark v. Shannon & M. Co.* 117 Iowa, 645, 91 N. W. 923, on necessity of actual delivery between vendor and vendee.

Cited in reference notes in 19 A. D. 347; 20 A. D. 481,—on delivery of chattels; 26 A. D. 284; 31 A. D. 450,—on sufficiency of delivery of chattels sold; 31 A. D. 39, on sufficiency of delivery to pass title to chattels; 26 A. D. 628, on sufficiency of constructive delivery to pass title to chattels.

Cited in note in 49 A. D. 329, on necessity for delivery, receipt, and acceptance to take verbal sales of goods out of statute of frauds.

—Entry of house as possession of contents.

Cited in *Comaita v. Kyle*, 19 Nev. 38, 5 Pac. 666, holding that nothing less than a conveyance by deed of real estate with a surrender of possession to vendee will give vendee possession of personal property thereon.

Possession by vendor after sale as evidence of fraud.

Cited in *Hankins v. Ingols*, 4 Blackf. 35, holding possession by vendor after a complete transfer is only evidence of fraud; *Blocker v. Burness*, 2 Ala. 354, hold-

ing that legal presumption of fraud from the continued possession of the vendor must be explained away.

Distinguished in *Cobb v. Haskell*, 14 Me. 303, 31 A. D. 56, holding a quantity of boards left in vendor's mill yard for two months, in same state as before purchase, passes to a subsequent attaching creditor.

— **Rebuttal of presumption.**

Cited in *Cole v. White*, 26 Wend. 511, holding that the presumption of fraud does not exclude the party from proving fair dealing and innocent intent.

Rights of officer where goods of third person are intermingled with those of debtor.

Cited in *Lehman v. Kelly*, 68 Ala. 192, holding levy on whole mass proper if one intentionally intermixes goods so that an officer cannot distinguish them and refuses to point out his own; *Slattery v. Stewart*, 45 Ill. 293, holding if duty of owner of goods which he has mixed with those of debtor, to point out his goods to officer; *Wildman v. Sterritt*, 80 Mich. 651, 45 N. W. 657, holding sheriff not liable for levying on property of one who has allowed debtor to intermingle goods with his own so as to make it impossible for sheriff to select or distinguish them; *Hamilton v. Rogers*, 8 Md. 301, holding that rights of third persons are not to be affected by commingling of property with that of debtor; *Smokey v. Peters-Calhoun Co.* 66 Miss. 471, 14 A. S. R. 575, 5 So. 632, holding it duty of sheriff to hold goods of third person intermingled with those of debtor till they are identified by such party; *Albee v. Webster*, 16 N. H. 382, holding an officer who attaches intermingled goods is not a trespasser; *Walcott v. Keith*, 22 N. H. 196, holding that officer must show that goods were intermixed in such a manner that they could not, upon due inquiry, have been distinguished by him; *Moore v. Bowman*, 47 N. H. 494, holding it duty of officer to make reasonable inquiry to distinguish goods; *Davis v. Stone*, 120 Mass. 228, holding that one not having unlawfully or fraudulently intermingled goods with those of debtor may recover against an officer taking goods against his consent; *Yates v. Wormell*, 60 Me. 495, holding officer liable where owner offers to select his goods and is prevented from so doing by the officer; *Vose v. Stickney*, 8 Minn. 75, Gil. 51 (dissenting opinion) on rights of officer where goods of third person are mixed with those of debtor.

Cited in note in 54 A. D. 593, on officer's duty as to attachment of, or attachment against, confused property.

Necessity of demand of goods to charge levying officer as wrongdoer.

Cited in *Masten v. Webb*, 60 How. Pr. 302, holding officer who acts upon appearances of ownership by the debtor, existing by consent of owner, not liable without demand.

Distinguished in *Masten v. Webb*, 24 Hun, 90, holding as to levy on goods not the property of the debtor, that demand is not necessary.

— **As to goods confused with debtor's.**

Cited in *Wilson v. Lane*, 33 N. H. 466; *Harding v. Coburn*, 12 Met. 333, 46 A. D. 680,—holding that if officer on due inquiry cannot distinguish them, the owner can maintain no action against the officer until notice and demand and refusal by officer; *Gilman v. Hill*, 36 N. H. 311, applying doctrine to pelts mixed; *Johnson v. Emery*, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann. Cas. 23, holding it incumbent on party claiming to be owner of goods not subject to attachment, to point them out and make demand for their return; *Robinson v. Holt*, 39 N. H. 557, 75 A. D. 233; *Taylor v. Jones*, 42 N. H. 25; *Smith v. Welch*, 10 Wis. 91,—holding in such case owner cannot maintain an action against the officer until

notice and a demand and refusal; *Lewis v. Whittemore*, 5 N. H. 364, 22 A. D. 466, holding where only part of corn belonged to debtor, that it was duty of officer to attach the whole and hold it until part was identified by owner and a redelivery demanded.

Duty of levying officer to inquire as to ownership of goods.

Cited in *Sibley v. Brown*, 15 Me. 185, holding that inquiry ought always to be made by the officer as to the ownership of property which he attaches.

Liability of attaching officer.

Cited in reference note in 39 A. D. 627, as to when attaching officer is liable for trespass.

Cited in note in 43 A. D. 264, on sheriff's liability for seizure of one person's goods under attachment against another.

Demand before suit for intermingled goods.

Cited in *Schuts v. Jordan*, 32 Fed. 55, on necessity of demand for goods by owner before bringing action; *Smith v. Morrill*, 56 Me. 566, holding owner reclaiming his own from intermingled property not liable for excess taken without identification and demand.

Doctrine of confusion of goods.

Cited in *Henderson v. Lauck*, 21 Pa. 359, holding that he who wrongfully causes confusion must submit to all risk and inconvenience of making an identification and separation.

Cited in note in 101 A. S. R. 922, on intermingling of goods of debtor and creditor.

Distinguished in *Tufts v. McClintock*, 28 Me. 424, 48 A. D. 501, holding that where goods mixed can be easily distinguished and separated, there is no change of property by mixture.

Effect of refusal to select or point out leviable property.

Cited in *McKenzie v. Redman*, 87 Me. 322, 32 Atl. 962, holding insolvent's refusal to select exemption gave assignee in insolvency right to do so.

19 AM. DEC. 343, LEFFINGWELL v. ELLIOT, 8 PICK. 455.

Effect of incorporation of tenants in common of land.

Cited in *Holland v. Cruft*, 3 Gray, 162, holding that mere incorporation does not transfer the fee of the estate to the corporation; *Second Cong. Soc. v. Waring*, 24 Pick. 304, holding that legal title to land granted to certain persons for religious purposes does not vest in later incorporated society.

Distinguished in *Colquitt v. Howard*, 11 Ga. 556, holding that title vested in corporation where corporation was organized for the purpose of selling and improving lands held in common; *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42, 26 N. E. 239, holding under statute that corporation organized by proprietors of lands held in common, has such a title to maintain a petition to quiet title.

Distinction of corporation from its members.

Cited in *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609, on individuals of a corporation as bound by a judgment against the corporation.

Measure of damages for breach of covenant of deed.

Cited in *Funk v. Creswell*, 5 Iowa, 62; *Kinley v. Crane*, 34 Pa. 146; *Lawton v. Howe*, 14 Wis. 242; *Loomis v. Bedel*, 11 N. H. 74,—holding upon purchase of paramount title measure is the amount paid, with compensation for trouble and expenses of covenantee; *Willson v. Willson*, 25 N. H. 229, 57 A. D. 320, holding

that, if encumbrance is still contingent and no injury has been sustained, covenantee can recover only nominal damages; *Mecklem v. Blake*, 22 Wis. 495, 99 A. D. 68, holding same unless covenantee paid off the encumbrance or lost the estate in consequence of breach; *Haynes v. Stevens*, 11 N. H. 28, holding that, where covenantee has been evicted, he may recover the costs recovered in suit in which he was defeated; *Cox v. Henry*, 32 Pa. 18, on measure of damages on covenant of general warranty.

Cited in note in 3 L.R.A. 792, on damages for breach of covenant against encumbrances.

19 AM. DEC. 345, WOODBURY v. LONG, 8 PICK. 543.

Sufficiency of delivery as to creditors of buyer.

Cited in *Plymouth Stove Foundry Co. v. Fee*, 182 Mass. 31, 64 N. E. 419, holding sale of ranges to be paid for when "furnished and set up," not complete until after they were set up.

Cited in reference notes in 26 A. D. 284, on what is sufficient delivery on a sale of chattels; 31 A. D. 39, on sufficiency of delivery to pass title to chattels.

What constitutes conversion.

Cited in *Salisbury v. Gourgas*, 10 Met. 442, holding tortious taking of another's goods is a conversion; *Draper v. Moseley*, 3 Baxt. 201, holding same as to an original unlawful detention; *Gilman v. Hill*, 36 N. H. 311, holding same of assumption of authority over property and an actual sale of it.

Cited in reference note in 37 A. D. 60, on what constitutes conversion.

Cited in notes in 24 A. S. R. 808, on demand and refusal as essential to conversion; 24 A. S. R. 800, on illustrations showing various modes of conversion.

— Unlawful attachment or seizure as.

Cited in *Schluter v. Jacobs*, 10 Colo. 449, 15 Pac. 813, holding attachment of personalty not the property of defendant constitutes conversion; State use of *McMurray v. Doan*, 39 Mo. 44, on same point; *Johnson v. Farr*, 60 N. H. 426, holding same though there was no manual taking or removal; *Foster v. Haines*, 13 Me. 307, holding person by whose direction an officer made an unjustifiable seizure, liable in trover; *Cooper v. Newman*, 45 N. H. 339, holding officer liable where he attached exempt property; *Parker v. Young*, 188 Mass. 600, 75 N. E. 98, holding officer delivering property to plaintiff without complying with statute wrongdoer from the beginning; *Bowen v. Sanborn*, 1 Allen, 289, holding officer liable who took exclusive custody of stock of goods known to include some belonging to strangers.

Cited in reference note in 25 A. D. 260, on liability in trover of officer attaching property of stranger to writ.

Disapproved in *Fernald v. Chase*, 37 Me. 289, holding declaration by an officer that he has attached personalty, without exercising any dominion or control over it, is not conversion.

— Demand as predicate.

Cited in *Stevens v. Eames*, 22 N. H. 568; *Bonaparte v. Clagett*, 78 Md. 87, 27 Atl. 619,—holding demand is not necessary if possession was wrongfully taken; *Gilman v. Hill*, 36 N. H. 311, holding same where goods of a stranger are attached; *Rodick v. Coburn*, 68 Me. 170, holding creditor to whom a bailee has delivered goods in payment of his pre-existing debt, liable to owner without previous demand.

Cited in reference note in 25 A. D. 400, on demand as prerequisite to action of trover.

Remedy for levy on goods as property of another.

Cited in *Hunt v. Lathrop*, 7 R. I. 58; *Kittredge v. Sumner*, 11 Pick. 50,—holding trespass will lie for taking goods of a stranger.

Cited in notes in 43 A. D. 264, on sheriff's liability for seizure of one person's goods under attachment against another; 95 A. S. R. 125, on remedies available against sheriffs, constables, and marshals for seizing property of third persons.

19 AM. DEC. 347, COM. v. WING, 9 PICK. 1.**Malicious mischief.**

Cited in *People v. Olsen*, 6 Utah, 284, 22 Pac. 163, holding it was an indictable offense at common law; *People v. Moody*, 5 Park. Crim. Rep. 568, holding the wanton, malicious, and secret destruction of personal property of another is a misdemeanor at common law; *Com. v. Cramer*, 2 Pearson (Pa.) 441, holding wounding trespassing steer is indictable offense.

Cited in note in 32 A. D. 665, on malicious mischief.

—To person of another.

Cited in *Com. v. Nusky*, 9 Lanc. L. Rev. 317, 1 Pa. Dist. R. 561, holding defendant may be indicted and convicted for wilfully, maliciously, and mischievously cutting another's hair, with intent to disfigure him.

Firing gun as crime.

Cited in *Stewart v. Cary Lumber Co.* 146 N. C. 47, 59 S. E. 545, on question of firing gun to frighten another being an indictable assault.

Cited in reference note in 56 A. D. 162, on discharging gun at wild fowl with knowledge that report will injure sick person as indictable offense.

19 AM. DEC. 348, COM. v. CHACE, 9 PICK. 15.**What constitutes larceny.**

Cited in notes in 88 A. S. R. 588, on larceny of animals; 57 A. D. 277, on intent as element of larceny.

Animals *feræ naturæ*.

Cited in *State v. Parker*, 89 Me. 81, 35 L.R.A. 279, 35 Atl. 1021; *State v. Weber*, 205 Mo. 36, 120 A. S. R. 715, 10 L.R.A. (N.S.) 1155, 102 S. W. 955,—holding deer are animals *feræ naturæ*.

Cited in note in 70 A. D. 261, on property in inferior wild animals.

—Tamed birds.

Cited in *Com. v. Lewis*, 47 Phila. Leg. Int. 58, 7 Pa. Co. Ct. 558, 25 W. N. C. 432, on question of pigeons being tamed and becoming subjects of property.

Cited in reference note in 72 A. D. 351, on acquiring doves.

19 AM. DEC. 350, GWINNETH v. THOMPSON, 9 PICK. 31.**Recovery of contributory share of expense from cotenant.**

Cited in *Clark v. Sidway*, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. Rep. 327, holding tenants in common can sue each other at law for reimbursements of allowances made on joint account; *Stewart v. Stewart*, 90 Wis. 516, 48 A. S. R. 949, 63 N. W. 886, holding in ejectment by one against his cotenant defendant was properly allowed to be reimbursed for one half of the moneys paid by him while in possession to discharge a mortgage and pay taxes; *Powell v. Jones*, 72 Ala. 392, holding where one tenant in common performs extraordinary services for common benefit he is entitled to contribution from his cotenants; *Wheeler*

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v. Wheeler, 111 Mass. 247, on question of right of tenant in common to recover share expended in repairs upon common property, with consent of cotenant.

Cited in reference note in 41 A. D. 165, on rights of tenant in common as to repairs and improvements made by him on the common land.

Cited in note in 29 L.R.A. 459, on liability of cotenants in assumpsit for repairs.

When partnership exists.

Cited in notes in 19 E. R. C. 422, on joint owners as partners; 27 L.R.A. 494, on sufficiency of facts and circumstances to constitute real estate partnership property.

19 AM. DEC. 350, TUCKER v. TOWER, 9 PICK. 109.

Rights of public and owner of fee in highway.

Cited in *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 13 L.R.A. (N.S.) 904, 90 Pac. 1053; *Wright v. Austin*, 143 Cal. 236, 101 A. S. R. 97, 65 L.R.A. 949, 76 Pac. 1023,—holding owner of fee over which highway is laid retains his rights in soil for all purposes which are consistent with full enjoyment of easement by public; *Denniston v. Clark*, 125 Mass. 216, holding surveyor of highways while acting within scope of his authority, may remove earth and gravel from one highway, or part of a highway to another; *Allen v. Boston*, 159 Mass. 324, 38 A. S. R. 423, 34 N. E. 519, holding owner of land has a right to excavate under the sidewalk, if he violates no ordinances or regulations of city, and interferes with no existing public use of street; *People v. Law*, 34 Barb. 494, on question whether use of part of street, for horse railroad, is such a new or additional use as requires a new assessment of damages.

Cited in reference note in 15 L.R.A. 554, on ownership and control of trees in highway.

Rights of proprietor in quasi public roadway.

Cited in *Ridge Turnp. v. Stoeve*, 2 Watts & S. 548, holding turnpike company has right to erect toll houses at its gates; *Still v. Langsingburgh*, 16 Barb. 107, upon question of reversion of title of turnpike company to road, upon abandonment; *May v. New England R. Co.* 171 Mass. 367, 50 N. E. 652, on question of relative rights of owner of fee and railroad which has easement in land; *State v. New Boston*, 11 N. H. 407; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 A. D. 177; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 A. R. 181,—on rights of turnpike company in road.

Way by necessity.

Cited in reference note in 59 A. D. 388, as to when way by necessity exists.

Title acquired by eminent domain.

Cited in *Harback v. Boston*, 10 Cush. 295, holding city did not acquire fee to land taken by eminent domain; *Kelsey v. King*, 11 Abb. Pr. 180, 32 Barb. 410, upholding right to construct sewer in middle of street and denying fee owner's right to additional compensation for such use; *Brainard v. Clapp*, 10 Cush. 6, 57 A. D. 74, holding railroad company has right to cut trees growing on strip of land which they have taken for their road; *Titus v. Boston*, 149 Mass. 164, 21 N. E. 310, on question of title acquired by city which took land for sewerage system; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 A. R. 181, holding nature of title of railroad company which took land by eminent domain.

19 AM. DEC. 353, HAVEN v. FOSTER, 9 PICK. 112.**Ignorance of foreign law.**

Cited in *Norton v. Marden*, 15 Me. 45, 32 A. D. 132, holding mistake of foreign law regarded as mistake of fact; *Rosenbaum v. United States Credit System Co.* 64 N. J. L. 34, 44 Atl. 966, holding person ignorantly making contract for services in another state, where same unlawful, may recover damages of employer, who knew contract was illegal; *Curtis v. Leavitt*, 15 N. Y. 9, holding foreign pledgee of domestic corporation's securities, not chargeable with knowledge of local statute prohibiting transfer without resolution of directors; *Morgan v. Bell*, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925, denying specific performance of contract for sale of land in foreign state, where vendor ignorant of disability known to vendee.

Distinguished in *Schaefer v. Wunderle*, 154 Ill. 577, 39 N. E. 623, denying leave to citizen of foreign country to file bill of review, on ground of ignorance of laws of this country, where local counsel employed; *Wooten v. Miller*, 7 Smedes & M. 380, holding party making contract to be performed in foreign state cannot plead ignorance of laws of that state; *Doll v. Earle*, 65 Barb. 298, denying right to recover payment of difference between gold and bank notes, upon faith of United States Supreme Court decision subsequently overruled.

Proof of foreign law.

Cited in *Hazelton v. Valentine*, 113 Mass. 472, holding that, where law of foreign state is in dispute, same may be proved by evidence as question of fact; *Knapp v. Abell*, 10 Allen, 485, holding statutes necessary to validity of judgment of foreign court are facts which must be proved.

Cited in note in 25 L.R.A. 450, on oral proof of foreign laws.

Construction of foreign statute as question of fact.

Cited in *Holman v. King*, 7 Met. 384, holding construction given statute of another state, by courts of that state, is question of fact for jury.

Presumptive knowledge of law.

Cited in *Butler v. Livingston*, 15 Ga. 565, holding admissions as to title to property presumed to have been made with knowledge of law, unless contrary is shown.

Recovery of money paid by mistake.

Cited in notes in 55 A. S. R. 517, on right to recover back money paid in ignorance of one's rights; 52 A. D. 759, on recovery, on count for money had and received of money obtained by fraud or other tort or by duress or by mistake.

— Of law.

Cited in *Washington v. Barber*, 5 Cranch, C. C. 157, Fed. Cas. No. 17,224, denying right to recover money paid for license which municipal corporation had no right to require; *Culbreath v. Culbreath*, 7 Ga. 64, 50 A. D. 375, sustaining recovery for excess of money paid heir for interest in estate, through ignorance of measure of his legal interest; *Claffin v. Godfrey*, 21 Pick. 1, questioning without deciding, whether money paid by mistake of law can be recovered; *Lyle v. Shinnebarger*, 17 Mo. App. 66, holding money paid under mistake of law of another state can be recovered; *Peterborough v. Lancaster*, 14 N. H. 382, denying right to recover money paid through mistake of law, when done with full knowledge of facts; *Moreland v. Atchison*, 19 Tex. 303, sustaining right of immigrant to recover purchase price of land, to which resident affirming knowledge of law, claimed good title.

Distinguished in *Com. ex rel. Lancaster County Mut. Live Stock & Chattel*

Theft Ins. Co. 19 Pa. Co. Ct. 373, 6 Pa. Dist. R. 372, 1 Dauphin Co. Rep. 212, 14 Lanc. L. Rev. 58, sustaining right to recover assessment paid receiver of insurance company, under mistaken belief that policy was assessable; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434, holding illegal freight rates paid to sole line of railroad may be recovered by shipper, as involuntarily paid.

— **Of fact.**

Cited in *Freeman v. Curtis*, 51 Me. 140, 81 A. D. 564, sustaining right to reconveyance upon bill in equity, where property conveyed through mistake of fact, resulting from ignorance of law; *Clafin v. Godfrey*, 21 Pick. 1, sustaining right to recover amount paid for assignment of satisfied note and mortgage, parties believing same to be subsisting lien; *Bank of Chillicothe v. Dodge*, 8 Barb. 233, sustaining foreign corporation's right to recover moneys advanced in good faith upon draft made in violation of domestic statute; *Gerard Trust Co. v. Harrington*, 23 Pa. Super. Ct. 615, sustaining right to recover moneys paid to attorney, under mistaken belief that he is counsel for person entitled to fund; *Glenn v. Shannon*, 12 S. C. 570, sustaining right to recover money paid under mistake of fact to person who has no right in conscience to claim it; *King v. Doolittle*, 1 Head, 77, holding purchaser of bank charter, in ignorance of right of repeal reserved by legislature, entitled to recover consideration paid.

Cited in reference note in 45 A. D. 171, on right to recover money paid under mistake of fact.

Recovery of chattels delivered through mistake of law.

Cited in *Gwynn v. Hamilton*, 29 Ala. 233, denying administrator's right to recover slaves delivered through mistake of law, there being no fraud, imposition, undue influence, or incapacity.

Relief from, or rescission of, contract.

Cited in note in 55 A. S. R. 496, on ignorance of one's rights as ground of relief.

— **Mistake of law.**

Cited in *Usher v. Waddingham*, 62 Conn. 412, 26 Atl. 538, denying party's right to show ignorance of legal relation of partnership when accepting note, in action against partner not signing; *Rauen v. Prudential Ins. Co.* 129 Iowa, 725, 106 N. W. 198, holding release executed through fraud or mistake may be repudiated.

Cited in notes in 10 A. D. 324; 5 L.R.A. 155,—on exception to rule that equity will not relieve against mistake of law; 6 L.R.A. 837, on mistake of law as ground for relief.

Distinguished in *Champlin v. Laytin*, 18 Wend. 407, 31 A. D. 382, canceling mortgage for purchase money given without knowledge that property is designated as street in grantor's deed to abutting property.

— **Mistake of fact.**

Cited in *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430 (affirming 105 Ill. App. 536) sustaining lessee's right to rescission of lease executed under mutual mistake as to sufficiency of walls to bear two additional stories; *Keough v. Foreman*, 33 La. Ann. 1434, denying right to have settlement of partnership accounts set aside for errors not discovered through negligence of party complaining.

Cited in note in 45 A. D. 632, on avoidance of contracts for mutual mistake of fact.

Right to interest.

Cited in *Steam Stone Cutter Co. v. Windsor Mfg. Co.* 17 Blatchf. 24, Fed. Cas.

No. 13,335, sustaining right to interest on profits decreed from time of entry of interlocutory decree prohibiting infringement of patent; *Kendall v. Brownson*, 47 N. H. 186 (dissenting opinion), on when interest runs in case of breach of contract.

Cited in notes in 51 A. D. 277, on allowance of interest; 92 A. D. 630, on recovery of interest to time of verdict.

Right to have mortgage discharged from decedent's estate.

Cited in *Robinson v. Simmons*, 156 Mass. 123, 30 N. E. 362, questioning without deciding whether heirs can call on personal estate to exonerate them from payment of mortgage on intestate's real estate; *Keene v. Munn*, 16 N. J. Eq. 398, denying right of grantee of devisee to have mortgage paid out of testator's personal estate.

Powers of executors.

Cited in note in 78 A. S. R. 177, on general power of executors over real property.

Submission of agreed case as waiver.

Cited in *Gaines v. McAdam*, 79 Ill. App. 201, holding objection to defects in pleadings waived by submitting case on agreed statement of facts; *Kimball v. Preston*, 2 Gray, 567, holding objections to form of proceeding waived, unless expressly received, by submitting case upon agreed statement of facts.

19 AM. DEC. 363, SALEM MILL-DAM CORP. v. ROPES, 9 PICK. 187.

Mutual mistake as affecting contract.

Cited in *Voorhis v. Smith & Co's Mfg. Works*, 11 Mo. App. 108, on question as to when mutual mistake will avoid contract.

Who are stockholders.

Cited in reference note in 26 A. S. R. 658, as to who are stockholders of corporation.

Validity of stock subscription.

Cited in notes in 81 A. D. 397, on necessity that subscription to stock be made by subscriber or his authorized agent; 81 A. D. 401, on subscriptions obtained by fraud; 33 L.R.A. 731, on opinions and representations as to future as ground for rescinding subscription to stock; 6 E. R. C. 816, on duty to disclose material facts by reason of fiduciary relation between contracting parties.

Necessity that whole stock of corporation be subscribed.

Cited in *Hendrix v. Academy of Music*, 73 Ga. 437; *Rockland, Mt. D. & S. S. B. Co. v. Sewall*, 78 Me. 167, 3 Atl. 181; *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *Livesey v. Omaha Hotel Co.* 5 Neb. 50; *Hale v. Sanborn*, 16 Neb. 1, 20 N. W. 97; *Hards v. Platte Valley Improv. Co.* 35 Neb. 263, 53 N. W. 73; *Littleton Mfg. Co. v. Parker*, 14 N. H. 543; *Contoocook Valley R. Co. v. Barker*, 32 N. H. 363; *New Hampshire C. R. Co. v. Johnson*, 30 N. H. 390, 64 A. D. 300; *Allman v. Havana, R. & E. R. Co.* 88 Ill. 521; *Temple v. Lemon*, 112 Ill. 51,—holding there is no liability on a subscription to stock of a corporation the amount of whose capital stock is fixed, until the whole amount of stock is subscribed; *Peoria & R. I. R. W. Co. v. Preston*, 5 Legal Gaz. 326, denying right of corporation to make assessment upon shares for general business purposes, until all the capital stock has been subscribed; *Peoria & R. I. R. Co. v. Preston*, 35 Iowa, 115, holding that where charter fixes amount of capital stock, no assessment can be made until full amount of stock is sub-

scribed, unless a contrary intention appears expressly or by implication, either from charter or contract of subscription; *Hoagland v. Cincinnati & Ft. W. R. Co.* 18 Ind. 452, holding under statute, right to sue for calls or instalments upon stock subscribed exists before full amount requisite to complete the enterprise is subscribed; *People's Ferry Co. v. Balch*, 8 Gray, 303; *Eaton v. Pacific Nat. Bank*, 144 Mass. 260, 10 N. E. 844,—on question of raising whole amount of capital stock being condition precedent to subscription; *Schenectady & S. Pl. Road Co. v. Thatcher*, 11 N. Y. 102; *Williamette Freighting Co. v. Stannus*, 4 Or. 261,—holding subscription to entire amount of stock not a condition precedent to legal corporate existence, and that stockholder may become liable before the whole amount of stock is subscribed; *Jones v. Dana*, 24 Barb. 394, as being a case involving an agreement entered into preparatory and preliminary to perfect incorporation and organization.

Cited in notes in 93 A. S. R. 378, on what subscriptions may be counted in determining whether entire capital stock has been subscribed; 93 A. S. R. 379, on subscription of entire capital stock as implied condition precedent to enforcement of subscriptions.

Distinguished in *Hamilton & D. Pl. Road Co. v. Rice*, 7 Barb. 157, where amount of capital stock was not made condition precedent by act of incorporation itself; *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311, where number of shares was not fixed by charter and vote of directors to close subscription books was in effect a vote fixing number of shares at number then subscribed.

Liability of subscribers to corporate stock.

Cited in reference note in 28 A. D. 516, on liability of subscribers to corporate stock.

19 AM. DEC. 368, CARSON v. WILSON, 11 N. J. L. 43.

Pleading justification or excuse for trespass.

Cited in *Lutlopp v. Heckmann*, 70 N. J. L. 272, 57 Atl. 1046; *Bruch v. Carter*, 32 N. J. L. 554,—holding matters of justification cannot be proved under general issue.

Cited in reference note in 25 A. D. 548, on necessity of specially pleading justification in trespass *quare clausum fregit*.

19 AM. DEC. 369, LIDDEL v. McVICKAR, 11 N. J. L. 44.

Settlement of accounts of personal representative.

Cited in reference note in 35 A. D. 516, on settlement of accounts of executors and administrators.

Correction of mistake in partial account of executor or administrator.

Cited in *Picot v. O'Fallon*, 35 Mo. 29, 86 A. D. 134; *Jackson v. Reynolds*, 39 N. J. Eq. 313,—holding Orphans' court has power to open a decree settling an intermediate account of trustees, in which it appears that excessive commissions were allowed.

Cited in note in 21 A. D. 599, on correction of mistake in administrator's account.

Annual or partial settlements as evidence in favor of executor or administrator.

Cited in *Harper v. Archer*, 9 Smedes & M. 71, holding they are only *prima facie* evidence.

Cited in notes in 39 A. D. 724, on how far settlement of administrator's account

is conclusive; 86 A. D. 143, 144, on effect as *res judicata* of annual settlements of executors or administrators.

Allowance of interest to executor or administrator upon advances.

Cited in *Furth v. Wyatt*, 17 Nev. 180, 30 Pac. 828; *Re Carpenter*, 146 Cal. 661, 80 Pac. 1072,—holding executor who has, without his fault, necessarily advanced money to an estate for its benefit, may be allowed such advances and interest thereon.

Exhaustion of primary funds before resorting to land for decedent's debts.

Cited in *Bray v. Neill*, 21 N. J. Eq. 343, holding it necessary that personal estate shall have been applied.

Cited in reference note in 44 A. S. R. 334, on rights of executors and administrators.

Time in which creditor must proceed to subject lands to payment of decedent's debts.

Cited in *Rosenthal v. Renick*, 44 Ill. 202; *Hohokus Twp. v. Erie R. Co.* 65 N. J. L. 353, 47 Atl. 566; *Ferguson v. Scott*, 49 Miss. 500,—holding there is no definite rule as to time; *State ex rel. Dana v. Probate Court*, 40 Minn. 296, 41 N. W. 1033, holding application made after lapse of ten years, the limit of ordinary judgment liens, properly refused; *Killough v. Hinton*, 54 Ark. 65, 26 A. S. R. 19, 14 S. W. 1092, holding delay of twenty years after grant of letters to sell lands set apart as dower is not unreasonable, where application was made as soon as widow died.

Cited in note in 26 A. S. R. 22, 25, on laches in applying for order to sell real property of decedent to pay debts.

Allowance of counsel fees to executor or administrator.

Cited in *Morgan v. Nelson*, 43 Ala. 586, holding an attorney at law who is an administrator is entitled to be allowed reasonable counsel fees in his own behalf; *Day v. Day*, 3 N. J. Eq. 549, holding executor undertaking to prove contested will, entitled to counsel fees.

Cited in note in 45 A. D. 117, on allowance of counsel fees by orphans' court.

How certiorari to orphans' court should be entitled.

Cited in *State, Taylor, Prosecutor, v. Hanford*, 11 N. J. L. 71, as being brought up upon a writ styled as between the person seeking redress and the executor or administrators.

19 AM. DEC. 386, COX v. BAIRD, 11 N. J. L. 105.

Evidence of declarations of decedent.

Cited in reference notes in 26 A. D. 61, on admissibility of declarations of testator; 26 A. S. R. 486, on declarations of testator as binding on executor; 27 A. S. R. 231, on declarations of deceased as to payment of rent.

19 AM. DEC. 388, PERRINE v. CHEESEMAN, 11 N. J. L. 174.

Variation of written contract by parol one.

Cited in *Bunce v. Beck*, 43 Mo. 266, holding subsequent parol contract, to be admissible, must be independent and not explanatory or contradictory of written one; *Thurston v. Ludwig*, 6 Ohio St. 1, 67 A. D. 328, holding subsequent parol agreement must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by parties that a refusal to carry

it out would operate as a fraud; *Long v. Hartwell*, 34 N. J. L. 116, holding substituted performance agreed upon by parol, actually and fully executed, may be set up in defense at law in a suit on a written contract within statute of frauds; *Cox v. Bennet*, 13 N. J. L. 165, holding evidence inadmissible of a parol agreement prior to or contemporary with a written instrument, which varies its terms.

Cited in note in 56 A. S. R. 661, 662, on subsequent parol agreement to vary writing.

— Writings not sealed.

Cited in *Rogers v. Atkinson*, 1 Ga. 12; *Waugenheim v. Graham*, 39 Cal. 169,—holding time for performance of a simple contract in writing may be waived, or extended by subsequent oral agreement; *Cummings v. Arnold*, 3 Met. 486, 37 A. D. 155, holding terms of a written contract for sale of goods may be varied by subsequent parol contract though the original falls within operation of statute of frauds.

Simple written contract as parol.

Cited in *Den ex dem. Mayberry v. Johnson*, 15 N. J. L. 116, on question of a written lease not under seal being parol lease at common law.

Parol evidence as to writing.

Cited in reference notes in 22 A. D. 212; 27 A. D. 295; 25 A. D. 213; 28 A. D. 259,—on parol evidence to vary written agreement; 1 A. D. 93, on parol agreement enlarging time of performance.

Cited in notes in 6 L.R.A. 33, on parol evidence of written instrument; 13 L.R.A. 622, on parol evidence to vary terms of written instrument.

Sufficiency of scroll as seal on money contracts.

Cited in reference notes in 57 A. S. R. 950, on sufficiency of seal; 36 A. D. 514, on sealing instrument and what sufficient.

Distinguished in *Flanagan v. Camden Mut. Ins. Co.* 25 N. J. L. 506, where the writing was a policy of insurance.

Necessity of consideration for unsealed contract.

Cited in note in 6 E. R. C. 9, on necessity of consideration to support action on contract not under seal.

19 AM. DEC. 392, BIRDSALL v. HEWLETT, 1 PAIGE, 32.

Legacies as equitable charge on estate.

Cited in *Warner v. Bullen*, 123 Ill. App. 138, holding devise on condition that devisee pay a stated sum to another, or provided he pay such sum, or subject to payment of such sum, or in consideration that devisee make such payment charges land devised unless will direct its payment otherwise; *Merritt v. Bucknam*, 78 Me. 504, 7 Atl. 383, holding devise upon condition that devisee pay annuity creates charge upon the estate and will be enforced in equity by sale; *Reynolds v. Bond*, 83 Ind. 36; *Pickering v. Pickering*, 15 N. H. 281; *Thurber v. Chambers*, 66 N. Y. 42; *Wheeler v. Lester*, 1 Bradf. 293; *Canal Bank v. Hudson*, 111 U. S. 66, 28 L. ed. 354, 4 Sup. Ct. Rep. 303,—holding under the devises in question legacies were charge upon estate; *Probate Judge v. Kimball*, 12 N. H. 165, holding a legacy not charged on land; *Fox v. Phelps*, 17 Wend. 393, holding direction that rents and profits of an estate be applied for a limited period to maintenance, support, and education of certain individuals, is a charge upon the land in the hands of the devisees; *Shreve v. Shreve*, 17 N. J. Eq. 487, on question of legacies being

charge on land; *Zerby v. Zerby*, 9 Watts, 234, on question of legacy being charge on land notwithstanding personal liability of devisee.

— **As dependent on acceptance of devise.**

Cited in *Perry v. Hale*, 44 N. H. 363, holding in equity estate is charged whether devisee accepts or not; *Dill v. Wisner*, 88 N. Y. 153 (affirming 23 Hun, 123), holding under devise property descended to heir at law and was chargeable with debts and legacies.

Condition or charge attached to legacy.

Cited in reference notes in 48 A. S. R. 768, on charging legacies upon devise; 21 A. D. 369; 26 A. D. 594,—on legacies chargeable upon land; 26 A. D. 75, on legacy charged on land and payable *in futuro*; 38 A. D. 773, as to when legacy is charge on land and remedy for recovery thereof.

Cited in 9 L.R.A. 167, on operation and effect of conditional devisee.

Personal liability of devisee of devise subject to charge or condition.

Cited in *Allport v. Jerrett*, 61 Hun, 447, 16 N. Y. Supp. 233, holding devisee must conform to conditions of the will; *Amherst College v. Smith*, 134 Mass. 543; *Spencer v. Spencer*, 4 Md. Ch. 456,—holding devisee who accepts devise, becomes personally liable for the legacy, and must pay it whether property devised be of less or greater value; *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004, holding acceptance of devise which provides that the devisee shall, out of the proceeds of the property devised, pay to another a certain annuity creates a liability on part of devisee merely to extent of property devised; *Martin v. Ballou*, 13 Barb. 119; *Mesick v. New*, 7 N. Y. 163,—on question of personal liability of devisee who accepts a devise.

Cited in reference notes in 43 A. D. 518, on personal liability of devisees of land subject to legacy; 80 A. D. 197, on liability of devisee who accepts devise conditioned upon paying legacies.

Postponement of payment preventing legacy from vesting.

Cited in *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Loder v. Hatfield*, 71 N. Y. 92 (affirming 4 Hun, 36, 6 Thomp. & C. 229); *Re Sebastian*, 4 Phila. 236, 17 Phila. Leg. Int. 388; *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302; *Fuller v. Winthrop*, 3 Allen, 51,—holding it does not prevent it when postponement is for benefit and convenience of estate; *McKinstry v. Sanders*, 2 Thomp. & C. 181, holding same where payment is deferred either on account of some interest in the subject being given to a person upon whose death the gift is to take effect, or some difficulty attending the collection of testator's effects; *Delavergne v. Dean*, 45 How. Pr. 206, holding payment deferred by reason of situation and circumstances of legatee, and not for benefit and convenience of estate prevents vesting; *Garland v. Smiley*, 51 N. J. Eq. 198, 26 Atl. 164, holding it a general rule that legacies charged upon real estate, and payable at a future day, are not vested, and become lapsed if legatee dies before time of payment arrives; *Larocque v. Clark*, 1 Redf. 469; *Saxton's Estate*, 1 Tucker, 32,—holding legacies consisting of personal property or charged upon personal estate, and payable in future, vest from death of testator, and are not devested by death of legatee, but belong to his representatives; *Barker v. Woods*, 1 Sandf. Ch. 129, holding children's interests vested where testator directed his executors to invest a fund, for his wife, and, after her decease, gave the principal to his children equally; *Re Bogart*, 28 Hun, 466, holding same as to the son where testator gave to his wife the use of all property, and, at her death, to his son, "his heirs or assigns" a certain sum of

money; *Bartholomew v. Merriam*, 55 Hun, 280, 8 N. Y. Supp. 179, holding under construction of will, legacy, vested at death of testator.

Cited in reference notes in 37 A. D. 461, as to when vested legacies are given by will; 78 A. D. 235, on vesting of legacies without performance of conditions; 10 A. S. R. 463, on right to property devised or bequeathed to person dead when will was made or dying before testator.

Cited in note in 9 L.R.A. 211, on distinction between vested and contingent remainders.

Lapsed legacies.

Cited in reference notes in 20 A. D. 423; 39 A. D. 582,—on lapsed legacies.

From what time legacy bears interest.

Cited in *Loring v. Woodward*, 41 N. H. 391, holding interest allowed on legacies, generally, from the time of payment limited in the will; *Lawrence v. Brinkerhoff*, 2 N. Y. Leg. Obs. 122, holding that an annuity bore interest from each semi-annual arrear; *Wheeler v. Ruthven*, 2 Redf. 491, holding interest on legacies under will allowable only from time assets come into executor's hands by death of life tenant, and not, from a year after testator's death; *Esmond v. Brown*, 18 R. I. 48, 25 Atl. 652, holding fact that legatee is in no position to receive the money does not prevent interest from running.

Cited in reference note in 47 A. S. R. 893, on computation of interest on legacies.

Estate primarily liable for legacies.

Cited in *Perry v. Hale*, 44 N. H. 363, on question of personal estate being primarily liable.

Enforcement of legacy charged on land.

Cited in *Hutchins v. Hutchins*, 18 Misc. 633, 42 N. Y. Supp. 601, on question of remedies for enforcing legacy.

19 AM. DEC. 395, RE HOWE, 1 PAIGE, 124.

Owner of equity of redemption as necessary party to suit to foreclose.

Cited in *Mickles v. Dillaye*, 15 Hun, 296, on whether a foreclosure by advertisement, in which no notice is served upon the owner of the equity of redemption, is not a mere nullity as to all parties.

Nature of judgment lien.

Cited in *Vaughn v. Schmalse*, 10 Mont. 186, 10 L.R.A. 411, 25 Pac. 102; *Parks v. Jackson*, 11 Wend. 442, 25 A. D. 656; *Watkins v. Wassell*, 15 Ark. 73,—holding it is not a specific but a general lien; *Lane v. Ludlow*, 2 Paine, 591, Fed. Cas. No. 8,052, holding it transfers no title, but is merely a lien on land of debtor. Cited in reference note in 32 A. D. 683, on relation back of lien of judgment to beginning of term.

Cited in note in 31 A. D. 256, as to what judgment lien attaches.

Equitable relief from judgment lien.

Cited in *Morris v. Mowatt*, 2 Paige, 586, 22 A. D. 661, holding lien of judgment may be removed by chancery, where the judgment debtor holds legal estate merely as naked trustee, or where there is a prior subsisting equitable claim against premises; *Nailor v. Fisk*, 27 Miss. 256, on question of equitable rights of third persons being protected against subsequent judgment against debtor.

Validity of mortgage of after-acquired property.

Cited in *Sillers v. Lester*, 48 Miss. 513; *Seymour v. Canandaigua & N. F. R. Co.*

14 How. Pr. 531, 25 Barb. 284; *Johnson v. Donohue*, 113 Tenn. 446, 83 S. W. 360; *Dupree v. McClanahan*, 1 Tex. App. Civ. Cas. (White & W.) 314; *Brett v. Carter*, 2 Low. Dec. 458, Fed. Cas. No. 1,844,—holding it valid in equity; *Everman v. Robb*, 52 Miss. 653, 24 A. R. 682, holding lien given by lessee on annual crops to be grown during term as security for his rent, valid; *Kellogg v. Wood*, 4 Paige, 578, on the inurement of a mortgagor's subsequent title to the mortgage and his privies; *Otis v. Sill*, 8 Barb. 102, holding at law grant or mortgage of property not then in existence, or not belonging to the mortgagors, but to be acquired *in futuro*, is void, and, if valid in equity, it is only valid as a contract to assign when the property shall be acquired.

Priority of liens.

Cited in *Dunham v. Cincinnati, P. & C. R. Co.* 1 Wall. 254, 17 L. ed. 584; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546,—holding recorded mortgage, given by a railroad company on its roadbed and other property creates a lien whose priority cannot be displaced thereafter either directly by a mortgage given by company, or indirectly by contract between company and a third party for the erection of buildings or other works of original construction; *Payne v. Wilson*, 11 Hun, 302, holding agreement to give mortgage had priority over subsequent mechanics' lien.

— Between judgment lien and equities.

Cited in *Peet v. Beers*, 4 Ind. 46; *Jenkins v. Bodley*, *Smedes & M.* Ch. 338; *Dunlap v. Burnett*, 5 *Smedes & M.* 702, 45 A. D. 269; *Walker v. Gilbert*, *Freem. Ch.* (Miss.) 85; *Story v. Black*, 5 Mont. 26, 51 A. R. 37, 1 Pac. 1; *Filley v. Duncan*, 1 Neb. 134, 93 A. D. 337; *White v. Carpenter*, 2 Paige, 217; *Neimcewicz v. Gahn*, 3 Paige, 614; *Keirsted v. Avery*, 4 Paige, 9; *Arnold v. Patrick*, 6 Paige, 310; *Hull v. Spratt*, 1 Hun, 298, 3 Thomp. & C. 718; *Brooks v. Wilson*, 53 Hun, 173, 6 N. Y. Supp. 116; *Crisfield v. Murdock*, 55 Hun, 143, 8 N. Y. Supp. 593; *Crocker v. Lewis*, 79 Hun, 400, 29 N. Y. Supp. 798; *Stymets v. Brooks*, 10 Wend. 206; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Moyer v. Hinman*, 13 N. Y. 180; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562,—holding general lien of judgment creditor is subject to all equities which existed against the land in favor of third persons at time of the recovery of the judgment; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134, holding lien of judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person; *Robinson v. Williams*, 22 N. Y. 380; *Cayce v. Stovall*, 50 Miss. 396,—holding judgment of subsequent date subordinate to equitable mortgage; *McArthur v. Scott*, 31 Fed. 521, holding lien of a mortgage executed by one cotenant prior to institution of suit for partition and for recovery of rents and profits is superior to the claim for rents and profits decreed in such suit; *Howard v. Simmons*, 43 Miss. 75, holding contract for agricultural lien under statute can only take effect as against a prior judgment creditor, from and after the date of the enrolment of such contract; *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823, holding holder of an unrecorded equitable charge upon land given for a full consideration moving at the date of its creation is entitled to priority over a subsequent legal mortgage given to secure a prior indebtedness; *Welton v. Tizzard*, 15 Iowa, 495, holding lien of subsequent judgment creditor not paramount to lien or equity of prior mortgagee as to lands intended to be mortgaged, but which, by accident or mistake, were misdescribed; *Siemon v. Schurck*, 29 N. Y. 598; *Sandford v. McLean*, 3 Paige, 117, 23 A. D.

773,—holding in equity purchaser under a judgment takes land subject to all equitable claims prior in point of time to the judgment, of which he had notice at or prior to sheriff's sale; *Flagler v. Malloy*, 30 N. Y. S. R. 612, 9 N. Y. Supp. 573; *National Bank v. Lanier*, 7 Hun, 623,—holding defective mortgage given to secure an antecedent debt can be sustained in equity so as to make it a prior lien to subsequent judgments; *Brown v. Bigley*, 3 Tenn. Ch. 618, holding lien of attorney for professional services entitled to priority over lien of a judgment creditor of his client, acquired by subsequent decree of the chancery court, where bill to enforce attorney's lien is filed before sale under decree in chancery is confirmed; *Dwight v. Newell*, 3 N. Y. 185, holding an equitable lien created to secure an antecedent indebtedness is not entitled to preference over a lien by judgment, where both attach upon land at same time; *Banning v. Edes*, 6 Minn. 402, Gil. 270, holding where one conveys land, and, at the same time, takes back a mortgage for part of the purchase money, the lien of the mortgage takes precedence of the lien of prior judgment against mortgagor; *Cook v. Kraft*, 41 How. Pr. 279, 60 Barb. 409, 3 Lans. 512, holding purchaser of real estate or lease, which, at the time of purchase, is subject to lien of a judgment, cannot claim improvements subsequently made by him, although without knowledge of the judgment, to be exempt from the lien; *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221, holding equity of each partner to have partnership land applied primarily to payment of firm debts is superior to lien of individual judgment creditors who have levied thereon; *Hulett v. Whipple*, 58 Barb. 224, holding judgment creditor without notice, is entitled to priority over unrecorded lien of vendor for part of the purchase money; *Hoagland v. Latourette*, 2 N. J. Eq. 254, holding articles made for valuable consideration and money paid will in equity bind estate and prevail against any intermediate judgment creditor, but the consideration paid must be somewhat adequate to the thing purchased; *Simpson v. Niles*, 1 Ind. 196, Smith (Ind.) 104, holding vendor's estate in land, contracted to be sold, but not conveyed, when a portion of the purchase money is unpaid and more than a mere trust to convey remains, is subject to the lien of judgments obtained against such vendor by third parties; *Sweet v. Jacocks*, 6 Paige, 355, 31 A. D. 252, on question of legal liens of judgment against father prevailing over equitable claims of his illegitimate children; *Snyder v. Martin*, 17 W. Va. 276, 41 A. R. 670, on question of priority of vendor's lien over subsequent judgment.

Cited in reference note in 43 A. D. 527, on priority among judgment liens.

Equitable mortgages and liens.

Cited in *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Watkins v. Vrooman*, 51 Hun, 175, 5 N. Y. Supp. 172; *Payne v. Wilson*, 74 N. Y. 348; *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 900; *Nevada Nickel Syndicate v. National Nickel Co.* 96 Fed. 133,—holding an equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage which fails for want of some solemnity is valid in equity; *Daggett v. Rankin*, 31 Cal. 321; *Raconillat v. Samsevain*, 32 Cal. 376; *Carter v. Holman*, 60 Mo. 498; *Burdick v. Jackson*, 7 Hun, 488; *Hewitt v. Northup*, 9 Hun, 543; *Woarms v. Hammond*, 5 App. D. C. 338,—holding in equity an agreement in writing for a mortgage is a valid contract fixing a specific lien on the property; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614, holding agreement to give mortgage valid lien and superior to junior judgment; *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494, holding an equitable mortgage by deposit of title deeds may be created to se-

cure the debt of a third person; *Donald v. Hewitt*, 33 Ala. 534, 73 A. D. 431, holding contract to create a lien upon boat, which was to exist independent of possession, constituted an equitable mortgage; *Chase v. Peck*, 21 N. Y. 581, holding agreement to support grantor, an equitable mortgage, and prior to subsequent judgment; *Smith v. Smith*, 51 Hun, 164, 4 N. Y. Supp. 669, holding parol agreement, by owner of a lot that, if a person should build thereon he might sell the building, gives such person a lien for amount expended on the land; *Dempsey v. McKenna*, 18 App. Div. 200, 45 N. Y. Supp. 973, holding that a present valuable consideration as distinguished from a past indebtedness is necessary in order to make the specific performance of an agreement to give a mortgage enforceable in equity; *Wickman v. Robinson*, 14 Wis. 494, 80 A. D. 789, holding lien of vendee of land who has paid part of purchase price, being recorded, is enforceable against purchaser of land; *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475, on question of executory contract being equitable lien; *Goulding v. Bunster*, 9 Wis. 513, on question of what constitutes equitable mortgage or lien.

Cited in notes in 4 L.R.A. 248, as to how equitable lien may be created; 18 E. R. C. 24, on agreement by which property is charged as security for debt as constituting equitable mortgage.

Bona fide purchasers.

Cited in *Roberts v. Corbin*, 26 Iowa, 315, 96 A. D. 146; *Chase v. Chapin*, 130 Mass. 128; *Shirley v. Congress Steam Sugar Refinery*, 2 Edw. Ch. 505; *Schiefelin v. Hawkins*, 1 Daly, 289, 14 Abb. Pr. 112; *Leger v. Bonnaffe*, 2 Barb. 475; *Sieman v. Austin*, 33 Barb. 9; *Sheldon v. Stevens*, 32 Misc. 314, 66 N. Y. Supp. 796; *Maas v. Goodman*, 2 Hilt. 275; *People v. Bank of Dansville*, 39 Hun. 187; *Smith v. Felton*, 43 N. Y. 419; *Pond v. Campbell*, 56 Vt. 674; *Palmer v. Thayer*, 28 Conn. 237,—holding trustee in insolvency or assignee for creditor takes the property subject to the equities which affected the debtor; *Slade v. Van Vechten*, 11 Paige, 21, holding general assignee for benefit of creditors is not bona fide purchaser within meaning of statute which protects title of a bona fide purchase made before actual levy; *Swift v. Thompson*, 9 Conn. 63, on question of difference between assignees for benefit of creditors and bona fide holders; *Taylor v. Baldwin*, 10 Barb. 626, on the question as to whether assignee for creditors is a bona fide holder.

Cited in reference notes in 33 A. D. 740; 15 A. S. R. 583,—on assignee for creditors as a bona fide purchaser.

Cited in note in 21 A. D. 732, on assignee of bankrupt, and voluntary assignee for creditors as bona fide purchasers.

—Mortgagees or takers for pre-existing debt.

Cited in *King v. Wilcomb*, 7 Barb. 263; *Tallman v. Farley*, 1 Barb. 280,—as to mortgagees, who have advanced money on credit of the land being bona fide purchasers; *Wood v. Robinson*, 22 N. Y. 564; *Fassett v. Smith*, 23 N. Y. 252,—holding one who takes mortgage to secure pre-existing indebtedness not bona fide holder; *Ray v. Birdseye*, 5 Denio, 619, holding one to whom property is assigned in payment of a pre-existing debt is not "purchaser in good faith" under above statute; *Anderson v. Taylor*, 1 Tenn. Ch. 436, holding one who takes notes in part payment of, or collateral security for, a pre-existing debt, is not a bona fide holder; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046, holding one taking mortgage in payment of pre-existing debt not a bona fide holder.

Validity of mortgage by insolvent debtor.

Cited in *Allis v. Jones*, 45 Fed. 148, holding mortgage given for a bona fide debt

by debtor in failing circumstances, but containing no trust, secret or expressed, in favor of anyone else, though in effect a preference, is valid.

Validity of unrecorded conveyance against subsequent purchaser with notice.

Cited in *Neal v. Kerrs*, 4 Ga. 161, holding it valid; *Dixon v. Doe*, 1 Smedes & M. 70, holding notice is equivalent to registration as to all persons.

Authority of equity to correct mistake in mortgage.

Cited in *White v. Wilson*, 6 Blackf. 448, 39 A. D. 437, holding court of equity had authority to correct mistake in mortgage and free tract thus omitted from subsequent judgment; *Wall v. Arrington*, 13 Ga. 88, holding equity had authority to correct description of land in mortgage.

Equities of third parties against assignee of judgment.

Cited in *Burtis v. Cook*, 16 Iowa, 194, holding that he takes it charged with all the equities which could be asserted against it in hands of assignor.

Cited in reference notes in 82 A. D. 612, on equities to which judgment lien is subject; 52 A. D. 190, on subordination of lien of judgment to pre-existing equities; 83 A. D. 329, on rights of mortgagee of undivided interest in property held in cotenancy after partition.

Cited in notes in 23 A. D. 116, on assignees taking subject to all pre-existing equities against assignor; 40 A. D. 460, on effect of assignment upon equitable claims.

Right of set-off.

Cited in note in 2 L.R.A. 273, on right of debtor of insolvent bank to set off demand.

19 AM. DEC. 399, CANDLER v. PETTIT, 1 PAIGE, 168.

Propriety of supplemental pleadings.

Cited in *New York Security & T. Co. v. Lincoln Street R. Co.* 74 Fed. 67; *Westinghouse Air Brake Co. v. Christensen Engineering Co.* 126 Fed. 764; *Patten v. Stewart*, 24 Ind. 332; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Stilwell v. Van Epps*, 1 Paige, 615; *Butchers & Drovers Bank v. Willis*, 1 Edw. Ch. 645; *Mallon v. Mallon*, 11 Pa. Dist. R. 456, 27 Pa. Co. Ct. 445; *Mitchesonn v. Harlan*, 3 Phila. 385, 16 Phila. Leg. Int. 148; *Orton v. Noonan*, 29 Wis. 541; *Putney v. Whitmire*, 66 Fed. 385,—holding fatally defective original bill, cannot be sustained by filing a supplemental bill founded upon matters taking place after the filing of the original bill; *Henderson v. 300 Tons of Iron Ore*, 38 Fed. 36, holding same as to a libel fatally defective but a supplemental libel may, for cause, be allowed to stand as an original libel as of that date; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787, holding granting of leave to file a supplemental bill or make an amendment is discretionary with trial court; *Miller v. Cook*, 135 Ill. 190, 10 L.R.A. 292, 25 N. E. 756; *Bostwick v. Menck*, 8 Abb. Pr. N. S. 169; *Latham v. Richards*, 15 Hun, 129; *Hasbrouck v. Shuster*, 4 Barb. 285; *Chicago Grain Door Co. v. Chicago, B. & Q. R. Co.* 137 Fed. 101,—holding if original bill entitles complainant to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out new matter by a supplemental bill; *Robbins v. Wells*, 26 How. Pr. 15, 18 Abb. Pr. 191, 1 Robt. 666, holding it proper to refuse a decree that plaintiff, a representative, be admitted to prosecute an original action which, on the face of the pleadings, appeared fatally defective;

Butler v. Cunningham, 1 Barb. 85, defining supplemental bill as distinguished from supplemental bill in the nature of an original bill.

Cited in reference notes in 39 A. S. R. 467, on supplemental pleading; 29 A. D. 723; 42 A. D. 587; 51 A. D. 221,—as to when supplemental bill may be filed; 61 A. D. 380, on nature of supplemental bills and when they are allowed.

Cited in note in 10 L.R.A. 299, on propriety of supplemental bill in equity where original bill defective.

Amendments.

Cited in *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151, holding original bill cannot be amended by anything which arose subsequent to commencement of the suit; it can only be done by supplemental bill; *French v. Hay* (*French v. Stewart*), 22 Wall. 238, 22 L. ed. 854, holding where final decree covering the entire existing cause subsisted further relief sought could not be reached by amendment but, if at all, by supplemental bill; *Bank of Kentucky v. Schuylkill Bank*, 1 Para. Sel. Eq. Cas. 180, holding as to new events or new matters which occurred since filing the original bill, a supplemental bill is the proper mode of bringing them before the court, for generally such facts cannot be introduced by amendment; *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 334, holding new matter accruing since bill was filed cannot be incorporated into the bill of revivor by amendment; *Allen v. Davenport*, 115 Iowa, 20, 87 N. W. 743, holding abuse of discretion to permit amendment under Code where such amendment introduced a new and distinct cause of action, which might as well have been maintained in a separate action.

Cited in reference note in 45 A. D. 307, as to when amendments to defective bill are proper.

When writ of ne exeat lies.

Cited in note in 7 L.R.A. 397, as to when writ of ne exeat will issue.

Retaining jurisdiction for all purposes.

Cited in reference notes in 64 A. D. 105, on granting full relief in equity after jurisdiction acquired; 33 A. D. 197, on retention of case in equity until entire matter is disposed of.

Cited in note in 51 A. D. 589, on jurisdiction having once attached extending to entire controversy.

Matters pleadable supplementally.

Cited in *Riddle v. Motley*, 1 Lea, 468, holding new events or new matters which do not change the parties before the court, or their rights and interests, but merely refer to and support rights and interests already in the bill, may be brought before the court by a supplemental bill; *Kelly v. Galbraith*, 87 Ill. App. 63, holding new matter arising after commencement of suit must be brought before the court by supplemental bill, if such new matter is to be the basis of distinct relief; *Allen v. Taylor*, 3 N. J. Eq. 435, 29 A. D. 721, holding a strictly supplemental bill is always founded on facts that have occurred since the filing of the original bill; *Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 486, holding supplemental bill proper to impeach as fraudulent judgments unknown at time of filing bill; *Edgar v. Clevenger*, 3 N. J. Eq. 258, holding general creditor having filed his bill for relief and having subsequently obtained judgment and execution at law, is not entitled to relief upon his original bill, but a supplemental bill should be filed stating the facts which entitle him to relief; *Swedish American Nat. Bank v. Dickinson Co.* 6 N. D. 222, 49 L.R.A. 285, 69 N. W. 455, holding facts embodied in a supplemental complaint under the Code must relate to cause of action set forth in the original complaint and must be in aid thereof; *Jaques v.*

Hall, 3 Gray, 194, holding plaintiff in bill to enforce a trust may, by supplemental bill, enforce rights acquired by him by assignment from coparties since the original bill was filed; *McLane v. Piaggio*, 24 Fla. 71, 3 So. 823, holding in a bill to foreclose a mortgage, notes that may become due should not be included in it unless a supplemental bill is filed or the original contains proper averments; *Winn v. Albert*, 2 Md. Ch. 42, holding plaintiffs who claimed title as grantee in a deed of trust of an insolvent debtor, and were afterwards appointed trustees for same debtor under the insolvent laws, had a right to introduce their new title as trustees by a supplemental bill; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4, holding defamatory words uttered by the defendant after commencement of an action for slander constitute a distinct and separate right of action, and cannot be brought into the original action by means of a supplemental complaint; *Leach v. Germania Bldg. Asso.* 102 Iowa, 125, 70 N. W. 1090, on ordinary use of supplemental petition.

Plea or demurrer to defective bill.

Cited in *Edgar v. Clevenger*, 3 N. J. Eq. 464, holding original bill, although defective, should be demurred to or answered.

Power of equity to aid creditors in collection of judgments.

Cited in *Wright v. Merchants' Nat. Bank*, 1 Flipp. 568, Fed. Cas. No. 18,084, holding equity has power to appoint receiver upon application of judgment creditor; *Uhl v. Dillon*, 10 Md. 500, 69 A. D. 172, on when receiver will be appointed and injunction issued restraining debtor from disposing of his property; *Durant v. Albany County*, 26 Wend. 66, on jurisdiction of court of equity to enforce collection of judgments out of equitable assets; *Steinmetz v. Witmer*, 1 Pearson (Pa.) 524, on question of equity enjoining commission of waste by debtor.

Cited in reference notes in 66 A. D. 658, on injunction against debtor's disposing of property; 34 A. D. 368, on necessity of judgment creditor showing exhaustion of legal remedies before resorting to equity; 44 A. D. 722, on necessity of creditor having judgment and execution unsatisfied to maintain bill to reach debtor's equitable assets or property fraudulently transferred.

Cited in notes in 63 L.R.A. 683, on equitable remedy to subject choses in action to judgment after return of no property found; 63 L.R.A. 687, on enactment of statute evidencing jurisdiction to subject choses in action to judgment after return of no property found.

19 AM. DEC. 402, CLARK v. FISHER, 1 PAIGE, 171, Later case involving same will in 1 Edw. Ch. 266.

Testamentary capacity.

Cited in *Kinne v. Johnson*, 60 Barb. 69, holding testator must have sufficient mind to comprehend the nature and effect of the act he is performing, the relation he holds to the various objects of his bounty, and be capable of making a rational selection among them; *Harvey v. Sullens*, 56 Mo. 372, holding law does not require any particular degree of understanding but simply sound mind to manage his own affairs and to know intelligently what disposition is made of them; *Campbell v. Campbell*, 130 Ill. 466, 6 L.R.A. 167, 22 N. E. 620, holding competency to make a will does not exist unless the party making it has reason and understanding sufficient to comprehend the act; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333, holding instruction that a person of unsound mind, all mental defects being included in the word "unsound," is incapable of making a valid will, whether or not such unsoundness affected the disposition of the property, is er-

roneous; *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314,—holding testator must be shown to have had at the time of making will sufficient active memory to recall his family and his property, and to form some rational judgment in regards to claims of one and disposition of the other; *Delafield v. Parish*, 25 N. Y. 9, 1 Redf. 1, holding question is, had testator capacity to make a will, not had he the capacity to make the will produced; *Re Forman*, 54 Barb. 274, holding question is, had testator sufficiently sound mind to make the will in question; *Alston v. Jones*, 17 Barb. 276, holding under facts in case testator incapable of making a will; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047,—on question of partial unsoundness of mind; *Nexsen v. Nexsen*, 3 Abb. App. Dec. 360, on necessity of testator having disposing memory; *Holden v. Meadows*, 31 Wis. 284, holding testator shown not to have sufficient mental capacity to execute will; *Nexsen v. Nexsen*, 2 Keyes, 229 (dissenting opinion), as to testamentary capacity of deceased.

Cited in reference notes in 52 A. D. 60; 33 A. S. R. 269,—on testamentary capacity; 25 A. D. 301; 61 A. D. 84,—on what constitutes testamentary capacity; 51 A. D. 262, on insanity affecting testamentary capacity; 44 A. S. R. 687, on effect of partial insanity on testamentary capacity; 63 A. S. R. 577, on insane delusions affecting testamentary capacity.

Cited in note in 1 L.R.A. 161, on capacity to make will.

Mental capacity to contract.

Cited in *Dennett v. Dennett*, 44 N. H. 531, 84 A. D. 97, holding mere weakness of mind does not disable a man to convey property if the capacity remains to see things in their true relations and to form correct conclusions; *Maddox v. Simmons*, 31 Ga. 512, holding mere weakness of mind, if he personally be legally *compos mentis*, is no ground for setting aside a contract.

Character of will as evidence of insanity.

Cited in *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *French v. French*, 215 Ill. 470, 74 N. E. 403,—holding it proper to take into consideration the reasonableness of the will in reference to the amount of his property and situation of his relatives; *Evans v. Arnold*, 52 Ga. 169, holding it error to charge that if testatrix was a monomaniac as to excluded children, and that her anxiety to provide for her idiot child was natural and just, it did not concern them as to whether the mode she took to do it was just and proper; *Mullen v. McKeon*, 25 R. I. 305, 55 Atl. 747, holding as to will unreasonable in its provisions and inconsistent with duties of testator with reference to his property and family, those claiming under it must give some reasonable explanation of the will or, at least, show that it is not the offspring of mental defect; *Colhoun v. Jones*, 2 Redf. 34, holding that court will take into consideration the fact, though not controlling, that the will disinherits all testator's relatives, and gives his estate to a stranger.

Cited in reference note in 18 A. S. R. 507, on will as proof of testamentary capacity.

Burden of proof of capacity to make will procured by beneficiary thereof.

Cited in *Re Welsh*, 7 N. Y. Leg. Obs. 153, 1 Redf. 238, holding mere impaired capacity throws upon the party seeking to benefit by an instrument made under it, the burden of establishing understanding and volition, particularly when prepared by an interested party; *McDaniel v. Crosby*, 19 Ark. 533, holding where will is written by the party to be benefited the party seeking to establish the will must show that testator had sufficient mental capacity.

Cited in reference notes in 2 A. S. R. 532, on burden of proof of execution of will and capacity of testator; 39 A. D. 592, on necessity for proof of testamentary capacity by parties claiming under will; 47 A. D. 422, on burden of proof where general mental unsoundness of testator before making will is shown.

Cited in note in 71 A. D. 130, on will written by beneficiary.

Admissibility and weight of opinion evidence.

Cited in *Culver v. Haslam*, 7 Barb. 314; *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843,—holding general rule is witnesses must testify to facts and not to opinions; *Chicago v. McGiven*, 78 Ill. 347, holding it should not be received where all the facts upon which such opinion is founded can be ascertained and made intelligible to the court and jury; *Illinois C. R. Co. v. Smith*, 208 Ill. 608, 70 N. E. 628, holding it error to permit physicians to give opinions that foot was injured, by being caught between two surfaces instead of allowing them to describe the injury or limiting their opinions to what might have caused it; *Norman v. Wells*, 17 Wend. 136, holding opinion of witness as to probable amount of damages not admissible.

Cited in reference notes in 70 A. S. R. 149, on opinions of witnesses; 58 A. D. 305, on opinions of witnesses as evidence; 48 A. D. 73, on evidence as to opinions or belief of witnesses; 22 A. D. 574; 53 A. D. 101,—on admissibility of opinions of witnesses; 42 A. S. R. 473, on weight given expert testimony.

Cited in notes in 66 A. D. 384, on expert evidence in insurance cases; 59 A. R. 181, on safety of highway as proper subject for opinion evidence; 42 L.R.A. 758, on weight of testimony of experts as affected by competency, opportunity, etc.

—As to sanity.

Cited in *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529, holding evidence of nonprofessional witnesses admissible on question of testator's sanity; *Dewitt v. Barley*, 9 N. Y. 371 (dissenting opinion), on question on admissibility of opinions as to soundness of mind of testator.

Cited in reference note in 90 A. D. 689, on competency of opinions of nonprofessional witnesses as to sanity or testamentary capacity of testator.

Cited in notes in 39 L.R.A. 305, on expert opinions as to sanity or insanity; 21 A. D. 84, on noneexpert testimony as to mental capacity; 39 L.R.A. 331, on weight of expert opinion as to sanity or insanity as affected by character, bias, and nature of the question.

Presumption as to sanity.

Cited in *Cornwell v. Riker*, 2 Dem. 354, holding fact of senility raises no presumption of existence of dementia.

Presumption as to continuance of insanity previously existing.

Cited in *Chandler v. Barrett*, 21 La. Ann. 58, 99 A. D. 701; *Bey's Succession*, 46 La. Ann. 773, 24 L.R.A. 577, 15 So. 297,—holding presumption of sanity does not cease because testator experienced some transitory derangement at a time anterior to the testament; *Shaw's Will*, 2 Redf. 107, holding where delusions are shown before the execution of the instrument, naturally affecting its provisions, the burden is upon proponents to show that they did not exist when the instrument was executed; *Kenworth v. Williams*, 5 Ind. 375; *Godden v. Burke*, 35 La. Ann. 160; *Pike v. Pike*, 104 Ala. 642, 16 So. 689,—holding where general insanity is shown it is presumed to continue, and burden of removing the presumption devolves on party affirming the validity of an act done at time insanity is supposed to have existed.

Cited in note in 35 L.R.A. 118, 119, on presumption of continuance of habitual insanity.

Prior acts as evidence of insanity.

Cited in *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279, holding testimony relating to acts and conduct of testatrix in court, prior to her death, is admissible as bearing upon the question of sanity.

Undue influence.

Cited in *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Kempsey v. Maginnis*, 2 Mich. N. P. 49,—holding improper and undue influence is the dominion acquired over the mind of another which prevents the exercise of discretion and destroys free will; *Re Hoge*, 2 Brewst. (Pa.) 450, holding neither advice nor argument nor persuasion nor ascendancy gained by affection can avoid a will made freely; *Lake v. Ranney*, 33 Barb. 49, holding fiduciary relation of beneficiary and agency in drawing the will created presumption of fraud and undue influence; *Davis v. Calvert*, 5 Gill. & J. 269, 25 A. D. 282, as setting aside will for undue influence; *Ingersoll v. Roe*, 65 Barb. 346; *Mairs v. Freeman*, 3 Redf. 181; *Clarke v. Sawyer*, 2 N. Y. 498 (affirming 3 Sandf. Ch. 351), on question of setting aside will for undue influence; *Howell v. Earp*, 21 Hun, 393, on undue influence.

Cited in reference notes in 34 A. D. 354; 49 A. D. 633,—on what constitutes undue influence; 25 A. D. 301, as to when importunity and undue influence invalidate will.

Evidence of undue influence.

Cited in *Re Stewart*, 30 N. Y. S. R. 438, 10 N. Y. Supp. 744, holding undue influence may be shown by all facts and circumstances surrounding testator; *Canfield v. Fairbanks*, 63 Barb. 461, upon admissibility of evidence upon the question of the validity of deed as against the allegation of undue influence.

Cited in note in 31 A. S. R. 686, on presumption as to undue influence in execution of will.

—Inequality as.

Cited in *Pooler v. Cristman*, 45 Ill. App. 334 (dissenting opinion), on inequality of disposition of property as evidence of undue influence.

Jurisdiction of equity in regard to wills.

Cited in *Heyer v. Burger*, Hoffm. Ch. 1, holding it has no original jurisdiction to try validity of wills of personal estate; *Burger v. Hill*, 1 Bradf. 360, holding it has no jurisdiction to reform a will after it is admitted to probate on ground of mistake or fraud.

Cited in note in 22 A. D. 652, on jurisdiction of equity court in will cases.

Jurisdiction of surrogate's court.

Cited in *Smith v. Hilton*, 50 Hun, 236, 2 N. Y. Supp. 820, holding that questions of fraud and undue influence in execution of will must first be litigated in surrogate's court.

Conclusiveness of probate decree.

Cited in *Brown v. Brown*, 14 Lea, 253, 52 A. R. 169, holding probate of a will of personality is conclusive if court had jurisdiction as to its testamentary character the capacity of the testator, and as to all questions of fraud, imposition, and undue influence, until set aside in mode prescribed by law.

Cited in notes in 21 L.R.A. 682, on conclusiveness of probate court decree as *res judicata*; 21 L.R.A. 686, on conclusiveness of probate decree in chancery.

19 AM. DEC. 409, FULTON v. ROSEVELT, 1 PAIGE, 178.**Suits by and against guardians ad litem and next friends.**

Cited in *Barwick v. Rackley*, 45 Ala. 215, holding court will order proceedings stayed where suit prosecuted by next friend is not for benefit of infant; *Thomas v. Williams*, 9 Fla. 289, holding infant by his next friend may call his guardian to account; *Chudleigh v. Chicago*, R. I. & P. R. Co. 51 Ill. App. 491, holding knowledge of suit by infant is not necessary; *Heller v. Heller*, Code Rep. N. S. 309, 6 How. Pr. 194, holding under Code married woman must prosecute or defend at suit for absolute divorce by her next friend; *Towner v. Towner*, 7 How. Pr. 387, holding if *feme covert* plaintiff is not an infant, or a lunatic, no order for leave to sue by next friend, or for appointment of next friend, is necessary; *Callahan v. New York*, C. & H. R. R. Co. 99 App. Div. 56, 90 N. Y. Supp. 657, on question of an action being maintained in name of infant without his knowledge or consent.

Cited in reference notes in 38 A. D. 169, on suits by or against infants; 40 A. D. 593, on infant suing by *prochein ami*; 21 A. D. 73; 34 A. D. 692,—on suit by *prochein ami* for infant.

— Reference to ascertain infant's interest.

Cited in *Idley v. Bowen*, 11 Wend. 227 (affirming 1 Edw. Ch. 148), holding chancery will, on its own motion, or upon petition, direct a reference to ascertain whether a suit prosecuted for an infant by a next friend is in the interest of the infant and whether the infant is properly placed in the case; *Middleditch v. Williams*, 47 N. J. Eq. 585, 21 Atl. 290, on question of court referring question of fitness of next friend of infant to master to inquire and report; *Cooper's Estate*, 2 How. Pr. N. S. 38, 3 Dem. 362, on question of court's watchfulness over interest of infants; *Leazar v. Cota*, 43 N. H. 81, on question of authority of court to remove next friend of infant.

— Responsibility for costs.

Cited in *Robertson v. Robertson*, 3 Paige, 387, holding next friend must be a responsible person or give security for costs; *Cohen v. Shyer*, 1 Tenn. Ch. 192, holding a person should not be permitted to file a bill as next friend without giving security for costs; *Cook v. Rawdon*, 6 How. Pr. 233, holding guardian of infant plaintiff should be a responsible person, for he is liable for the costs; *Wise v. Commercial Ins. Co.* 7 Daly, 258, holding defendant entitled to an appearance by infant by a guardian *ad litem*, who is peculiarly responsible for his costs; *Wice v. Commercial F. Ins. Co.* 2 Abb. N. C. 325, holding defendant against whom an infant plaintiff appears by guardian *ad litem* must require the necessary security, if any, promptly; *Hill v. Thacter*, 3 How. Pr. 407, on question of requiring irresponsible guardian or next friend to give security for costs; *Wood v. Wood*, 8 Wend. 357, holding bills filed in chancery by *feme covert* must be filed by a responsible next friend; *Lawrence v. Lawrence*, 3 Paige, 267, holding if next friend who prosecutes suit for wife is irresponsible or insolvent, all proceeding may be stayed until security for costs is given or responsible person is substituted in his place.

Infant's suits in forma pauperis.

Cited in *Sharer v. Gill*, 6 Lea, 495, holding infants cannot prosecute an appeal by taking pauper oath.

Security for costs.

Cited in *Bridges v. Canfield*, 2 Edw. Ch. 217, holding nonresident complainants

must give security for costs; *Northup v. Peacedale Mfg. Co.* 25 R. I. 503, 56 Atl. 685, holding it in court's discretion in regard to resident plaintiffs.

19 AM. DEC. 411, DE LA VERGNE v. EVERTSON, 1 PAIGE, 181.

Effect of payment of lien on land by grantee of debtor.

Cited in *Whiting v. Butler*, 29 Mich. 122, on question of widow's right to dower in such cases.

Cited in reference note in 30 A. D. 174, on payment of judgment as a discharge of its lien.

Revival of lien by agreement.

Cited in *Winslow v. Clark*, 2 Lans. 377, holding mortgage once paid cannot be revived by parol agreement; *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878, on question of revival of lien of deed of trust by agreement.

Assignment of judgments.

Cited in reference note in 85 A. D. 156, on assignment of judgments.

When interest upon a lien becomes a lien.

Cited in *Mower v. Kip*, 6 Paige, 88, 29 A. D. 748, holding where debt is secured by bond and mortgage, the mortgagee has a lien upon the land for the whole amount of principal and interest due according to condition of the mortgage, although such amount exceeds penalty of bond; *Mower v. Kip*, 2 Edw. Ch. 165, on question of interest upon judgments becoming lien upon land.

Cited in reference notes in 26 A. D. 435, on subject of interest; 49 A. D. 379, on allowance of interest on judgment; 29 A. D. 754, on interest on judgments and lien therefor.

Rules of equity.

Cited in reference note in 57 A. D. 200, on rules governing exercise of equity.

Priority between liens.

Cited in reference note in 43 A. D. 527, on priority among judgment liens.

Right to costs.

Cited in reference note in 33 A. D. 475, as to when costs are not allowed.

Distribution of moneys among creditors.

Cited in *Leavitt v. Felton*, 11 W. N. C. 74, holding *pro rata* method usually adopted.

Equitable conversion of moneys from execution sale of land.

Cited in *New York L. Ins. Co. v. Mayer*, 14 Daly, 318, 19 Abb. N. C. 92, holding judgment lien attaches to the surplus moneys arising upon the foreclosure of land; *Averill v. Loucks*, 6 Barb. 470, holding same where land is sold under judgment and surplus moneys are brought into court, creditors having liens upon the land, subsequent to judgment; *Lawson v. Jordan*, 19 Ark. 297, 70 A. D. 596; *Polk County v. Sypher*, 17 Iowa, 358, 85 A. D. 568,—holding when lands are sold upon execution, lien follows surplus; *Ritter v. Cost*, 99 Ind. 80 (dissenting opinion), on right in surplus money being measured by extent of lien in equity of redemption.

Judgment or other securities taken for future responsibilities and advances.

Cited in *Averill v. Loucks*, 6 Barb. 19, holding it must be part of the original agreement that the judgment shall be a security for such responsibilities and advances.

19 AM. DEC. 413, RE FRANKLIN BANK, 1 PAIGE, 249.**Relation between bank and depositor.**

Cited in *Perley v. Muskegon County*, 32 Mich. 132, 20 A. R. 637; *Nichols v. State*, 46 Neb. 715, 65 N. W. 774; *Terhune v. Bank of Bergen County*, 34 N. J. Eq. 307; *Re Bank of Madison*, 5 Biss. 515, Fed. Cas. No. 890,—holding relation of bank to customers is that of simple debtor and creditor; *United States Trust Co. v. Wiley*, 41 Barb. 477; *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 217; *Robinson v. Gardiner*, 18 Gratt. 509,—holding deposit of money in bank is a loan, and not a bailment; *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43, on question of relation as debtor and creditor between bank and depositors.

Annotation cited in *Bank of Blackwell v. Dean*, 9 Okla. 626, 60 Pac. 226, on relation and rights of banker and depositor; *Tobias v. Morris*, 126 Ala. 535, 28 So. 517, on general deposit as loan requiring demand for repayment.

Cited in reference notes in 39 A. D. 519, on relation between bank and depositor; 81 A. D. 253, on relation between banker and depositor in case of general deposit; 81 A. D. 253, on nature of relation between banker and depositor in case of special deposit; 12 A. S. R. 541, on savings bank as agent of depositors.

Cited in notes in 9 L.R.A. 109; 12 L.R.A. 791,—on relation between bank and depositor.

Nature of deposits in bank.

Cited in reference notes in 46 A. D. 567; 78 A. D. 475; 91 A. D. 148; 16 A. S. R. 347,—on deposits in banks; 71 A. D. 62, on deposits in savings bank; 61 A. D. 436, on law of deposits in bank.

—General and special deposits generally.

Cited in *Brahm v. Adkins*, 77 Ill. 263; *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 74 A. S. R. 180, 55 N. E. 360,—holding deposit is general unless depositor makes it special or deposits it expressly in some particular capacity; *Re Smith*, 15 Nat. Bankr. Reg. 459, Fed. Cas. No. 12,990, holding in absence of an agreement to contrary its deposits are not special, but become property of the bank, and bank does not stand in character of trustee; *Foulker v. Union Bkg. Co.* 6 W. N. C. 109, holding course of dealing between banks constituted the banks and bankers "depositors" within meaning of statute; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450, on question of ownership of bank in paper received on deposit.

Cited in reference notes in 87 A. D. 532; 40 A. S. R. 665,—on nature of general bank deposits; 55 A. S. R. 338, on special deposit in savings bank.

Cited in notes in 33 A. S. R. 226, on general and special bank deposits; 86 A. S. R. 779, on what constitutes a special deposit.

—Trust funds deposited.

Cited in *State Bank v. Bartley*, 39 Neb. 353, 23 L.R.A. 67, 58 N. W. 172, holding depositing in banks of public funds, under provisions of the depository law, constitutes a loan and investment of moneys so deposited; *Retan v. Union Trust Co.* 134 Mich. 1, 95 N. W. 1006, holding money deposited in a bank by register in chancery pursuant to statute is not a special deposit entitled to priority over the others upon insolvency of bank; *Independent Dist. v. King*, 80 Iowa, 497, 45 N. W. 908, holding bank which knowingly received deposit of school money from treasurer, who had no authority so to deposit it, and carried it in treasurer's own name, held it as trustee for school district.

Running of limitations against deposit.

Cited in reference note in 80 A. D. 513, as to when statute of limitations runs against deposit in bank.

Bank's rights in deposits.

Cited in Metropolitan Nat. Bank v. Loyd, 25 Hun, 101, holding title to check deposited in bank to general account of payee passes to bank; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530, holding check deposited and credited as cash became the property of the bank *contra* as to one deposited for collection; Doppelt v. National Bank, 74 Ill. App. 429, holding same as to checks deposited as cash.

Cited in reference note in 53 A. S. R. 231, on use of special deposits by bank.

Cited in notes in 57 A. D. 466, on bank's ownership of general deposit; 7 L.R.A.(N.S.) 697, on title of bank to check drawn on another bank which has been credited to depositor.

Rights of depositors generally.

Cited in reference notes in 27 A. D. 197, on rights of depositors in banks; 17 A. S. R. 782, on rights and remedies of depositors; 49 A. S. R. 872, on rights of special depositor; 78 A. D. 238, on right of principal to deposit made by agent in own name; 41 A. D. 503, on depositors' right of action against bank for amount of deposit.

Set-off between bank and depositor.

Cited in reference notes in 42 A. D. 302, on right of debtor to set-off; 26 A. D. 711, on set-off between bank and depositor; 20 A. S. R. 139, on bank's right to set off debt due from depositor.

Cited in note in 47 A. S. R. 142, on right of set-off against receiver or assignee of insolvent bank.

Right of holder of check.

Cited in reference notes in 44 A. S. R. 709, on nature of bank checks; 78 A. D. 475, on rights of holder of check; 51 A. S. R. 141, on liability of bank for refusing to pay check; 96 A. D. 157; 50 A. S. R. 177,—on check as assignment of fund; 88 A. S. R. 986, on check as *pro tanto* assignment of funds of drawer; 40 A. S. R. 665, on execution of check effecting assignment of fund; 32 A. S. R. 196, on duty of bank with regard to payment of check; 58 A. S. R. 524, on damages for refusal to pay check.

Cited in notes in 19 A. S. R. 609, as to whether check is an assignment of the fund; 3 E. R. C. 761, on liability of bank to third person as holder of check; 96 A. D. 132, 134, on right of holder of check to sue.

What deposit is payable in.

Cited in reference notes in 85 A. D. 316, on what deposits in bank are payable in; 81 A. D. 253, as to what kind of money general deposit is payable in.

Liability for general deposits.

Cited in reference note in 80 A. D. 513, on necessity of demand on bank before action for general deposit can be maintained.

Cited in note in 21 L. ed. U. S. 474, on liability of bank for general deposits.

Liability for special deposits.

Cited in Marine Bank v. Rushmore, 28 Ill. 463, on question of liability of bank for special deposits.

Cited in reference note in 33 A. S. R. 306, on bank's liability for special deposit.

Cited in notes in 32 L.R.A. 774, on care required of bank in keeping special deposit; 25 L. ed. U. S. 750, on responsibility of banks for special deposits.

Priority between depositors and creditors generally.

Cited in *State ex rel. Girardey v. Southern Bank*, 33 La. Ann. 957, holding if bank goes into insolvency depositor has no right to any preference.

Distinguished in *People v. Mechanics' & T. Sav. Inst.* 28 Hun, 375, holding creditors of savings institution entitled to be paid in full in preference to depositors.

Right of general creditors to specific fund.

Cited in *Butler v. Sprague*, 66 N. Y. 392, holding they have none.

Appointment of receivers of corporations.

Cited in *Mann v. Penty*, 2 Sandf. Ch. 257, as being case in which receiver was appointed upon application by creditor under statute.

Annotation cited in *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733, upholding power to appoint receiver.

Cited in notes in 64 A. D. 486, on appointment of receivers of corporations and associations; 72 A. S. R. 46, on appointment of receiver for bank.

19 AM. DEC. 431, PHOENIX F. INS. CO. v. GURNEE, 1 PAIGE, 278.**Power of equity to relieve against mistake.**

Cited in *Wyche v. Greene*, 11 Ga. 159, holding it has such power; *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645, holding equity should withhold its aid where mistake is not made out by clearest evidence.

— Effect of delay.

Cited in *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263, holding there is no period within which one must discover that a writing does not express contract which he thought it contained other than statute of limitations; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248, holding no written contract is beyond the reach of equity for purpose of reforming it if the prayer for relief is presented in due season shorter than the period of limitations.

— Mistakes in insurance policies.

Cited in *North American Ins. Co. v. Whipple*, 2 Biss. 418, Fed. Cas. No. 10,315, holding it has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by parties; *Brugger v. State Invest. Ins. Co.* 5 Sawy. 304, Fed. Cas. No. 2,051, holding mutual mistake will be corrected, even after a loss; *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding mistake must be mutual to warrant reformation; *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498, holding if a policy when drawn and received does not express a previously concluded agreement for insurance, which it has designed by both parties to execute, equity will reform it; *Kleis v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155, holding in case of fraud or mistake in policy of insurance the proper remedy is the reformation of the contract; *Dow v. Whetten*, 8 Wend. 160, on admissibility of application for policy in equity to reform policy.

Cited in reference notes in 28 A. D. 259, on jurisdiction of equity to correct mistakes in policy; 9 A. S. R. 453, on reformation of insurance contract for mistake; 79 A. D. 547, on equitable correction of mistake in insurance policy.

Cited in notes in 23 A. D. 469, on correction in equity of mistake in policy; 19 A. D. 433, on effect of misdescription in policy; 65 A. S. R. 515; 2 L.R.A. 65; 5 L.R.A. 712,—on reformation of policy of insurance; 13 E. R. C. 490, on reformation of insurance policy for mistake; 37 L. ed. U. S. 457, on reformation in equity of deeds, contracts, policies of insurance, and other written instruments.

Waiver of mistake in policy.

Cited in notes in 67 L.R.A. 722, on retention of insurance policy as waiver of mistake or fraud as to property covered appearing in the policy; 67 L.R.A. 740, on effect of illiteracy of insured on his retention of policy as a waiver of mistake or fraud of the insured or his agent.

Construction of insurance policy.

Cited in *Saunders v. Agricultural Ins. Co.* 167 N. Y. 261, 60 N. E. 635, on office of label or written memorandum from which policy was filled up, in determining intention of parties; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534, on construction as to property insured.

Cited in reference note in 44 A. S. R. 326, on description of use of insured building.

19 AM. DEC. 433, CONNOLLY v. PARDON, 1 PAIGE, 291.**Sufficiency of description of beneficiary in will or grantee in deed.**

Cited in *Episcopal Fund v. Colgrove*, 4 Hun, 362; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302; *Episcopate Fund v. Colegrove*, 6 Thomp. & C. 614,—holding all that is necessary is such a specification or description of the object of the bequest or legacy as will show intention of testator; *South Newmarket Methodist Seminary v. Peaslee*, 15 N. H. 317, holding latent ambiguity in description of legatee in will might be explained by parol evidence; *Staak v. Sigelkow*, 12 Wis. 235, holding though deed be made to party by wrong Christian name, the grant is good and the title vests in the intended grantee.

Construction of will.

Cited in *Nelson v. McDonald*, 61 Hun, 406, 16 N. Y. Supp. 273, on question of construing will as to intent of testator; *St. Luke's Home v. Relief Asso.* 2 Jones & S. 241, on parol evidence to show intention of testator.

Explanation of writings by parol.

Cited in *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061 (reversing 2 Woodb. & M. 472, Fed. Cas. No. 2829), holding parol proper to identify things referred to in a writing.

Cited in reference notes in 49 A. D. 441, on admissibility of evidence to correct or explain will; 47 A. D. 431, on parol evidence to explain, vary, or control will; 57 A. D. 709, on parol evidence of mistake in will.

Cited in note in 23 A. D. 170, on parol evidence to show who was intended by bequest to person by wrong Christian name.

19 AM. DEC. 434, HAGGARTY v. PITTMAN, 1 PAIGE, 298.**Appointment of receiver.**

Cited in *Haines v. Carpenter*, 1 Woods, 262, Fed. Cas. No. 5,905, holding application must be supported by evidence showing that the appointment is necessary; *Livingston v. Swofford Bros. Dry Goods Co.* 12 Colo. App. 320, 56 Pac. 351, holding that where court entertains jurisdiction of a creditor's bill it has authority to appoint a receiver.

Cited in reference notes in 90 A. D. 297, on injunction and receiver in creditors' suit; 35 A. D. 722, on appointment of receiver in case of assignment to insolvent assignee.

Cited in notes in 64 A. D. 492, on right of debtor to have receiver appointed; 72 A. S. R. 41, over what property a receiver may be appointed; 72 A. S. R. 62, on appointment of receiver in creditors' suit; 72 A. S. R. 96, on appointment

of receiver in supplementary proceedings; 72 A. S. R. 44, on appointment of receiver where assignment for creditors has been made.

— To conserve assets.

Cited in *Byrne v. First Nat. Bank*, 20 Tex. Civ. App. 194, 49 S. W. 706, holding receiver proper at instance of simple creditors where surviving partner is wasting assets or jeopardizing them; *Cohen v. Morris*, 70 Ga. 313, holding if a trustee mismanages and wastes the property entrusted to him and persists in so doing, injunction and appointment of receiver is the proper remedy; *Clark v. Ely*, 2 Sandf. Ch. 166, on question of receiver being appointed for debtor and disposal of certain notes in hands of latter restrained.

Aid of equity to enforce collection of debt.

Cited in *Reese v. Bradford*, 13 Ala. 837, holding before a party can come into equity to enforce collection of simple contract debt, he must establish a trust in his favor, upon the effects he seeks to subject to its payment.

Rights in security held by surety.

Cited in *Re Jaycox*, 8 Nat. Bankr. Reg. 241, Fed. Cas. No. 7,242, holding assignment of security to surety for his indemnity, gave creditor equitable claim upon the fund, and surety has no right to divert it to any other object; *Pratt v. Adams*, 7 Paige, 615; *Wright v. Austin*, 56 Barb. 13,—on question of right of creditor to compel application of collateral security in hands of surety to payment of debt of principal.

19 AM. DEC. 436, BECK v. BURDETT, 1 PAIGE, 305.

Equitable aid to creditors.

Cited in notes in 1 L.R.A. 788, on jurisdiction in equity; 1 L.R.A. 369, on equity's aid to judgment creditor.

— Against obstructions to execution.

Cited in *Stone v. Manning*, 3 Ill. 530, 35 A. D. 119; *Quinn v. People*, 45 Ill. App. 547; *Adsit v. Butler*, 87 N. Y. 585; *Hyde v. Chapman*, 33 Wis. 391; *Reese v. Bradford*, 13 Ala. 837,—holding it necessary that creditors show a lien or a judgment at law, with execution returned unsatisfied, before equity will grant them relief against fraudulent obstruction; *Shainwald v. Lewis*, 6 Fed. 766; *Gates v. Boomer*, 17 Wis. 456,—holding a judgment creditor with execution issued and returned unsatisfied might maintain a suit to have deed fraudulent as to him set aside; *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94; *Banning v. Armstrong*, 7 Minn. 40, Gil. 24; *Merchants' Nat. Bank v. Greenwood*, 16 Mont. 395, 41 Pac. 250; *State Bank v. Belk*, 68 Neb. 517, 94 N. W. 617; *Dodge v. Griswold*, 8 N. H. 425; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; *Dargan v. Waring*, 11 Ala. 988, 46 A. D. 234,—holding judgment creditor might resort to equity to set aside a conveyance fraudulent as to him; *Child v. Brace*, 4 Paige, 309, denying relief to judgment creditor attempting to reach choses in action when he had not exhausted remedy at law; *Stewart v. Fagan*, 2 Woods, 215, Fed. Cas. No. 13,426, holding it indispensable prerequisite that creditors' claim be reduced to judgment to avoid fraudulent conveyance; *McKibben v. Barton*, 1 Mich. 213; *Blish v. Collins*, 68 Mich. 542, 36 N. W. 731; *Partee v. Mathews*, 53 Miss. 140; *Sanders v. Watson*, 14 Ala. 198,—denying relief in equity to set aside a conveyance fraudulent as to creditors who failed to show a judgment at law; *McCullough v. Colby*, 5 Bosw. 477, affirming necessity of execution being issued in order to maintain suit to set aside deed of real estate as fraudulent to creditors; *Clarkson v. DePeyster*, 3 Paige, 320; *Stephens v. Beal*, 4 Ga.

319,—holding equity would aid a judgment creditor in the removal of a fraudulent mortgage interposed to prevent satisfaction of debt out of debtor's property; *Petefish v. Buck*, 56 Ill. App. 149, holding equity would aid a judgment creditor in reaching unassigned dower rights of debtor who, in order to defeat collection of debt, refused to apply for assignment of dower; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Loomis v. Tift*, 16 Barb. 541; *Lazarus Jewelry Co. v. Steinhardt*, 50 C. C. A. 393, 112 Fed. 614; *Robert v. Hodges*, 16 N. J. Eq. 299,—holding equity would aid an attaching creditor having a lien on debtor's real estate to set aside a fraudulent conveyance; *Shaw v. Dwight*, 27 N. Y. 244, 84 A. D. 275, holding judgment creditor, having no specific lien, might maintain action to cancel prior judgments, apparent liens on land but which he alleges were paid; *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 997, holding equity would aid a judgment creditor, with execution issued, by declaring conditional deeds mortgages and judgment lien on land; *Galloway v. Hamilton*, 68 Wis. 651, 32 N. W. 636; *Cornell v. Radway*, 22 Wis. 260,—holding creditor having specific judgment lien on property might seek the avoidance of fraudulent conveyance in equity; *Boardman v. Halliday*, 10 Paige, 223, holding decree restricted to subjects of specific lien where execution had not been returned *nulla bona*; *Cleveland v. La Crosse & M. R. Co.* Fed. Cas. No. 2,887, holding equity might declare deed by corporation to director void as against judgment creditors, when judgment a lien; *Tuck v. Olds*, 29 Fed. 738, holding judgment creditor might maintain creditors' bill to set aside a chattel mortgage on a dock on land previously levied on; *Brainard v. Van Kuran*, 22 Iowa, 261, holding it unnecessary to exhaust legal remedies before bringing bill to set aside fraudulent sale of property levied on; *Stowell v. Haslett*, 5 Lans. 380, holding mortgage void between parties might be removed in equity as obstruction to collection of judgment recovered after execution of mortgage on debt incurred prior thereto; *People v. Erie R. Co.* 56 How. Pr. 123, refusing to admit petitioner as party to mortgage foreclosure, he having failed to prove his debt by obtaining a judgment; *Williams v. Hubbard*, Walk. Ch. (Mich.) 28; *Reeg v. Burnham*, 55 Mich. 39, 20 N. W. 708; *Tappan v. Evans*, 11 N. H. 311; *McElwain v. Willis*, 9 Wend. 548; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Apperson v. Ford*, 23 Ark. 746,—considering when equity will grant relief to judgment creditor.

Cited in reference notes in 66 A. D. 658, on injunction against debtor's disposing of property; 84 A. D. 280, on necessity that judgment and execution be returned unsatisfied to maintain bill to set aside fraudulent conveyances.

Cited in notes in 4 L.R.A. 354, on suit to set aside fraudulent conveyance; 33 L.R.A. 547, on necessity of return as condition of judgment creditors' right to procure receivership.

Distinguished in *Lehman v. Meyer*, 67 Ala. 396, holding by statutory enactment simple contract creditors without any lien might petition in equity for the avoidance of a fraudulent transfer of property.

—To reach equitable assets.

Cited in *Van Mater v. Ely*, 13 N. J. Eq. 271, holding equity would set aside a conveyance fraudulent to creditor who had exhausted his remedy by execution at law; *Carr v. Parker*, 10 Mo. App. 364, holding equity will aid judgment creditor after return of execution *nulla bona* to reach property which cannot be taken on execution; *Richardson v. Gilbert*, 21 Fla. 544; *Robinson v. Springfield Co.* 21 Fla. 203,—holding equitable assets not subject to sale on execution could not be reached in equity, not having shown that the remedy under the execution levy had been exhausted; *Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 859, holding

failure of creditors' bill in suit to reach equitable assets, to state a return of judgment unsatisfied, fatal defect; *Manchester v. McKee*, 9 Ill. 511, holding creditors' bill, to subject lands not reachable on execution to payment of judgments, would lie, judgment having been returned only partly satisfied; *Moffatt v. Tuttle*, 35 Minn. 301, 28 N. W. 509, holding to entitle judgment creditor to enforce trust for benefit of creditors on land paid for by debtor, it must be shown creditor had exhausted remedies at law; *Jones v. Green*, 1 Wall. 330, 17 L. ed. 553; *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169,—affirming right of maintaining action in nature of creditor's bill to reach assets not subject to execution, after return of execution unsatisfied; *Dunlevy v. Tallmadge*, 32 N. Y. 457, 29 How. Pr. 397, holding debtors' equitable assets not reachable in equity until creditor had exhausted remedy at law by recovery of judgment and return of execution unsatisfied; *Everingham v. Vanderbilt*, 51 How. Pr. 177, holding it necessary that judgment creditor seeking to reach administration assets assigned by administrators without consideration, have exhausted remedy at law; *Chillingworth v. Freeman*, 67 Barb. 379, holding equity would enforce a trust upon land purchased by party in wife's name, in favor of creditors, there being no estate reachable at law; *Watson v. LeRow*, 6 Barb. 481, holding conveyance in trust for another such an equitable interest as could be reached by creditors' bill for benefit of creditors; *Suydam v. North Western Ins. Co.* 51 Pa. 394, 23 Phila. Leg. Int. 53, holding equity would not aid judgment creditors of insolvent corporation, seeking to have corporation funds applied on judgment, there being no averments of executions issued and returned unsatisfied; *Stark v. Cheatham*, 2 Tenn. Ch. 300, affirming right of equity to subject equity of redemption of judgment debtor to satisfaction of judgment debt upon return of execution issued in another county unsatisfied; *Macauley v. Smith*, 28 Abb. N. C. 276, 30 N. E. 997, holding bill would lie by judgment creditor to have deed declared a mortgage and grantor's interest subject to lien of judgment; *Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778; *Mason v. Pierron*, 63 Wis. 239, 23 N. W. 119,—on when equity will grant relief against equitable assets; *Owen v. Dupignac*, 9 Abb. Pr. 180, affirming validity of order for hearing of judgment debtor, it appearing by affidavit that execution had been issued and returned unsatisfied.

Cited in note in 63 L.R.A. 679, 681, 682, on equitable remedy to subject choses in action to judgment after return of no property found.

When creditors' bill will lie.

Cited in *Van Norman v. Circuit Judge*, 45 Mich. 204, 7 N. W. 796, holding bill defective in not averring that legal proceedings by attachment had resulted in a lien; *McCaffery v. Hickey*, 66 Barb. 489, holding creditors' bill would lie only on recovery of a judgment with execution issued and returned unsatisfied; *Galveston, H. & S. A. R. Co. v. McDonald*, 53 Tex. 510, holding equity would subject trust property to a payment of a judgment, a trust indebtedness; *Gavazzi v. Dryfoos*, 110 App. Div. 90, 97 N. Y. Supp. 59, holding complaint, alleging return of execution unsatisfied because of prior lien, which is invalid as against plaintiff, insufficient in absence of allegations of fraud as to interposing lien; *Schofield v. Ute Coal & Coke Co.* 92 Fed. 269, holding creditors' suit, to avoid fraudulent conveyance, maintainable in equity when creditor has a vested right in or lien upon property; *Gavazzi v. Dryfoos*, 47 Misc. 15, 95 N. Y. Supp. 199, holding creditors' bill maintainable to reach property with which to satisfy judgment; *Kirkman v. Vanlier*, 7 Ala. 217; *Cassaday v. Anderson*, 53 Tex. 527; *Durant v. Albany County*, 26 Wend. 66,—on when creditors' bill will lie.

Necessity of creditors' bill averring return of execution nulla bona.

Cited in *Loving v. Pairo*, 10 Iowa, 282, 77 A. D. 108, holding in bill to set aside fraudulent conveyance of real property not necessary that return of execution *nulla bona* be averred.

Cited in reference notes in 39 A. S. R. 888, on what must be pleaded in creditors' bill; 34 A. D. 368, on necessity of judgment creditor showing exhaustion of legal remedies before resorting to equity.

Validity of bill filed before return of execution.

Cited in *Steward v. Stevens*, Harr. Ch. (Mich.) 169, upholding demurrer to a bill filed before the return day of execution issued, although return had been made "unsatisfied;" *McElwain v. Willis*, 3 Paige, 505, holding supplemental bill filed before the return of execution could not be sustained, although defendant had no property which could be reached.

Cited in reference note in 44 A. D. 722, on necessity of creditor having judgment and execution unsatisfied to maintain bill to reach debtor's equitable assets or property fraudulently transferred.

Cited in notes in 90 A. D. 288; 66 A. S. R. 277,—on issuance and return of execution *nulla bona* as prerequisite to filing of creditors' bill.

Effect of appointment of receiver.

Cited in reference note in 38 A. D. 558, on effect of order appointing receiver to vest title to personal property in him before assignment by debtor.

Obstacles to execution.

Cited in *Mechanics' & T. Bank v. Dakin*, 28 How. Pr. 502, refusing prayer of judgment creditor to set aside assignment of a bond as fraudulent, it being impossible for him to reach bond on execution; *Spear v. Wardell*, 2 Barb. Ch. 291, holding equity would not relieve judgment creditors as against assignment fraudulent to them and subsequent to their lien as the judgment overreached the assignment and land might be sold on execution.

Parties to creditors' suit.

Cited in *Goodrich v. Williamson*, 10 Okla. 588, 63 Pac. 974 (affirmed on rehearing, 10 Okla. 617), holding real debtors and owners of property necessary parties to creditors' suit; *Smith v. Ford*, 48 Wis. 115, 2 N. W. 134, holding it unnecessary on creditors' suit against grantor of trust and *cestui que trust* to set aside conveyance as fraudulent, to join trustee as defendant; *Eameston v. Lyde*, 1 Paige, 637, 19 A. D. 454, holding creditor whose execution was returned unsatisfied might file bill to reach equitable assets without joining other creditors in same position as himself.

Lien and priority of creditors.

Cited in *New York L. Ins. Co. v. Mayer*, 14 Daly, 318, 19 Abb. N. C. 92, holding that the creditors' suit is complementary of a judgment lien on lands or of execution on personalty, and partakes of their priority; *Robertson v. Lawton*, 91 Hun, 67, 36 N. Y. Supp. 175, holding attaching creditor who first levied on chattels of debtor obtained a preference over judgment creditor who had execution issued but no levy made.

Specific lien on property, how obtained.

Cited in *Mathews v. Mobile Mut. Ins. Co.* 75 Ala. 85, holding specific lien acquired by the filing of a bill for equitable relief after the return of the execution unsatisfied; *Bank of United States v. Burke*, 4 Blackf. 141; *Davidson v. Burke*, 143 Ill. 139, 36 A. S. R. 367, 32 N. E. 514,—holding specific lien obtained

on property sought to be reached, by filing of creditor's bill after return of execution; *Trow v. Lovett*, 122 Mass. 571, holding no lien in equity obtained against assignee in bankruptcy, where an execution was not first taken out on the judgment; *Beith v. Porter*, 119 Mich. 365, 75 A. S. R. 402, 78 N. W. 336, holding filing of creditors' bill of itself did not give complainant lien as against other creditors; *Lawrence v. Bayard*, 7 Paige, 70, holding a contingent interest in shares of stock not subject to an equitable lien until filing of bill for equitable relief; *Storm v. Waddell*, 2 Sandf. Ch. 494, 3 Y. Y. Legal Obs. 367, holding commencement of suit in equity by judgment creditor where execution was returned unsatisfied gave him equitable lien upon things in action; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827; *Myrick v. Selden*, 36 Barb. 15,—holding commencement of suit in equity by judgment creditor created an equitable lien in nature of attachment upon service of process; *Boynton v. Rawson, Clarke*, Ch. 584, holding the filing of creditors' bill did not become a lien on judgment debtors' equitable assets, there being no service of process; *Spencer v. Spencer*, 9 R. I. 150; *Brainard v. Cooper*, 10 N. Y. 356; *May v. Bryan*, 17 App. D. C. 392,—holding filing of judgment creditors' bill, and issue of process to reach trust fund of judgment debtor, created equitable lien on such fund; *Stewart v. Beale*, 7 Hun, 405, holding execution delivered to sheriff created a lien on judgment debtor's personal property within county, although no actual levy; *Kennedy v. McGuire*, 15 Hun, 70, holding equitable lien created on real estate upon appointment of receiver and commencement of action to reach trust property, execution being returned unsatisfied; *Clafin v. Gordon*, 39 Hun, 54, holding commencement of action by judgment creditor to set aside conveyance as fraudulent, after return of execution unsatisfied, created equitable lien; *Ex parte Waddell*, Fed. Cas. No. 17,027; *Kinmouth v. White*, 61 N. J. Eq. 358, 48 Atl. 952; *Re Milburn*, 59 Wis. 24, 17 N. W. 965; *Bragg v. Gaynor*, 85 Wis. 468, 21 L.R.A. 161, 55 N. W. 919,—on operation of creditors' bill as lien.

Cited in reference note in 90 A. D. 295, on creditors' bill as lien.

Validity of assignment for creditors.

Cited in reference notes in 27 A. D. 207, on validity of assignment for benefit of creditors; 48 A. D. 724, on vitiation of deed of assignment by reservation of benefit to debtor; 36 A. D. 293, on effect of reservation for debtor's benefit in deed of assignment for creditors.

Cited in notes in 58 A. S. R. 94, on conflict of laws as to validity of assignment for creditors; 58 A. S. R. 80, on illegal reservations in assignment for creditors; 15 A. D. 506, on invalidity of assignment for creditors which does not comprise all of debtor's property; 23 A. D. 71, on invalidity of assignment for creditors containing reservation for benefit of debtor's family.

— Effect of reservation of surplus.

Cited in *McFarland v. Birdsall*, 14 Ind. 126, holding in absence of requirement of release of debtor the mere hypothetical reservation of surplus to debtor would not invalidate assignment; *Muchmore v. Budd*, 53 N. J. L. 369, 22 Atl. 518, holding reservation by vendor in bill of sale for benefit of creditors, of surplus, not *per se* proof of fraud; *Carey v. Giles*, 10 Ga. 9, holding assignment for payment of debt not void because of reservation providing for return of surplus to assignor; *Huntley v. Kingman & Co.* 152 U. S. 527, 38 L. ed. 540, 14 Sup. Ct. Rep. 688, holding a provision in assignment for certain creditors, reserving surplus to assignor, did not render the assignment void; *Clafin v. Iseman*, 23 S. C. 416, holding an assignment for creditor, with an interest reserved for assignor, without provision for

payment of all his debts, fraudulent; *Trumbo v. Hamel*, 29 S. C. 520, 8 S. E. 83, holding an assignment by partnership with a preference to creditor taking *pro rata* in full discharge and the others ratably, with a return of surplus to assignor, not fraudulent and void.

— **Excessive assignment.**

Cited in *Carey v. Giles*, 10 Ga. 9, holding assignment by insolvent bank for benefit of a creditor not void because the amount assigned larger than that reasonably necessary to pay debt; *Burt v. McKinstry*, 4 Minn. 146, Gil. 146, 77 A. D. 507, holding excess in value of property conveyed over and above debts and liabilities ground for avoiding assignment for creditors.

19 AM. DEC. 440, SUFFERN v. JOHNSON, 1 PAIGE, 450.

Control of courts over judicial sales.

Cited in *City Bank v. McIntyre*, 8 Rob. (La.) 467, discussing control of court over judicial sales.

Sale of property when only part of debt due.

Cited in *Lacoss v. Keegan*, 2 Ind. 406, holding entire premises liable to sale on default in payment of instalment of debt when property not susceptible of division; *Gregory v. Campbell*, 16 How. Pr. 417, holding mortgaged premises would be sold in one parcel to satisfy instalment of debt due on stipulation of plaintiff to bid amount of principal and interest due.

Cited in reference notes in 77 A. S. R. 908, on foreclosure where only part of debt is due; 47 A. D. 115, on sale of whole property where only part of debt due.

Cited in note in 37 L.R.A. 747, on provision for balance of debt in decree in proceedings to enforce mortgage for part of debt.

19 AM. DEC. 442, SWEET v. GREEN, 1 PAIGE, 473.

Rights of purchaser under judgment.

Cited in reference note in 61 A. D. 353, on rights acquired by purchaser under judgment.

Inurement of after-acquired title by estoppel.

Cited in *Tucker v. Tucker*, 122 App. Div. 308, 106 N. Y. Supp. 713; *House v. McCormick*, 57 N. Y. 310,—holding grantor estopped from setting up after-acquired rights as against assignee of grantor when conveyance was made with covenants of quiet enjoyment; *Collins v. Hasbrouck*, 1 Thomp. & C. 36, holding sublease not forfeited by fraud of lessee in obtaining lessor's consent to sublet when sublessee was bona fide and ignorant of fraud; *Sheridan v. House*, 4 Abb. App. Dec. 218, 4 Keyes, 569, holding after-acquired title of grantor and his heirs inured to benefit of purchaser at execution sale; *McCusker v. McEvey*, 10 R. I. 606 (dissenting opinion), on operations of covenants in deed as an estoppel.

Covenants running with the land.

Cited in reference note in 27 A. D. 553, on covenants running with the land.

Grantee of bona fide purchaser.

Cited in note in 17 A. D. 524, on grantee of bona fide purchaser.

Construction of deed.

Cited in *Thorn v. Newson*, 64 Tex. 161, 53 A. R. 747; *Harrison v. Boring*, 44 Tex. 255,—holding in construing a deed ambiguous as to its nature, the circumstances under which and the purposes for which it was made to be considered.

19 AM. DEC. 444, DURELL v. HALEY, 1 PAIGE, 492.**Right to disaffirm sale as fraudulent.**

Cited in *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 60 A. R. 140, 1 So. 460, holding there must be insolvency, design not to pay for goods, and fraudulent concealment or representation, to justify vendor in disaffirming sale as fraudulent, and citing annotation also on this point.

Fraudulent concealment of insolvency.

Cited in *Rawdon v. Blatchford*, 1 Sandf. Ch. 344, holding concealment by bank cashier of his insolvency and defalcation would avoid a transfer of securities to him which he used to conceal his defalcation; *Nichols v. Pinner*, 18 N. Y. 295 (dissenting opinion), on concealment of insolvency as fraud; *Chaffee v. Fort*, 2 Lans. 81, considering when concealment of insolvency may operate as fraud; *Bienenstok v. Ammidown*, 31 Abb. N. C. 400, 59 N. Y. S. R. 471, 29 N. Y. Supp. 593, 11 Misc. 76, holding plaintiffs could recover deposit made defendant firm by partner also member of corporation indebted to firm and which had fraudulently purchased goods from plaintiff, while insolvent.

Cited in reference note in 44 A. D. 463, as to when suppression of truth constitutes fraud.

— By purchaser of goods.

Cited in *Stewart v. Emerson*, 52 N. H. 301, 5 Legal Gaz. 313; *Stoutenbourgh v. Konkle*, 15 N. J. Eq. 33; *Thomas v. Snyder*, 77 Hun, 365, 28 N. Y. Supp. 877; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203; *Henshaw v. Bryant*, 5 Ill. 97,—holding concealment of his insolvency by purchaser of goods by fraudulent representations, with no intention of paying for them, is a fraud, and the property does not pass; *Johnson v. Monell*, 2 Keyes, 655, 2 Abb. App. Dec. 470, holding mere omission of firm to disclose insolvency when buying on credit, without any affirmative representations as to solvency, renders sale void; *Buckley v. Artcher*, 21 Barb. 585, considering when insolvency of vendee may avoid sale.

Cited in reference notes in 52 A. D. 57, on insolvency of vendee of chattels: 23 A. D. 614; 60 A. D. 56, on purchaser's concealment of insolvency as a fraud.

Cited in notes in 28 A. D. 486, 487, on title acquired by fraudulent purchaser of goods; 2 L.R.A. 154, 155, on effect of fraudulent concealment of insolvency by purchaser of goods; 23 L. ed. U. S. 994, on validity of sale of goods on credit to insolvent vendee.

Protection of bona fide purchasers.

Cited in reference notes in 83 A. D. 122, on protection of bona fide purchasers for valuable consideration; 28 A. D. 207, on rights of purchasers with notice of fraudulent conveyance.

— From fraudulent grantee.

Cited in *Rateau v. Bernard*, 3 Blatchf. 244, Fed. Cas. No. 11,579, holding purchaser of property from fraudulent holder would be protected when sale bona fide, and he had no notice of fraudulent or wrongful possession; *Hoyt v. Shelden*, 3 Bosw. 267, holding transferee of assignment of mortgage made by insolvent corporation to assignee obtained good title, being a bona fide purchaser without notice of insolvency; *Devoe v. Brandt*, 53 N. Y. 462; *Sargent v. Sturn*, 23 Cal. 359, 83 A. D. 118,—holding creditor purchasing property of fraudulent vendee at execution sale acquired no title to the property; *Fenno v. Sayre*, 3 Ala. 458, refusing to devert bona fide purchaser of real estate of title without reimbursement of cash paid.

Cited in reference notes in 25 A. D. 532; 58 A. S. R. 718,—as to who is a bona fide purchaser; 28 A. D. 207, on protection of bona fide purchaser under fraudulent conveyance; 25 A. D. 108, on protection of bona fide purchaser without notice of fraud from one who was a party to the fraud.

Cited in notes in 23 A. D. 613; 25 A. D. 613,—on right of bona fide purchaser from fraudulent purchaser.

Who is a bona fide purchaser.

Cited in *Merritt v. Northern R. Co.* 12 Barb. 605, holding mortgagees of property bona fide as against railroad company having right of way over it under unrecorded deed, but in possession, their mortgages being on present consideration and recorded.

Cited in reference note in 24 A. D. 235, on who are bona fide purchasers.

Purchases in contemplation of insolvency.

Cited in *Baer Sons Grocer Co. v. Williams*, 43 W. Va. 323, 27 S. E. 345, holding vendor of goods had a prior lien for the value of goods ordered, but not delivered until after execution of trust for creditors.

Cited in reference notes in 60 A. D. 56, as to whether vendee's intention not to pay for goods was fraud; 38 A. S. R. 265, on purchasing goods without the ability to pay as fraudulent.

Cited in note in 14 L.R.A. 265, on preconceived intention not to pay for goods purchased, as fraud.

Jurisdiction of equity in cases of fraud.

Cited in *Taymon v. Mitchell*, 1 Md. Ch. 496, holding equity had the power to rescind a sale of personalty on grounds of fraud.

Fraudulent concealment as grounds for avoiding sale.

Cited in *Keen v. James*, 39 N. J. Eq. 527, 51 A. R. 29, holding sale of bank stock by executors of estate effected by fraudulent concealment might be avoided by vendee.

19 AM. DEC. 446, SQUIRE v. HARDER, 1 PAIGE, 494.

Resulting trust to grantor when created.

Cited in *Lovett v. Taylor*, 54 N. J. Eq. 311, 34 Atl. 896, holding no trust could be implied in favor of grantor of land by deed operating under the statute of uses, which contained usual declaration of uses in favor of grantee.

Cited in reference note in 27 A. D. 313, as to when resulting trust arises.

Cited in notes in 51 A. D. 760; 2 L.R.A. 146,—on resulting trusts.

—Effect of expressing consideration or absolute title.

Cited in *Eaves v. Vial*, 98 Va. 134, 34 S. E. 978; *Patton v. Beecher*, 62 Ala. 579,—holding express trust that grantee of lands conveyed by absolute deed expressing money consideration should hold for use of grantor could not be created by parol; *Russ v. Mebius*, 16 Cal. 350; *Moore v. Jordan*, 65 Miss. 229, 7 A. S. R. 641, 3 So. 737,—holding no trust resulted to grantor in deed reciting a nominal consideration; *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235, holding no resulting trust created in favor of daughter in land deeded by father to her husband, reciting a money consideration; *Luckhart v. Luckhart*, 120 Iowa, 248, 94 N. W. 461, holding recitation of money consideration in deed from father to son prevented creation of resulting trust to other heir in absence of fraud or mistake; *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66, holding no resulting trusts in favor of heirs of grantor on ground that grantor had joint interest with grantee when deed con-

tained express warranty; *Rathbun v. Rathbun*, 6 Barb. 98, holding trust could not be created between grantor and grantee in absolute deed by evidence of parol message sent by grantor to grantee after delivery of deed.

Parol trusts.

Cited in note in 10 L.R.A. 401, on parol creation of express trust in land.

Necessity of consideration.

Cited in note in 9 L.R.A. 414, on necessity for consideration in conveyance.

After-acquired title.

Cited in reference note in 61 A. D. 422, on effect of warranty deeds to pass subsequently acquired title by way of estoppel.

Part performance of oral contract.

Cited in reference note in 52 A. D. 295, on necessity that part performance be in consequence of contract.

Cited in note in 53 A. D. 543, as to what acts are part performance of contract of sale of land.

Parol evidence to vary terms of instrument.

Cited in *Ohmer v. Boyer*, 89 Ala. 273, 7 So. 663, holding parol not admissible to show no consideration for a deed of trust from husband to wife expressing valuable consideration; *Way v. Mayhugh*, 57 W. Va. 175, 50 S. E. 724, holding parol evidence to prove conveyance to be a mortgage which, on its face an absolute deed, must be clear and unquestionable.

Cited in reference note in 90 A. D. 270, on contradiction by parol evidence of consideration clause in deed.

Disapproved in *Rockhill v. Spraggs*, 9 Ind. 30, 68 A. D. 607, holding parol evidence admissible between privies to show a different consideration from that expressed in deed.

— Of trust collateral to deed.

Cited in *Whyte v. Arthur*, 17 N. J. Eq. 521, holding parol not admissible on part of mortgagor to prove that mortgage was made in trust for self; *Troll v. Carter*, 15 W. Va. 567; *Richardson v. McConaughy*, 55 W. Va. 546, 47 S. E. 287; *Fouty v. Fouty*, 34 Ind. 433,—holding parol not admissible to show deed absolute on face was made in trust for benefit of grantor.

Cited in reference note in 90 A. D. 271, on parol evidence to show that grantee is trustee for grantor.

Agreement by husband regarding sale of wife's property.

Cited in *Annan v. Merritt*, 13 Conn. 478, holding equity would not enforce an agreement made by husband with third party to sell him wife's lands, made without seemingly any authority from wife; *Park v. Johnson*, 4 Allen, 259, holding agreement by husband to convey, with a release of wife's dower rights, could not affect her rights without her consent.

Cited in reference note in 32 A. D. 750, on doctrine that equity will not attempt to coerce wife by acting upon husband.

Cited in note in 24 L.R.A. 763, on specific performance against wife on contract of conveyance by husband.

19 AM. DEC. 449, MORGAN v. SCHERMERHORN, 1 PAIGE, 544.

Equitable relief from usurious contracts.

Cited in *Bell v. Mulholland*, 90 Mo. App. 612, enjoining defendants from receiving assignments of salary to be due plaintiff, the contract being void for usury;

Hudnit v. Nash, 16 N. J. Eq. 550, on when equity will relieve from usurious contract.

Cited in reference note in 54 A. D. 88, on equitable relief from usurious contract.

Cited in notes in 55 A. D. 400, on affirmative relief in equity against usury; 46 A. S. R. 179, on materiality of form on question of usury.

— Necessity of doing equity by tendering amount due.

Cited in **Turner v. Merchants' Bank**, 126 Ala. 397, 28 So. 469, holding party seeking in equity to have a usurious mortgage canceled must first return the loan with interest; **Ware v. Thompson**, 13 N. J. Eq. 66; **Ruddell v. Ambler**, 18 Ark. 369,—denying relief to debtor until he made a tender of the principal with interest; **Miller v. Ford**, 1 N. J. Eq. 358, sustaining a demurrer to a bill praying relief from a usurious mortgage without a tender of amount advanced thereon; **Williams v. Fitzhugh**, 37 N. Y. 444, holding court would not direct a mortgage given to secure several notes several of which were void for usury to be canceled without a payment or tender of payment of valid notes; **Dawson v. Burrus**, 73 Ala. 111, holding defendant setting up usury in the mortgage debt in action to foreclose not compelled to pay interest; **Phelps v. Pierson**, 1 G. Greene, 121, a creditor before seeking to obtain a decree upon a bill disclosing usury should allege therein a willingness to abandon usurious portion thereof.

Usuriousness of contract with fictitious principal.

Cited in **Bishop v. Exchange Bank**, 114 Ga. 962, 41 S. E. 43, holding contract to pay off a note held by lender, the maker of which was insolvent, and borrower under no obligation to pay as a condition precedent to making the loan, usurious; **Schermerhorn v. American L. Ins. & T. Co.** 14 Barb. 131, holding a loan of bonds bearing interest, with a face value considerably greater than could be realized in cash, was void for usury; **Fitzsimons v. Baum**, 44 Pa. 32, holding a contract usurious which compelled a party, to secure the loan, to purchase property he did not want at an exorbitant price besides the legal interest; **Dowdall v. Lenox**, 2 Edw. Ch. 267, holding the adding of an old indebtedness to amount to be secured by a bond did not render the new contract usurious.

When usury a defense.

Cited in reference note in 32 A. D. 718, as to when usury is available as a defense.

Cited in note in 22 A. R. 293, as to who may set up defense of usury.

Necessity of offering equity.

Cited in **Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.** 60 C. C. A. 588, 126 Fed. 46, holding it necessary that mortgagee seeking to enforce a conveyance of legal title under clause to that effect must satisfy equities of subsequent mortgagor.

19 AM. DEC. 452, RE MIDDLE DIST. BANK, 1 PAIGE, 585.

Set-off generally.

Cited in reference notes in 26 A. D. 710, on law of set-off; 43 A. D. 159, on set-off in equity.

Right of set-off as affected by appointment of receiver.

Cited in **Citizens' Bank v. Kendrick**, 92 Tenn. 437, 36 A. S. R. 96, 21 S. W. 1070, holding right of equitable set-off not affected by assignment for creditors; **Barbour v. National Exch. Bank**, 50 Ohio St. 90, 20 L.R.A. 192, 33 N. E. 542, holding appointment of receiver for insolvent company did not affect bank's

right to set-off, as against debt due company, judgments obtained against it on over-due notes.

Cited in reference note in 36 A. S. R. 100, on effect of appointment of bank receiver on right of set-off.

Cited in note in 23 L.R.A. 313, on right to set off insolvent's obligation upon claim in hands of receiver.

Claims which may be set off against insolvents.

Cited in *Hepburn v. Montgomery*, 5 N. Y. Civ. Proc. Rep. 244, allowing insurance agent to set off against action by receiver of the insolvent company to foreclose mortgage, amount due him as salary determined after appointment of receiver; *Pardo v. Osgood*, 2 Abb. Pr. N. S. 365, holding obligation of insurer on his premium note could not be set off against his claim against company for a loss, after insolvency of company.

Cited in note in 17 L.R.A. 456, on effect of immaturity of claim owing to insolvent on right of set-off.

—Against insolvent banks.

Cited in *Clarke v. Hawkins*, 5 R. I. 219, allowing debtor of insolvent bank to set off, as against debt, claims due him from bank at time of insolvency; *Van Wagener v. Paterson Gaslight Co.* 23 N. J. L. 283, holding debtor of insolvent bank might set off against his indebtedness his deposit in the bank and bills of the bank bona fide received by him before the failure; *Thompson v. Union Trust Co.* 130 Mich. 508, 97 A. S. R. 494, 90 N. W. 294, holding depositor might set off amount standing to his credit when bank became insolvent against his notes payable to bank, and not then due; *New Amsterdam Sav. Bank v. Tartter*, 4 Abb. N. C. 215, 54 How. Pr. 385, holding same as to depositor who had given his bond and mortgage to the bank; *Balch v. Wilson*, 25 Minn. 299, 33 A. R. 467, holding joint note due and belonging to bank against defendants could not be made subject of equitable set-off in their favor against notes against bank and other insolvent makers; *Pendergast v. Greenfield*, 40 Hun, 494, 10 N. Y. Civ. Proc. Rep. 231, holding in action brought against one as trustee he might set up a demand due him individually from a bank of which plaintiff is receiver.

Cited in notes in 2 L.R.A. 273, on right of debtor of insolvent bank to set off demand; 47 A. S. R. 585, on insolvency as affecting set-off against bank; 47 A. S. R. 142, on right of set-off against receiver or assignee of insolvent bank.

Right of indorser to set-off.

Cited in *American Bank v. Wall*, 56 Me. 167, holding bills held by indorser of note when bank became insolvent might be set off against the action of receiver of bank on note; *Yardley v. Clothiers*, 17 L.R.A. 462, 2 C. C. A. 349, 3 U. S. App. 207, 51 Fed. 506 (affirming 49 Fed. 337, 29 W. N. C. 305, 1 Pa. Dist. R. 46), holding indorser of note discounted by national bank, which becomes insolvent, might set off deposit in bank against note even though it did not mature until after failure; *Stephens v. Schuchmann*, 32 Mo. App. 333, holding indorser of note could not set off his claim for money deposited against suit on note by receiver of insolvent bank.

Right to set off bills obtained after stoppage of payment.

Cited in *Diven v. Phelps*, 34 Barb. 224; *Exchange Bank v. Knox*, 19 Gratt. 739; *Farmers' Bank v. Willis*, 7 W. Va. 31; *Stone v. Dodge*, 96 Mich. 514, 21 L.R.A. 280, 56 N. W. 75,—holding in action by receivers of insolvent bank to recover a sum due at date of suspension, defendant could not set off certificate of deposit procured by him from creditor of bank after suspension.

Cited in note in 21 L.R.A. 292, on right to set off, against insolvent bank, bank bills purchased after insolvency.

Right of secondary party to set-off.

Cited in *Mattingly v. Sutton*, 19 W. Va. 19, holding surety, having paid or discharged his liability as surety, might set off as against debt due by him to principal such payment when equal to or greater than the indebtedness.

19 AM. DEC. 454, EDMESTON v. LYDE, 1 PAIGE, 637.

Parties to creditors' suit.

Cited in reference notes in 60 A. S. R. 608, on necessary parties to creditors' suit; 25 A. D. 108, on joinder of creditors in action to vacate a fraudulent conveyance.

Cited in note in 90 A. D. 292, on assignee as necessary party to creditors' suit.

—Parties plaintiff.

Cited in *Brown v. Bates*, 10 Ala. 432, holding that several plaintiffs having distinct judgments with execution returned unsatisfied might join in filing creditors' bill to reach property of debtor; *Conro v. Port Henry Iron Co.* 12 Barb. 27, holding different creditors of corporation having common interest in relief sought might unite in same creditors' bill; *Mebane v. Layton*, 86 N. C. 571, holding creditors affected by fraud of common debtor in conveyance of his property might join in one action to subject same to payment of debts; *Wakeman v. Grover*, 4 Paige, 23, holding it unnecessary that judgment creditor who has exhausted remedies at law join similar creditors in suit to reach equitable assets of debtor; *O'Brien v. Browning*, 49 How. Pr. 109, on parties to creditors' suit; *Mattison v. Demarest*, 19 Abb. Pr. 356, 1 Robt. 717, on when creditors may be joined in creditors' suit; *Claffin v. Gordon*, 39 Hun, 54; *Chase v. Searles*, 45 N. H. 511,—on who may be parties in suit in equity to reach debtor's estate.

Cited in notes in 58 A. D. 641, on creditor's right to file bill in his own name, or in behalf of himself and other creditors; 90 A. D. 291, on right of creditors by several judgments to join in creditors' bill.

Distinguished in *Bryant v. Russell*, 23 Pick. 508, holding creditor seeking in equity to reach an assignment on trust for benefit of creditors must join all other scheduled creditors whose claims were unsatisfied; *Wheeler v. Wheeldon*, 9 How. Pr. 293, holding creditors who were first in equity but for the purpose of affirming an assignment not entitled to come in on a decree setting aside the assignment.

Creditors coming in as new parties.

Cited in *Lallman v. Hovey*, 92 Hun, 419, 36 N. Y. Supp. 662, holding new parties might be admitted on order of court by consent of plaintiffs named without its appearing in complaint and summons; *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570, on admission of creditors as cocomplainants in creditors' suit already commenced.

Bill to reach debtor's equitable estate.

Cited in *Jenks v. Horton*, 114 Mich. 48, 72 N. W. 20, holding creditor having no judgment or decree of personal nature against debtor could not maintain a bill to subject equitable interests; *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 75 A. D. 219, holding creditor with execution returned unsatisfied might maintain bill for discovery of debtor's estate; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303, holding district courts had power to compel the interest of beneficiary of

trust property to be applied to payment of debts due judgment creditor; *Watson v. Le Row*, 6 Barb. 481, holding a conveyance on trust by debtor for wife such an equitable interest that might be reached by judgment creditors by creditors' bill; *Smith v. Millett*, 12 R. I. 59, holding bill in equity would lie to give creditors who had exhausted their remedy at law a lien on dividends of nonreleasing creditors in hands of assignee; *Shainwald v. Lewis*, 6 Fed. 766, holding bill would lie in equity to discover property fraudulently secreted and transferred when judgment had been obtained and execution returned unsatisfied; *Farnham v. Campbell*, 10 Paige, 598, creditors' bill would lie to reach rents and profits of real estate of judgment debtor, on return of execution unsatisfied; *Owen v. Dupignac*, 9 Abb. Pr. 180, allowing order for examination of judgment debtor upon showing in affidavit that execution was returned unsatisfied; *Steward v. Stevens*, Harr. Ch. (Mich.) 169, sustaining a demurrer to a creditors' bill filed before the return day of the execution, although execution already returned "unsatisfied;" *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94; *Shields v. Keys*, 24 Iowa, 298; *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549; *Durant v. Albany County*, 26 Wend. 66; *Galveston, H. & S. A. R. Co. v. McDonald*, 53 Tex. 510; *Ex parte Hardy*, 68 Ala. 303 (dissenting opinion), on jurisdiction of equity to reach debtor's property.

Cited in reference notes in 36 A. D. 45, on jurisdiction of equity to enforce creditors' demand; 78 A. D. 458, on what is necessary to maintain creditors' bill; 90 A. D. 288, on necessity of return of execution *nulla bona* before commencement of creditors' suit; 34 A. D. 368, on necessity of judgment creditor showing exhaustion of legal remedies before resorting to equity.

Cited in notes in 1 L.R.A. 369, on equity's aid to judgment creditor; 25 A. D. 313, on creditors' right to resort to equity to reach assets; 63 L.R.A. 680, 682, on equitable remedy to subject choses in action to judgment after return of no property found; 8 L.R.A. 623, on jurisdiction of chancery to assist judgment creditor to reach and apply property not subject to execution at law.

Distinguished in *McKibben v. Barton*, 1 Mich. 213, holding creditors' bill filed after return of execution unsatisfied, to set aside conveyance and reach equitable assets, could not be sustained, the debtor having no longer any equity to be reached.

Creation of specific lien on debtor's equitable estate.

Cited in *Storm v. Waddell*, 2 Sandf. Ch. 494, 3 N. Y. Leg. Obs. 367; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Blake v. Bigelow*, 5 Ga. 437,—holding judgment creditor did not obtain a specific lien upon equitable estate of debtor by return of execution unsatisfied, but by commencement of suit in equity after return of execution; *May v. Bryan*, 17 App. D. C. 392; *Myrick v. Selden*, 36 Barb. 15; *Young v. Clapp*, 40 Ill. App. 312,—holding filing of creditors' bill and service of process created specific lien in equitable assets superior to rights of interveners; *Becker v. Torrance*, 31 N. Y. 631, holding institution of supplementary proceedings by judgment creditor on return of execution unsatisfied did not create a lien as against other creditors who had discovered property liable to execution; *Re Hinds*, 3 Nat. Bankr. Reg. 351, Fed. Cas. No. 6,516, denying right of creditors to lien on real estate by mere entry of judgment and execution issued; *Tomlinson & W. Mfg. Co. v. Shatto*, 34 Fed. 380, holding commencement of supplementary proceedings upon return of execution unsatisfied gave judgment creditor lien on equitable assets of debtor disclosed; *Talcott v. Thomas*, 50 N. Y. S. R. 621, 21 N. Y. Supp. 1064, commencement of action by creditors' bill to set aside fraudu-

lent conveyance by judgment debtor gave judgment creditor equitable lien on assets of assigned estate; *Marshall v. United States Trust Co.* 42 Misc. 306, 86 N. Y. Supp. 617, commencement of suit by judgment creditor to reach income of trust fund created an equitable lien in his favor; *Knower v. Central Nat. Bank*, 124 N. Y. 552, 21 A. S. R. 700, 27 N. E. 247; *Re Milburn*, 59 Wis. 24, 17 N. W. 965; *Bragg v. Gaynor*, 85 Wis. 468, 21 L.R.A. 161, 55 N. W. 919; *M'Cutchen v. Miller*, 31 Miss. 65 (dissenting opinion),—on whom creditor obtains specific lien on debtor's equitable estate; *Greenwood v. Brodhead*, 8 Barb. 593, on how judgment creditor may acquire lien on property.

Cited in reference note in 90 A. D. 295, on creditors' bill as lien.

Distinguished in *Fisher v. Western Carolina Bank*, 132 N. C. 769, 44 S. E. 601, holding commencement of suit by creditors for themselves and all other creditors to set aside a fraudulent deed of assignment by bank did not create a lien in their favor, not increasing the assets of corporation; *Spencer v. Spencer*, 9 R. I. 150, holding filing of petition for divorce and alimony did not create a lien on property described therein as against attaching creditors of husband.

Effect of subsequent bankruptcy or assignment by debtor on specific lien acquired by creditor.

Cited in *Iselin v. Goldstein*, 35 Misc. 489, 71 N. Y. Supp. 1069; *Doyle v. Heath*, 22 R. I. 213, 47 Atl. 213,—holding bill in equity to reach stock fraudulently transferred, commenced four months before petition filed in bankruptcy, gave judgment creditor lien as against trustee in bankruptcy; *Pool v. Ragland*, 57 Ala. 414, holding paramount lien created by bill filed to reach and condemn property not disturbed by subsequent bankruptcy of debtor, the proceedings having been commenced six months before bankruptcy; *Trow v. Lovett*, 122 Mass. 571, holding judgment creditor who had not taken out execution on judgment did not, by filing bill in equity to reach land fraudulently conveyed by debtor, obtain a lien as against assignee in bankruptcy.

Distinguished in *Ex parte Waddell*, Fed. Cas. No. 17,027, holding filing of creditors' bill gave no lien when debtor subsequently obtains decree in bankruptcy.

Priority of liens among creditors.

Cited in *George v. St. Louis Cable & W. R. Co.* 44 Fed. 117; *Kelly v. Turner*, 74 Ala. 513,—holding among judgment creditors who had exhausted their legal remedies, the first filing his bill for equitable relief acquired a paramount lien; *United States Bank v. Burke*, 4 Blackf. 141; *Koechl v. Leibinger & O. Brewing Co.* 26 App. Div. 573, 50 N. Y. Supp. 568; *Metcalf v. Del Valle*, 64 Hun, 245, 19 N. Y. Supp. 16; *Clark v. Figgins*, 31 W. Va. 156, 13 A. S. R. 860, 5 S. E. 643; *Freedman's Sav. & T. Co. v. Earle*, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226; *Lyon v. Robbins*, 46 Ill. 276,—holding judgment creditor who first commenced suit in equity to reach property fraudulently conveyed had the paramount lien; *Bridgman v. McKissick*, 15 Iowa, 260; *Rappleve v. International Bank*, 93 Ill. 396,—holding the lien of a junior judgment creditor who first filed his bill in equity to have a deed of trust set aside as fraudulent had a superior lien to that of a senior judgment creditor; *Hancock v. Wooten*, 107 N. C. 9, 11 L.R.A. 466, 12 S. E. 199, holding creditors' bill brought to reach property of debtor fraudulently conveyed gave the plaintiff a preference by way of equitable lien over other judgment creditors; *Babbington v. Washington Brewery Co.* 13 App. D. C. 527, holding same as to bill by judgment creditor to reach equitable interest in mortgaged chattels; *Clafin v. Gordon*, 39 Hun, 54, holding lien acquired by plaintiffs first

commencing action superior to that acquired by subsequently obtaining judgments and becoming parties; *Jones v. Fayerweather*, 46 N. J. Eq. 237, 19 Atl. 22; *Hammond v. Hudson River Iron & Mach. Co.* 20 Barb. 378; *McElwain v. Willis*, 9 Wend. 548; *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 A. S. R. 601, 47 N. E. 262; *Maguire v. Spaulding*, 194 Mass. 601, 80 N. E. 587,—on when judgment creditor entitled to priority.

Cited in note in 17 L.R.A. 345, on priority as to proceeds of creditors' bills.

Distinguished in *Kinmouth v. White*, 61 N. J. Eq. 358, holding priorities of judgment creditors in property fraudulently conveyed were in order of levies, and not in order of commencing suit to set aside conveyance, the assets being legal; *Voorhees v. Seymour*, 26 Barb. 569, holding judgment creditor commencing supplementary proceedings and receiving order for examination of debtor did not acquire prior lien on his equitable assets.

Fraudulent assignee or transferee as defendant to creditors' suit.

Cited in *Olney v. Tanner*, 10 Fed. 101, affirming necessity of joining fraudulent assignee in suit against judgment debtor to reach property fraudulently assigned; *Field v. Sands*, 8 Bosw. 685, holding in creditors' suit against judgment debtor to set aside assignment of property, assignee necessary party to suit to create lien on assigned property; *Green v. Hicks*, 1 Barb. Ch. 309, holding that when property fraudulently assigned by debtor is not in his possession so as to come into control of receiver, grantee should be joined as party; *Burtus v. Tisdall*, 4 Barb. 571, holding value of goods fraudulently assigned might be recovered by judgment creditors in equity when assignee joined in suit; *Smith v. Ford*, 48 Wis. 115, 2 N. W. 134, holding in suit by judgment creditor against grantor of a trust and *cestui que trust* to set aside mortgage given to trustee after deed of trust, non-joinder of trustee as defendant did not disable court to take jurisdiction.

—Debtor as defendant.

Cited in *Miller v. Hall*, 8 Jones & S. 262, holding judgment debtor necessary party to action on nature of creditors' bill to reach proceeds of assigned mortgage not reachable at law.

Property which may be sold under decree of equity.

Cited in *Fulghum v. Cotton*, 3 Tenn. Ch. 296; *Stark v. Cheatham*, 2 Tenn. Ch. 300,—holding equity of redemption or mortgaged property subject to sale; *Mills v. Morris*, Hoffm. Ch. 419, holding interest of a debtor in a settlement made on his wife might be sold; *Pendleton v. Perkins*, 49 Mo. 565, holding money of absconding debtor in city treasury might be reached by bill in equity; *Stephens v. Cady*, 14 How. 528, 14 L. ed. 528, holding that a copyright might be seized and made the subject of sale; *Ager v. Murray*, 105 U. S. 126, 26 L. ed. 942, holding same of patent right; *Congden v. Lee*, 3 Edw. Ch. 304, denying equitable relief to judgment creditor in the way of receiving rents of real estate when real estate might be reached at law; *Hoyt v. Thompson*, 5 N. Y. 320, confirming sale of choses in action under judicial order by receiver of corporation for benefit of creditors; *Lewis v. Leak*, 9 Ga. 95, holding creditor entitled to bill to reach his insolvent debtor's share in a partnership settlement.

Cited in reference note in 25 A. S. R. 337, on what property is subject to creditors' bill.

Cited in notes in 90 A. D. 204, as to property which may be reached in creditors' suit; 14 A. D. 542, on choses in action subject to creditors' bill.

Disapproved in *Creswell v. Smith*, 2 Tenn. Ch. 416, denying right of chancery to compel judgment debtor to turn over government bonds to receiver to satisfy debt of judgment creditors.

Jurisdiction of equity to sell for creditor's benefit.

Cited in *Chautauque County Bank v. White*, 6 N. Y. 236, 57 A. D. 442; *Hunt v. Knox*, 34 Miss. 655,—holding equity having taken jurisdiction at instance of judgment creditor to set aside fraudulent conveyance would grant full relief by decreeing sale of property for payment of debt; *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75, holding creditors' bill to reach property fraudulently standing in name of third party to payment of judgments is within jurisdiction of Federal court sitting as court of equity; *Chautauque County Bank v. White*, 6 Barb. 589, holding chancery had no power by statutory enactment to order real estate of judgment debtor sold to satisfy judgment; *Dawley v. Brown*, 65 Barb. 107, holding sale of real estate by deed thereof by referee under authority of equity in action setting aside conveyance as fraudulent, void.

Right of junior lienor to redeem.

Cited in *Hays v. Cornelius*, 3 Tenn. Ch. 461, holding second mortgagee entitled to redeem from prior liens and to an order for sale to reimburse him and to pay his debt.

Assignees of debtors.

Cited in *Cumming v. Egerton*, 9 Bosw. 684, on status of receiver as assignee of debtor.

Nature of creditors' suits.

Cited in *Fassett v. Tallmadge*, 18 Abb. Pr. 48, on distinction between bills to assert superior equities and bills to secure equality in distribution of equitable funds.

Rights of creditor commencing suit.

Cited in *Tremain v. Guardian Mut. L. Ins. Co.* 11 Hun, 286, holding creditor commencing suit in behalf of himself and other creditors may discontinue suit at any time before judgment, without consent of other creditors.

Doctrine of *lis pendens*.

Cited in notes in 2 L.R.A. 50, on prosecution of *lis pendens* as notice; 56 A. S. R. 873, on necessity of prosecuting suit with reasonable diligence to operation of law of *lis pendens*.

Effect of appointing receiver.

Cited in reference note in 38 A. D. 558, on effect of order appointing receiver to vest title to personal property in him before assignment by debtor.

19 AM. DEC. 459, JOHNSON v. PINNEY, 1 PAIGE, 646.**Rights of party in contempt of court.**

Cited in *Brinkley v. Brinkley*, 47 N. Y. 40; *Rogers v. Paterson*, 4 Paige, 450, holding party on contempt could not apply to court for favor until he had complied with the former order of court which he had disobeyed; *Robinson v. Owen*, 46 N. H. 38, holding failure of defendant to pay costs imposed by court for not complying with its order sufficient grounds for refusal to hear him on question of damages; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366, holding party in contempt of court for not answering would not be heard on motion to open the default; *Krom v. Hogan*, 4 How. Pr. 225, 2 Code Rep. 144, refusing to vacate an injunction, defendant being in contempt for disobeying it; *Michel v. O'Brien*, 6 Misc. 408, 27 N. Y. Supp. 173, holding disobedience of defendant may be considered by court, on application to dissolve an injunction addressed to favor of court; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, holding court had not

power to order answer of defendant stricken out, and decree entered against him, because guilty of contempt by neglecting to pay money subject of controversy into court.

Cited in reference notes in 33 A. S. R. 302, on right of defendant in contempt to make defense; 53 A. D. 737, on right of party in contempt to favor, not matter of strict right.

Cited in note in 8 L.R.A. 586, on summary punishment for contempt of court.

Distinguished in *Field v. Hunt*, 22 How. Pr. 329, 13 Abb. Pr. 320, granting motion of defendant in contempt for violating injunction, to dissolve same on payment of costs of plaintiff, who was not entitled to injunction; *Kahler v. Dobberpuhl*, 56 Wis. 497, 14 N. W. 631, holding party violating injunction had right to demand hearing on regularity and propriety of issuing the same.

Motions combining several successive objects.

Cited in *Hawkins v. Hawkins*, 1 Mich. N. P. 10, holding vacation of order setting aside of default, and leave to answer, properly combined in one motion.

19 AM. DEC. 461, MUMFORD v. BROWN, 1 WEND. 52.

Cotenants' rights as to possession.

Cited in *McGarrell v. Murphy*, 1 Hilt. 132, holding possession of one cotenant not unlawful unless other is prevented from occupying; *King v. Phillips*, 1 Lans. 421, on same point.

Distinguished in *Carpentier v. Webster*, 27 Cal. 524, denying right in cotenants to occupy common estate in severalty before partition.

Holding over under lease from cotenants.

Cited in *McKay v. Mumford*, 10 Wend. 351, holding that a holding over under a lease from one's cotenant is presumed to be under prior title so as not to create liability for use.

Cited in note in 28 L.R.A. 852, on position of cotenant holding over as to liability to account for use and occupation and rents and profits.

Distinguished in *Valentine v. Healey*, 86 Hun, 259, 33 N. Y. Supp. 246, presuming that firm of which one cotenant was member held over under the lease.

Remedy of ousted cotenant.

Cited in *Beach v. Child*, 13 Wend. 343, on maintenance of ejectment by cotenant ousted from possession.

Cited in notes in 50 A. S. R. 845, 846, on forcible entry and detainer between cotenants; 10 L.R.A.(N.S.) 213, on trespass *quare clausum fregit* by tenant in common of realty against cotenant.

19 AM. DEC. 462, HAWKINS v. ROCHESTER, 1 WEND. 53.

Discontinuance of condemnation proceedings.

Cited in *People ex rel. Green v. Syracuse*, 20 How. Pr. 491, holding confirmation of award passes title so as to abrogate council's power to discontinue proceedings for laying out of street; *Re Anthony Street*, 20 Wend. 618, 32 A. D. 608, holding property owners cannot insist on continuance under same proceedings until confirmation of the award; *People ex rel. Dikeman v. Brooklyn*, 1 Wend. 318, 19 A. D. 502, refusing mandamus to compel trustees to obtain confirmation of an award under same proceedings; *Re Rhinebeck & C. R. Co.* 67 N. Y. 242, denying right in railroad, under it's charter, to abandon after confirmation of appraisal; *Stacey v. Vermont C. R. Co.* 27 Vt. 39, holding delivery of possession and payment of money passes title under charter of railroad, so as to allow discontinu-

ance up to that time; *Beveridge v. West Chicago Park*, 7 Ill. App. 460, holding same under act for condemnation for park purposes.

Vesting of award of damages in eminent domain.

Cited in *Buell v. Lockport*, 11 Barb. 602, holding right to damages under same proceedings absolute upon assessment, confirmation, and judgment; *Dodge v. Catskill*, 66 N. Y. 648, holding right to damages not vested upon their assessment under charter reserving power of ratification in taxable inhabitants; *First Nat. Bank v. West River R. Co.* 49 Vt. 167, holding railroad enjoined from proceeding with work after deposit of damages, not possessed of title so as to vest right to damages.

Cited in reference note in 33 A. D. 744, on vested right to damages after verdict awarding damages for laying out highway.

Remedy by suit against municipality.

Cited in *Marathon Twp. v. Oregon Twp.* 8 Mich. 372 (dissenting opinion), on common-law remedy by suit implied from statute creating charges against town and failing to provide a remedy.

19 AM. DEC. 463, MARSHALL v. DAVIS, 1 WEND. 109.

When replevin is maintainable.

Cited in *Harwood v. Smethurst*, 29 N. J. L. 195, 80 A. D. 207, holding it not maintainable for a mere unlawful detention; *Caldwell v. West*, 21 N. J. L. 411, holding it maintainable for goods wrongfully taken and detained as well as for goods distrained; *Trapnall v. Hattier*, 6 Ark. 18; *Rogers v. Arnold*, 12 Wend. 30; *Pirani v. Barden*, 5 Ark. 81,—holding it maintainable by statute for wrongful detention; *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 A. D. 540, on whether it is maintainable for mere wrongful detention; *Martin v. Martin*, 12 Leigh, 495, on tortious taking as gist of replevin; *McKnight v. Morgan*, 2 Barb. 171 (dissenting opinion), on maintenance of replevin in *cepit* only where trespass will lie.

Cited in reference notes in 21 A. D. 468, 755; 23 A. D. 333; 26 A. D. 688, 689; 40 A. D. 204; 52 A. D. 159; 58 A. D. 66; 93 A. D. 743,—as to when replevin lies for wrongful detention; 20 A. D. 606, on right to maintain replevin; 38 A. D. 546, on what will authorize replevin; 61 A. D. 766, on what is necessary to maintain replevin; 91 A. D. 432, on right to maintain replevin for wrongful detention of property; 38 A. D. 546, on necessity for tortious taking to authorize replevin; 91 A. D. 432, on trespass, trover, and replevin as concurrent remedies for wrongful taking of goods; 91 A. D. 432, on what constitutes wrongful detention of property.

Cited in notes in 23 A. D. 333, on replevin for tortious and unlawful taking; 80 A. S. R. 743, as to when replevin or claim and delivery is sustainable; 80 A. S. R. 753, on wrongful taking and unlawful detention as essential to replevin or claim and delivery.

— What constitutes a “taking.”

Cited in *Barrett v. Warren*, 3 Hill, 348; *Smith v. Clark*, 21 Wend. 83, 34 A. D. 213,—holding it not maintainable against party taking by delivery from bailee in actual possession; *Bruen v. Ogden*, 11 N. J. L. 370, 20 A. D. 593, holding officer taking goods of one on execution against another, liable in replevin; *Hall v. Tuttle*, 2 Wend. 475, holding it maintainable against officer levying on goods in possession of defendant in execution, and retaking them from owner after their coming peaceably into his possession; *Dudley v. Ross*, 27 Wis. 679, holding re-

plevin proper under statute without previous demand against officer seizing property on tax warrant void on its face; *Coit v. Waples*, 1 Minn. 134, Gil. 110, holding taking wrongful unless there was all the delivery of which the property was susceptible.

Cited in reference notes in 91 A. D. 432, on what constitutes tortious or wrongful taking of property; 34 A. D. 216, on delivery by bailee as wrongful taking, authorizing replevin.

— Sufficiency of plaintiff's possession.

Cited in *Johnson v. Carnley*, 10 N. Y. 570, 61 A. D. 762, holding actual possession and equitable interest will sustain replevin against wrongdoer; *Ely v. Ehle*, 3 N. Y. 506; *Acker v. Campbell*, 23 Wend. 372,—holding owner may replevin goods taken absolutely from possession of bailee or other person in actual possession; *Beebe v. DeBaun*, 8 Ark. 510, holding it unnecessary to have had actual possession and bailed it, to maintain replevin in *detinet*; *Dunham v. Wyckoff*, 3 Wend. 280, 20 A. D. 695, sustaining replevin by one having property and right to reduce to possession against officer taking them out of possession of defendant; *Miller v. Adsit*, 16 Wend. 335, holding receiptor, bound to deliver or pay amount of execution at day certain, may replevin, though property was left with defendant in execution; *Wise v. Grant*, 140 N. Y. 593, 35 N. E. 1078, holding right to rescind for fraud not a "right to reduce to possession" within statute, so as to sustain replevin against attaching creditor; *Klee v. Grant*, 4 Misc. 88, 23 N. Y. Supp. 855, holding owner delivering goods to another with option to purchase can maintain action under same statute.

When trespass is maintainable.

Cited in *Nash v. Mosher*, 19 Wend. 431, holding it not maintainable by owner against purchaser from transferee who came lawfully into possession by delivery from a bailee; *Wilson v. Martin*, 40 N. H. 88, holding it not maintainable by owner where right to possession was exclusively in a bailee; *Earl v. Camp*, 16 Wend. 562, holding officer who voluntarily surrendered goods levied on by him cannot maintain trespass; *Talmadge v. Scudder*, 38 Pa. 517, holding purchaser at sheriff's sale not liable in trespass though original taking was tortious provided possession was received from sheriff.

Cited in note in 18 A. D. 547, on necessity of actual or constructive possession to maintenance of trespass in case of chattels.

Disapproved in *Stanley v. Gaylord*, 1 Cush. 536, 48 A. D. 643, holding it maintainable by owner against mortgagee from bailee, who had no authority to retain or dispose of property.

When trover is maintainable.

Cited in *Little v. Denn*, 34 N. Y. 452, holding sheriff attaching held-over goods in possession of bailee liable for conversion upon refusal to deliver to bailor; *Dudley v. Hawley*, 40 Barb. 397, holding jeweler selling diamonds and giving proceeds to customer in ignorance of another's title liable in trover; *Equitable Co-Op. Foundry Co. v. Hersee*, 33 Hun, 169, on liability for conversion of one forcibly taking goods on execution against fraudulent vendee to rescind.

Witness with balanced interest.

Cited in *Keutgen v. Parks*, 2 Sandf. 60, holding agent usuriously pledging note for his own use competent in action by principal against pledgee; *Fuller v. Townsend*, 5 Denio, 184, holding vendor of defendant in trover who was himself liable in case sale was unauthorized, not competent on question of value.

Pleading in replevin.

Cited in *Prosser v. Woodward*, 21 Wend. 205, on whether it is sufficient for declaration to aver that plaintiff was "entitled to possession of goods."

Abuse of authority.

Cited in *Taylor v. Jones*, 42 N. H. 25, holding the error or mistake must be so complete a departure from duty to raise presumption of wrongful intent.

Cited in reference note in 87 A. D. 634, on right of officer to take property described in writ of replevin from stranger who is true owner.

Cited in note in 14 A. D. 365, as to what abuse of process constitutes an officer trespasser.

19 AM. DEC. 469, LE PAGE v. McCREA, 1 WEND. 164.**Accord and satisfaction.**

Cited in *Nathan v. Smith*, 24 Misc. 374, 53 N. Y. Supp. 265, holding pending action and right of action discharged upon payment of costs and agreement to accept two notes as a full settlement; *Lincoln Sav. Bank & S. D. Co. v. Allen*, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148, holding agreement to surrender part of collateral notes, retain rest, and accept sum of money, valid; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365, holding agreement to relinquish part mortgage debt in consideration of payment of taxes by mortgagor, valid; *Levy v. Levy*, 12 Ark. 148, holding agreement to accept jewelry in consideration of shortening time of payment, valid.

Cited in reference note in 45 A. D. 145, on accord and satisfaction.

Cited in notes in 11 L.R.A. 712, as to when agreement is a good accord and satisfaction; 100 A. S. R. 419, on accord and satisfaction of judgment or decree; 64 A. D. 140, on payment of part of unliquidated debt as discharge of whole.

—Acceptance of part in full.

Cited in *Ryan v. Ward*, 48 N. Y. 204, 8 A. R. 539, holding recovery not barred by execution of receipt in full upon part payment, though with full knowledge; *Diller v. Brubaker*, 52 Pa. 498, 91 A. D. 177, holding it must appear that satisfaction was advantageous to the creditor; *Reid v. Hibbard*, 6 Wis. 175, holding acceptance of foreign draft for less amount as a satisfaction of judgment, valid; *Lewis v. Donohue*, 27 Misc. 514, 58 N. Y. Supp. 319, holding same of acceptance of part of rent due on consideration of quitting premises and abandoning claim of untenability; *Bunge v. Koop*, 5 Robt. 1, holding acceptance of less sum as a satisfaction, the money having been borrowed, as a part of the agreement, insufficient; *Buckingham v. Oliver*, 3 E. D. Smith, 129, holding neither of two joint and several obligors discharged by receipt to one acknowledging payment of one half of demand as a full satisfaction; *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415, holding acceptance of less sum of cash in satisfaction of a bond, valid where obligee knew that all parties were insolvent.

Cited in reference notes in 51 A. S. R. 699, on effect of acceptance of less than sum due as accord and satisfaction; 52 A. D. 779, on part payment of liquidated debt as no satisfaction though accepted.

—Acceptance of third person's note or liability for part in full.

Cited in *Goldenberg v. Hoffman*, 69 N. Y. 322, construing and holding valid an agreement by creditor to accept a less sum from third person as a full settlement; *Kellogg v. Richards*, 14 Wend. 116; *Webb v. Goldsmith*, 2 Duer, 413; *Booth v. Smith*, 3 Wend. 66,—holding acceptance of third person's note for full amount of a demand operates as a discharge; *Dolsen v. Arnold*, 10 How. Pr. 528; *Pope v.*

Tunstal, 2 Ark. 209,—holding same where stranger indorsed note; Singleton v. Thomas, 73 Ala. 205, holding same though agreement for discharge was not in writing; Frisbie v. Larned, 21 Wend. 450, holding acceptance of third person's note indorsed by one member of a firm, and balance of account in cash, discharges liability of other members; Waydell v. Luer, 3 Denio, 410, holding note of copartner after dissolution and indorsed by stranger, a discharge of firm debt; Gillfillan v. Farington, 12 Ill. App. 101, holding agreement of a portion of creditors to accept notes of third person for less amount as a satisfaction, valid regardless of assent of other creditors; Babcock v. Dill, 43 Barb. 577, holding agreement by insolvent's father to pay 40 cents on dollar as a full payment, binding; Nevins v. Depierries, 1 Edm. Sel. Cas. 196, 4 N. Y. Leg. Obs. 70, holding compromise for less amount by accepting debtor's note and an order on third person operates as a discharge after payment; Keeler v. Salisbury, 27 Barb. 485, holding agreement to discount a portion of mortgage executed by husband alone in consideration of wife's joining in new instrument, valid; Conkling v. King, 10 N. Y. 440, 10 Barb. 372, on discharge of obligation by acceptance of note of third person as a full satisfaction and payment at maturity.

Cited in notes in 23 A. D. 777, as to when payment by note of third person discharges debt; 100 A. S. R. 438, on note of third person in part payment as consideration for accord and satisfaction; 1 E. R. C. 398, on acceptance of accord from stranger as satisfaction.

—Acceptance of part with security.

Cited in Brown v. Kern, 21 Wash. 211, 57 Pac. 798, holding agreement to accept less amount of cash and note secured by collateral is good discharge; Phillips v. Berger, 2 Barb. 608, holding same of agreement to accept less than demand in consideration of receiving security; Jaffray v. Davis, 124 N. Y. 164, 11 L.R.A. 710, 26 N. E. 351, 4 Silv. Ct. App. 315, holding agreement to accept secured notes for less amount as a satisfaction, operates as a discharge after payment; Chambers v. McDowell, 4 Ga. 185, holding on acceptance of a security of same grade as accord and satisfaction.

Cited in notes in 20 L.R.A. 792, on accord and satisfaction by part payment where further security is given; 100 A. S. R. 439, on giving of security for part payment as consideration for accord and satisfaction.

Accord and satisfaction as a defense.

Cited in Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 100, holding acceptance of note of one of several obligors in satisfaction of unliquidated damages for breach of bond bars action on bond; Savage v. Everman, 70 Pa. 315, 10 A. R. 676, 29 Phila. Leg. Int. 45, holding it a good defense to action on judgment.

Merger of debt.

Cited in reference note in 38 A. D. 763, on merger of debt in higher security.

Subrogation against partner.

Cited in note in 54 L.R.A. 615, on right of partner who pays firm debt to subrogation against copartner.

Pleading specialties.

Cited in Hays v. Lasater, 3 Ark. 565, holding it necessary to expressly aver the "sealing" though the covenant was set out in *laec verba*.

Mode of objecting to nonjoinder of parties.

Cited in reference notes in 43 A. D. 259, on form of objection to nonjoinder of

parties; 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of; 42 A. D. 531, on mode of taking advantage of nonjoinder of joint contractor as codefendant; 41 A. D. 296, as to when and how objection of nonjoinder is made; 27 A. D. 720, as to time and place for taking objection of want of proper parties.

— **By pleas in abatement.**

Cited in *Douglass v. Leonard*, 44 N. Y. S. R. 293, 17 N. Y. Supp. 591, holding nonjoinder of parties waived unless raised by answer or demurrer.

Cited in reference notes in 37 A. D. 69; 69 A. D. 87; 65 A. S. R. 405,—on nonjoinder as matter for plea in abatement; 24 A. D. 744, on raising by plea in abatement nonjoinder of proper party defendant.

Cited in note in 1 E. R. C. 173, on right to plead in abatement nonjoinder of defendant in contract.

Necessity of consideration.

Cited in note in 12 L.R.A. 469, giving instances of contracts void because without consideration.

19 AM. DEC. 473, WELSH v. CARTER, 1 WEND. 185.

Liability for sale of spurious or worthless goods.

Cited in *Carley v. Wilkins*, 6 Barb. 557, holding selling of article as of particular character is neither a warranty nor a representation; *Johnson v. Titus*, 2 Hill, 606, holding decay and lifelessness of mulberry trees cannot be offset to purchase-money notes in absence of fraud or warranty; *Ives v. Ellis*, 50 App. Div. 399, 64 N. Y. Supp. 147, holding purchaser of ancient book cannot recover on finding it a reproduction, there being no fraud or a warranty.

Caveat emptor.

Cited in *Wilbur v. Cartright*, 44 Barb. 536, holding rule of *caveat emptor* inapplicable where warranty was exacted; *Gillespie v. Torrance*, 25 N. Y. 306, 82 A. D. 355, holding defect in timber cannot be offset in action on purchase-money notes in absence of warranty or fraud; *McCormick v. Sarson*, 45 N. Y. 265, 6 A. R. 80, holding purchaser accepting lumber as fulfilling contract after examination, cannot set up defect, there being no fraud or warranty; *Tompkins v. Lamb*, 121 App. Div. 366, 106 N. Y. Supp. 6 (dissenting opinion), on payment as a bar to action on account of deficiency in quality.

Implied warranty.

Cited in *Horner v. Fellows*, 1 Dougl. (Mich.) 51, holding representation during negotiation merged in warranty so as to be unactionable unless amounting to fraud; *Misner v. Granger*, 9 Ill. 69, holding sale of threshing machine by machinist, not a manufacturer, does not imply warranty; *Blake v. Ferris*, 5 N. Y. 95, 55 A. D. 304, holding exhibition of sample does not imply warranty, unless evidence shows such to have been the intention; *Waring v. Mason*, 18 Wend. 425 (dissenting opinion), on nonwarranty of quality of bales of cotton by sample, open to examination.

Cited in notes in 54 A. D. 145; 23 E. R. C. 461,—on implied warranty of quality on sale of chattel; 43 A. D. 680, on implication of warranty from sound price paid for goods; 70 L.R.A. 664, on warranty on sale of goods by both sample and description.

— **Goods unfit for known purpose.**

Cited in *Hart v. Wright*, 17 Wend. 267, holding sale of flour for sound price to starch maker does not imply a warranty of soundness; *Wright v. Hart*, 18

Wend. 449 (dissenting opinion), on warranty by implication upon a sale of flour to starch manufacturer for a sound price; *Demming v. Foster*, 42 N. H. 165, holding no warranty of fitness implied upon sale of article subject to examination, though known to be purchased for a specific use.

Want of consideration as a defense.

Cited in note in 25 A. D. 393, on failure or want of consideration of note as defense.

Recovery of money paid by mistake.

Cited in *Norton v. Marden*, 15 Me. 45, 32 A. D. 132, holding it cannot be recovered when voluntarily paid, or with knowledge or means of knowing the facts.

Declarations of agent.

Cited in *Franklin Bank v. Steward*, 37 Me. 519 (dissenting opinion), on right of surety on note to prove declarations of plaintiff's cashier as to payment.

Cited in reference notes in 22 A. D. 212; 23 A. D. 522,—on declarations of agent as evidence against principal; 31 A. D. 61, on admissibility of declarations of agent or servant against principal or master; 25 A. D. 139, as to when agents' declarations are evidence against principal; 39 A. D. 656, on agent's declarations after transaction to which agency extends as evidence against principal.

19 AM. DEC. 477, PEOPLE v. FITCH, 1 WEND. 198.

What constitutes forgery.

Cited in reference notes in 53 A. D. 694; 96 A. D. 164,—as to what constitutes forgery.

Cited in notes in 22 A. D. 776, on forgery; 22 A. D. 307, on false making as essential to forgery.

—Element of deception in.

Cited in *Hotchkiss v. English*, 4 Hun, 369, 6 Thomp. & C. 658, defining forgery as false signature made with intent to deceive.

Cited in note in 22 A. D. 314, on accomplishment of fraud as essential to forgery.

—Forgery of writings patently nonobligatory or void.

Cited in *Fadner v. People*, 33 Hun, 240, 2 N. Y. Crim. Rep. 553, holding false impression of seal on judgment not a forgery unless instrument is regular on its face; *Cunningham v. People*, 4 Hun, 455, 2 Cow. Crim. Rep. 214, holding state warrants, invalid on their face for want of seal, not subject of forgery; *People v. Shall*, 9 Cow. 778, holding forgery of writing, containing naked promise to pay sum of money in labor, expressing no consideration, not indictable; *Re Benson*, 34 Fed. 649, holding theater ticket may be the subject of forgery, though it expresses no consideration or promise of admission; *State v. Anderson*, 30 La. Ann. 557, on writings subject of forgery.

Cited in notes in 22 A. D. 316, on instrument having no legal efficacy not subject of forgery; 24 L.R.A. 39, on forgery of instruments void on their face.

—Of writings not conducive to fraud.

Cited in *People v. Cady*, 6 Hill, 490, holding fraudulent alteration of day appointed in writ of inquiry for its execution, not a forgery either at common law or by statute; *State v. Young*, 46 N. H. 266, 88 A. D. 212, holding false charge in one's own books not a forgery either at common law or by statute.

Actual perpetration of fraud as essential to forgery.

Cited in reference note in 78 A. D. 490, on effect of failure to accomplish fraud on crime of forgery.

19 AM. DEC. 480, BISSELL v. GOLD, 1 WEND. 210.**Liability of officers for erroneous proceedings.**

Cited in *Prosser v. Secor*, 5 Barb. 607, holding assessors exceeding jurisdiction in assessment of minister, liable as trespassers.

Cited in reference note in 22 A. D. 550, on liability of judicial officers.

Cited in notes in 54 A. D. 263, on personal liability of judicial officers for official acts; 23 A. D. 383, on liability of officers for acting in excess of authority.

Liability for arrest on void process.

Cited in *Parsons v. Harper*, 16 Gratt. 64, holding one suing out capias without bond liable regardless of malice or want of probable cause; *Hoose v. Sherrill*, 16 Wend. 33 (dissenting opinion), on inability of justice to justify arrest upon judgment and execution without proof of jurisdiction of person.

Cited in reference notes in 25 A. D. 600; 27 A. D. 301; 10 A. S. R. 104,—as to who is liable for wrongful arrest; 50 A. D. 747, on liability of officer executing warrant; 67 A. D. 88, on liability of attorney for suing out void process.

Cited in notes in 19 A. D. 491, on liability of magistrate issuing warrant for arrest; 73 A. D. 142, on liability of plaintiff in attachment and other writs for act of officer thereunder; 54 A. D. 266, on liability for false imprisonment on part of person procuring arrest or on whose evidence warrant issued; 54 A. D. 266, on liability for false imprisonment on part of officer executing writ or warrant; 54 A. D. 267, on liability for false imprisonment on part of persons assisting officer making arrest under warrant; 18 L.R.A. 357, on lack of jurisdiction or of legal grounds of criminal prosecution as affecting liability for false imprisonment of complainant, who acts in good faith.

Limited in *Rogers v. Mulliner*, 6 Wend. 597, 22 A. D. 546, holding justice not liable for issuing warrant without oath unless he acted in bad faith.

—For execution of void process.

Cited in *Shadbolt, v. Bronson*, 1 Mich. 85, holding justice, issuing execution without jurisdiction, liable as a trespasser.

—For execution of process not founded on statutory bond.

Cited in *Barkeloo v. Randall*, 4 Blackf. 476, 32 A. D. 46, holding party procuring and justice issuing attachment without bond, liable as trespasser.

What constitutes false imprisonment.

Cited in reference note in 118 A. S. R. 721, on necessity, to constitute false imprisonment, that actual force be employed.

Cited in notes in 44 A. D. 277; 67 A. S. R. 409,—on false imprisonment; 54 A. D. 259, on necessity for actual imprisonment to constitute false imprisonment.

Joint and several liability.

Cited in *Egleston v. Scheibel*, 113 App. Div. 798, 99 N. Y. Supp. 969, holding police officers successively contributing to false imprisonment suable as joint tortfeasors; *Teal v. Fissel*, 28 Fed. 351, 18 W. N. C. 71, holding no liability on bona fide prosecutors for erroneous warrant issued by justice, charging a public offense.

Distinguished in *Von Latham v. Rowan*, 38 Barb. 339, 17 Abb. Pr. 247, holding no liability on bona fide prosecutors for erroneous warrant issued by magistrate within jurisdiction.

Process as protection to officer.

Cited in *Blake's Case*, 106 Mass. 501, on whether officer is liable for arrest of spendthrift under guardianship on execution in action of contract.

Distinguished in *Kyle v. Evans*, 3 Ala. 481, 37 A. D. 705, holding constable liable for failure to return executions issued under delegated power from justice.

Explained in *Savacool v. Boughton*, 5 Wend. 170, 21 A. D. 181, holding want of jurisdiction of person in justice not shown on face of process does not render officer liable, where there was jurisdiction of subject-matter.

What constitutes an arrest.

Cited in *Harft v. McDonald*, 1 N. Y. City Ct. Rep. 181, holding it sufficient if accused is within power of officer; *Collins v. Fowler*, 10 Ala. 858, holding submission to officer having warrant, sufficient; *Fay v. Whitman*, 100 Mass. 76; *Butler v. Washburn*, 25 N. H. 251; *State v. Hann*, 40 N. J. L. 228; *Field v. Ireland*, 21 Ala. 240,—holding it sufficient if party is within power of officer and submits; *Hebrew v. Pulis*, 73 N. J. L. 621, 118 A. S. R. 716, 7 L.R.A.(N.S.) 580, 64 Atl. 121, holding constraint by threats without touching person, sufficient; *State v. Deatherage*, 35 Wash. 326, 77 Pac. 504, holding it unnecessary to handcuff the prisoner; *State ex rel. Lawrence v. Buxton*, 102 N. C. 129, 8 S. E. 774; *Pike v. Hanson*, 9 N. H. 491,—holding it necessary that there be an actual touching of body, or that power be accompanied by a submission; *Searls v. Viets*, 2 Thomp. & C. 224, holding actual touching of body unnecessary, provided acts amount to a restraint of liberty; *Callahan v. Searles*, 78 Hun, 239, 60 N. Y. S. R. 214, 28 N. Y. Supp. 904, holding inquiry as to stolen property, exhibition of shield, and direction to come to certain place, sufficient; *Fuller v. Bowker*, 11 Mich. 204, on insufficiency of mere words of officer.

Annotation cited in *Goodell v. Tower*, 77 Vt. 61, 107 A. S. R. 745, 58 Atl. 790, holding it sufficient if party is within power of officer, and submits.

Cited in reference notes in 31 A. D. 428; 55 A. D. 104; 61 A. D. 151; 81 A. D. 677,—as to what is arrest; 20 A. D. 319, on what constitutes an arrest and liability therefor; 44 A. D. 294, on what is an arrest and liability of magistrate issuing void warrant.

Cited in notes in 8 L.R.A. 532, on how arrest made; 61 A. D. 152, on what constitutes an arrest where party submits thereto.

Distinguished in *Lansing v. Case*, 4 N. Y. Leg. Obs. 221, holding it no arrest where there was no manual detention, and the person's attendance was by uncoerced agreement with the officer.

Manucaption as element in a taking.

Cited in *Connah v. Hale*, 23 Wend. 462, holding actual manucaption of goods unnecessary provided there was submission to threat of right.

Jurisdiction of justice of peace.

Cited in *Bargis v. State*, 4 Ind. 126, holding judgment of guilty without complaint on oath as required by statute, a nullity; *Silsbury v. McCoon*, 4 N. Y. 379, 53 A. D. 307 (dissenting opinion), on validity of warrant issued by justice, when summons is proper process.

Invalidity of process without statutory oath or bond.

Cited in *Bennett v. Brown*, 4 N. Y. 254, Code Rep. N. S. 267 (dissenting opinion), on validity of attachment against nonresident without affidavit or bond.

Pleading in action for false imprisonment.

Cited in note in 54 A. D. 270, on pleading in actions for false imprisonment.

land and exclusive right of fishing; *Rockfeller v. Lamora*, 85 App. Div. 254, 83 N. Y. Supp. 289, on same point; *Robins v. Ackerly*, 91 N. Y. 98, holding town possessed of exclusive fishery in certain harbor by grant can execute valid lease of a part of tract to individual; *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12, holding Coeyman's grant of 1714 conferred no exclusive fishing privilege in the Hudson river.

Cited in notes in 60 L.R.A. 488, on grant of exclusive right to fish to individual; 60 L.R.A. 492, on how grants of exclusive right to fish are made to individual.

Criticized in *Lowndes v. Dickerson*, 34 Barb. 586, on whether Crown, alone, can grant exclusive right of fishing in sea to an individual.

Disapproved in *Gough v. Bell*, 21 N. J. L. 156, denying power of Crown to grant several fishery or soil under navigable waters or arms of sea.

Prescriptive rights in public waters.

Cited in *Brinckerhoff v. Starkins*, 11 Barb. 248, holding individuals cannot set up exclusive right to plant oysters unless shown by prescription or positive grant; *Folsom v. Freeborn*, 13 R. I. 200, holding title by lost grant against state or Crown presumed from possession of long duration or shorter possession and corroborative facts; *Timpson v. New York*, 5 App. Div. 424, 39 N. Y. Supp. 248, holding title to lands under water can be acquired by adverse possession against city of New York.

Cited in reference notes in 38 A. D. 727, on acquisition by individual, by grant or prescription, of exclusive right to fish in navigable waters; 42 A. D. 160, on right of individual to acquire several fishery in navigable stream by grant or prescription.

Cited in notes in 60 L.R.A. 496, on prescriptive right to fishery; 14 L.R.A. 386, on prescriptive rights of fishing in public navigable waters.

Separate rights of submerged soil and fishery in waters.

Cited in *People v. Thompson*, 1 N. Y. Crim. Rep. 501, holding state can grant exclusive right of fishing in any portion of its aquatic domain without granting the submerged land; *People v. Vanderbilt*, 26 N. Y. 287, holding property in underlying soil in the people or the King, so as to be capable of alienation, while right to use the waters is vested in public at large; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71 (modifying 7 Hun, 105), holding legislative grant of subsoil impliedly reserves right to regulate use of waters.

Crown grants of submerged lands to towns.

Cited in *Nott v. Thayer*, 2 Bosw. 10, holding city of New York the absolute owner of fee between high and low water mark, by virtue of its charters; *Furman v. New York*, 5 Sandf. 16, holding charter of city of New York gives it the fee of land under water within certain limits to extent of 400 feet below low water; *Fleet v. Hegeman*, 14 Wend. 42, holding right of fishing in Oyster bay exclusively in the inhabitants of town by virtue of their charter; *Southampton v. Mecox Bay Oyster Co.* 116 N. Y. 1, 22 N. E. 387, holding Southampton got title to the undivided and unappropriated land within its bounds by its charter; *Robins v. Ackerly*, 24 Hun, 499, holding Huntington got title under its charter to land under Northport harbor, so as to be able to lease land for the raising of oysters; *People ex rel. Hunt v. Schermerhorn*, 19 Barb. 540, holding title to lands under navigable waters in town of Bushwick by virtue of its charter, as against subsequent grant from land commissioner; *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294, holding fee to soil under bays and harbors in town of Brookhaven by virtue of

Effect of nonappearance by plaintiff at trial.

Cited in *Goldstein v. Loeb*, 21 Misc. 72, 46 N. Y. Supp. 838, holding failure to ask for dismissal upon nonappearance of plaintiff at return of summons operates as a discontinuance.

19 AM. DEC. 493, ROGER v. JONES, 1 WEND. 237.**When conveyance carries land under water.**

Cited in *Nostrand v. Durland*, 21 Barb. 478, holding underlying land not included in grant of "a stream and pond of water and sawmill thereunto belonging;" *Brookhaven v. Strong*, 60 N. Y. 56, holding land under water within bounds of grant passes with the conveyance; *Coudert v. Underhill*, 107 App. Div. 335, 95 N. Y. Supp. 134, holding same of land between high and low water mark within limits of the Andros grant; *DeLancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822, (modifying 63 Hun, 169, 17 N. Y. Supp. 681), holding land below high-water mark on navigable stream does not pass under patent unless within its bounds.

Cited in reference note in 39 A. D. 687, on grant of land covered by water.

Cited in note in 42 L.R.A. 164, on title to grants of land under water.

Boundary of land on navigable water.

Cited in *Alaska Gold Min. Co. v. Barbridge*, 1 Alaska, 311, on ordinary high-water mark as boundary of riparian lands at common law.

What waters are navigable.

Cited in note in 21 A. D. 712, on what are navigable rivers.

Rights of owner of tide flats.

Cited in *Whittaker v. Burhans*, 62 Barb. 237, holding owner of flats on navigable stream can maintain trespass against one driving stakes in soil for mooring of his boats.

Public rights in public waters generally.

Cited in *American Ice Co. v. Catskill Cement Co.* 43 Misc. 221, 88 N. Y. Supp. 455, on the state's ownership of water in Hudson river, as trustee for people subject to regulation by Congress.

Cited in reference notes in 37 A. D. 58, on public rights in navigable streams; 42 A. D. 314, on legislative control over navigation on public rivers.

Cited in notes in 21 A. D. 101, on law as to navigable streams; 41 L. ed. U. S. 998, on navigable waters and right therein.

Public right and regulation of fishery.

Cited in reference notes in 39 A. S. R. 407, on fishing privileges; 67 A. S. R. 705, on right to fish in non-navigable streams; 23 A. S. R. 399, on right of fishery in public waters; 54 A. D. 769, on public right of fishery in navigable waters; 7 A. S. R. 798, on fishing rights of public in uninclosed flats between high and low water mark of sea; 100 A. D. 609, as to several and exclusive fishery in navigable waters.

Cited in notes in 12 E. R. C. 192, on right of several fishery in navigable waters; 60 L.R.A. 482, on public right of fishery; 60 L.R.A. 501, on public regulation of right of fishery; 60 L.R.A. 515, on right of municipal corporations as to fisheries.

Public grants of fishery.

Cited in *People v. Thompson*, 30 Hun, 457, holding state can grant exclusive right to plant oysters to an individual; *Brookhaven v. Strong*, 60 N. Y. 56 (affirming 1 Thomp. & C. 415), holding King could make valid grant of underlying

its charter subject to public easement; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758, holding Huntington bay within limits of Huntington charter describing north boundary as "the sound."

Distinguished in *People ex rel. Underhill v. Saxton*, 15 App. Div. 263, 44 N. Y. Supp. 211, as not involving questions relative to title of lands in Hempstead harbor.

Private riparian rights.

Cited in *Smith v. Rochester*, 92 N. Y. 463, 44 A. R. 393, holding title on fresh water unnavigable streams, excepting Hudson and Mohawk, extends to thread of stream, with right to undisturbed flow; *Vansickle v. Haines*, 7 Nev. 249, holding each proprietor can use water in any manner not incompatible with rights of the others.

Cited in reference note in 58 A. D. 54, on ownership or property in watercourse.

Power of municipality in matters covered by general law.

Cited in *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *State v. Fourcade*, 45 La. Ann. 717, 40 A. S. R. 249, 13 So. 187; *State v. Sanders*, 68 S. C. 192, 47 S. E. 55; *Hamilton v. State*, 3 Tex. App. 643; *Mobile v. Allaire*, 14 Ala. 400,—holding act violative of authorized municipal ordinance and general law, punishable under both; *Polinsky v. People*, 11 Hun. 390, holding authorized ordinance not invalid because subject is also covered by general law; *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577, holding municipality can regulate liquor traffic under general welfare clause, though there are full general laws on the subject; *Moundsville v. Fountain*, 27 W. Va. 182, holding authorized ordinance regulating liquor traffic valid, though there are general laws on the subject; *Yankton v. Douglass*, 8 S. D. 440, 66 N. W. 923, holding Constitution prohibiting sale of liquors does not repeal city's charter power to suppress tippling houses; *Kansas City v. Hallett*, 59 Mo. App. 160, holding ordinance prohibiting lotteries not repugnant to statute because more definite as to fine or penalty; *Arhart v. Stark*, 6 Misc. 579, 27 N. Y. Supp. 301, holding civil judgment for penalty under authorized ordinance inadmissible in action under general law; *Greenville v. Kemmis*, 58 S. C. 427, 50 L.R.A. 725, 36 S. E. 727, holding charter of Greenville authorizes ordinance prohibiting gambling, though such acts are not criminal by general law; *Hill v. St. Louis*, 159 Mo. 159, 60 S. W. 116, holding charter impliedly allows city to create another remedy in favor of sewer contractor, notwithstanding provision as to payment in tax bills; *Bly v. Nashua Street R. Co.* 67 N. H. 474, 68 A. S. R. 681, 30 L.R.A. 303, 32 Atl. 764, holding street railway subject to general law as to rate of speed, though city could have modified the limit under its charter; *Marion v. Chandler*, 6 Ala. 899, on validity of by-law imposing penalty on act also punishable by general law.

Cited in reference note in 68 A. D. 455, on validity of town law not consistent with general laws of state.

Cited in notes in 13 L.R.A. 185, on validity of ordinance conflicting with state law; 1 L.R.A. (N.S.) 384, on right of municipality to enact ordinances on subject covered by state law; 34 A. D. 642, on validity of municipal ordinances defining and punishing public offenses.

Disapproved in *Savannah v. Hussey*, 21 Ga. 80, 68 A. D. 452, denying power to legislate criminally upon case fully covered by state law; *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, holding general welfare clause does not carry power to punish for acts already criminal under general law.

Partial validity of by-law or ordinance.

Cited in *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596, holding by-law of

insurance company may be valid as to one part and void as to another provided it is distinct; *People ex rel. Gould v. Rochester*, 45 Hun, 102, holding distinct valid part of ordinance not affected by void portions; *Burlington v. Kellar*, 18 Iowa, 59, on same point; *Utica v. Blakeslee*, 46 How. Pr. 165, holding void part of penalty in ordinance will not invalidate rest where it can be separated; *State ex rel. Ross v. Anderson*, 31 Ind. App. 34, 67 N. E. 207, on partial validity and nullity of a divisible by-law of private corporation.

Cited in note in 43 A. S. R. 157, on divisibility, alteration, amendment, or repeal of corporate by-laws.

Hale's De Jure Maris.

Cited in *New York v. Hart*, 95 N. Y. 443, holding it an authority at time of Harlem patent of 1666.

19 AM. DEC. 502, PEOPLE v. BROOKLYN, 1 WEND. 318.

When mandamus lies.

Cited in *People ex rel. Martin v. Brown*, 55 N. Y. 180 (dissenting opinion), on necessity of clear legal and equitable right to thing demanded; *McManus v. School Controllers*, 7 Phila. 23, 25 Phila. Leg. Int. 213, holding it proper for teacher whose certificate is withheld by controllers.

Cited in reference notes in 48 A. D. 216; 63 A. D. 197; 72 A. S. R. 149,—as to when mandamus lies; 21 A. D. 605, as to when mandamus will be granted.

Cited in notes in 16 E. R. C. 783, as to when mandamus is available remedy; 89 A. D. 730, on need that no other adequate remedy exists to warrant mandamus; 89 A. D. 729, on need that clear legal right to relief sought be established to justify issuance of mandamus.

Pleading in mandamus.

Cited in reference notes in 51 A. D. 734, on facts stated in return to mandamus not traversable; 52 A. D. 490, on necessity that petitioner for mandamus show clear legal right and no other specific remedy.

Cited in note in 89 A. D. 742, on pleadings in mandamus.

Vested right to compensation in eminent domain.

Cited in reference notes in 86 A. D. 204, on time at which eminent domain proceedings may be discontinued; 33 A. D. 744, on vested right to damages after verdict awarding damages for laying out highway.

Rights acquired by opening street.

Cited in note in 19 A. D. 463, on rights acquired under proceedings to establish street.

19 AM. DEC. 508, MOWATT v. WRIGHT, 1 WEND. 355.

Action for money had and received.

Cited in *Houston v. Frazier*, 8 Ala. 81, holding it maintainable by assignee of note against assignor's administrator, retaining proceeds of collection; *Moore v. Mandelbaum*, 8 Mich. 433; *Knox v. Abercrombie*, 11 Ala. 997,—holding it maintainable as a general rule for money which *ex æquo et bono* the defendant ought to refund; *Eddy v. Smith*, 13 Wend. 488, holding its character permits defendant to show that he is not equitably liable.

Cited in reference note in 46 A. D. 594, on recovery back of money paid under compulsion.

Cited in note in 52 A. D. 760, on recovery on count for money had and received of money obtained by fraud or other tort or by duress or by mistake.

—For money paid by mistake.

Cited in *Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598; *Billings v. McCoy Bros.* 5 Neb. 187; *Boyer v. Pack*, 2 Denio, 107; *Goddard v. Merchants' Bank*, 2 Sandf. 247,—holding it maintainable for money paid under a mistake of facts; *Livermore v. Peru*, 55 Me. 469, holding money paid by town under mistake of law for relief of paupers cannot be recovered back.

Cited in reference notes in 25 A. S. R. 491, on recovery of money paid under mistake of law; 45 A. D. 171, on right to recover money paid under mistake of fact; 27 A. D. 489, on recovery back of money paid under mistake or in ignorance of essential fact.

Cited in note in 55 A. S. R. 517, on right to recover back money paid in ignorance of one's rights.

Relief against mistake.

Cited in *Hargous v. Ablou*, 3 Denio, 406, holding mutual mistake as to quantity of goods sold in closed packages allows recovery for deficiency but not for remote damages; *Rider v. Powell*, 28 N. Y. 310, holding bond and mortgage reformable in equity upon proof of mistake on one side, though there was no fraud; *Ketchum v. Catlin*, 21 Vt. 191, holding purchase of produce under mutual mistake as to the city where it was stored avoidable in court of law; *Bell v. Shields*, 19 N. J. L. 93, holding agreement by indorser to remain liable after extension to maker not binding, the extension having been forged, of which he was ignorant; *Potter v. Greenwich*, 26 Hun, 326, holding twenty-year bonds under statute authorizing thirty-year ones not reformable, there being neither a mistake as to fact or law.

Cited in notes in 55 A. S. R. 499, on ignorance or mistake of law as ground for relief; 55 A. S. R. 494, 495, on ignorance of one's rights as ground of relief; 15 A. R. 182, on application of maxim, *Ignorantia juris non excusat*.

What amounts to mistake of fact.

Cited in *Barker v. Clark*, 12 Abb. Pr. N. S. 106, holding mistake of tenants as to right of receiver of administrator to collect rents of estate, of such a character; *Duncan v. New York Mut. Ins. Co.* 29 Jones & S. 13, 18 N. Y. Supp. 863, 46 N. Y. S. R. 241, holding such a mistake exists upon cancelation of insurance and return of unearned premiums, in ignorance of loss of property; *Earle v. De Witt*, 6 Allen, 520 (dissenting opinion), on mistake of grantee as to grantor's appointment as assignee in insolvency as one of fact.

Payments under mistake and overpayments.

Cited in *George v. Tallman*, 5 Lans. 392, holding overpayment, due to error in survey, recoverable; *Grimes v. Blake*, 16 Ind. 160, holding same of excess interest paid through error of clerks appointed to make calculation; *Calkins v. Griswold*, 11 Hun, 208; *Wheaton v. Olds*, 20 Wend. 174,—holding same of money paid for deficiency in estimate as to quantity, due to mutual mistake of fact; *Norton v. Marden*, 15 Me. 45, 32 A. D. 132, holding same of payments under mutual mistake of fact as to lot described in bond; *Chapman v. Brooklyn*, 40 N. Y. 372, holding money paid on consideration wholly failed, recoverable; *Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, holding payments by executors under mistake of law as to payee's character as legatee, not recoverable; *Belloff v. Dime Sav. Bank*, 118 App. Div. 20, 103 N. Y. Supp. 273, holding consideration paid under mistake as to ability of sole devisee to convey when child had been born, not recoverable.

Payments of money under compulsion or stress of undue advantage.

Cited in *Lott v. Swezey*, 29 Barb. 87, holding payments on binding judgment

subsequently reversed, recoverable though there was no duress; *Doll v. Earle*, 65 Barb. 298, holding payment upon decision in legal-tender cases pursuant to agreement not recoverable, though holding on reargument was different; *Shelley v. Lash*, 14 Minn. 498, Gil. 373, holding payment by judgment debtor to purchasers at void sale not recoverable, in absence of misrepresentation or mistake of fact; *Baltimore v. Lefferman*, 4 Gill, 425, 45 A. D. 145, holding expenditures for wall, erected pursuant to notice from city under provisions of void ordinance, not recoverable.

Cited in note in 45 A. D. 153, as to what constitutes compulsory payment so as to enable payer to recover the money paid.

Payments on unenforceable demand.

Cited in *Columbus Ins. Co. v. Walsh*, 18 Mo. 229, holding money paid by insurer in ignorance of subsequent insurance avoiding policy, recoverable; *National L. Ins. Co. v. Minch*, 53 N. Y. 144, holding contra as to loss paid in ignorance of existing defense; *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109, holding commissioners's payment for repair of joint bridge under mistaken construction of statute not recoverable; *Brumagin v. Tillinghaast*, 18 Cal. 265, 79 A. D. 176, holding same as to voluntary payments for stamps under unconstitutional revenue act; *Newburgh Sav. Bank v. Woodbury*, 64 App. Div. 305, 72 N. Y. Supp. 222, holding bank loaning money to town for payments to drafted men under void statute cannot recover of drafted men; *Kraft v. Keokuk*, 14 Iowa, 86, holding taxes paid under invalid law, not recoverable; *Betz v. New York*, 119 App. Div. 91, 103 N. Y. Supp. 886, holding payments for taxes assessed in wrong city by mistake, after severance of territory by statute, recoverable; *Union Ins. Co. v. Allegheny*, 101 Pa. 250, 13 W. N. C. 440, 13 Pittsb. L. J. N. S. 213, holding payment under protest by purchaser at foreclosure sale for taxes not a lien on land, not recoverable.

— Payments on compromise.

Cited in *Morton v. Ostrom*, 33 Barb. 256, holding money paid on compromise of disputed claim, not recoverable; *Rheel v. Hicks*, 25 N. Y. 289, holding payments upon compromise of bastardy charge, recoverable upon proof of non-pregnancy; *Sears v. Grand Lodge*, A. O. U. W. 163 N. Y. 374, 50 L.R.A. 204, 57 N. E. 618 (reversing 24 App. Div. 410, 48 N. Y. Supp. 559, and affirming 20 Misc. 53, 45 S. Y. Supp. 331), holding return of insured after long absence does not affect right to money agreed to be paid under bona fide compromise.

Voluntary payments.

Cited in *Campbell v. Vandervoort*, 2 N. Y. City Ct. Rep. 315; *Union Insurance Co. v. Allegheny*, 40 Phila. Leg. Int. 68; *Wyman v. Farnsworth*, 3 Barb. 369,—holding voluntary payment with full knowledge of facts cannot be recovered back; *Herbert v. Williams*, 5 Luzerne Leg. Reg. 62, on recovery of voluntary payment made with full knowledge of facts but in ignorance of law; *Arnold v. Georgia R. & Bkg. Co.* 50 Ga. 304, holding payments for excess freight charges with full knowledge of all facts not recoverable; *Granger v. Olcott*, 1 Lans. 169, holding same of consideration for title known to be doubtful; *People v. Stephens*, 71 N. Y. 527, holding conspiracy to restrain bidding on state work not actionable after payment with full knowledge; *Onondaga v. Briggs*, 2 Denio, 26; *People use of Macon County v. Foster*, 133 Ill. 496, 23 N. E. 615,—holding payment of salary of officer by county board with full knowledge after auditing, not recoverable in absence of fraud; *Surdam v. Fuller*, 31 Hun, 500 (dissenting opinion), on applicability of rule that voluntary payments cannot be recovered back to payments by public officer.

Laches.

Cited in note in 23 A. S. R. 149, on stale claim in equity.

19 AM. DEC. 515, JACKSON, v. TOPPING, 1 WEND. 388.

Validity, nature, and effect of condition in deed.

Cited in reference notes in 26 A. D. 597, on conditions in deeds; 24 A. D. 298, on validity of conditions in conveyances; 34 A. D. 731, on personal charge in deed; 72 A. D. 302, on personal character of obligation where father conveys to son in consideration that latter maintain father; 58 A. D. 644, on effect of deed by father to son in consideration of son's maintaining grantor.

Cited in note in 44 A. D. 759, on validity of conditions subsequent.

Breach of condition in deed.

Cited in reference notes in 93 A. D. 80, on effect of breach of condition to re-vest title in grantor; 75 A. D. 172, on what constitutes breach of condition to support grantor or to pay his debts.

Cited in notes in 44 A. D. 751, on breach of condition to indemnify grantor against mortgage, etc.; 44 A. D. 754, on effect of breach of condition subsequent to re-vest estate.

Forfeiture for nonperformance of conditions in grant.

Cited in *People v. Kingson & M. Turnp. Road Co.* 23 Wend. 193, 35 A. D. 551, holding state can enforce forfeiture of corporate charter upon substantial non-performance of conditions.

Cited in notes in 44 A. D. 745, on duration of condition subsequent and who bound by; 44 A. D. 748, on performance of condition subsequent and time within which it must be fulfilled.

Who may re-enter for breach of condition subsequent.

Cited in *Nicoll v. New York & E. R. Co.* 12 Barb. 460, holding grantor in fee cannot by conveyance pass right of re-entry either at common law or by statute; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455, holding foregoing not the rule, as to leases in fee reserving rents, nor to leases for life or for years; *Upington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359, holding statutes do not allow devise as against right of heirs to re-enter.

Cited in reference notes in 28 A. D. 393, on re-entry for condition broken; 22 A. D. 203, as to who may re-enter for condition broken; 90 A. D. 104, on applicability of rule against perpetuities to rights of entry for breach of condition.

Cited in notes in 95 A. S. R. 573, 574, by and against whom breach of condition may be asserted; 60 L.R.A. 758, on rule against transferability of right of entry for condition broken before breach of condition.

—As dependent on reservation in grant.

Cited in *Post v. Bernheimer*, 31 Hun. 247, holding right of grantor or his heirs to re-enter for breach of condition not dependent on express reservation; *Fluharty v. Fluharty*, 54 W. Va. 407, 46 S. E. 199; *Osgood v. Abbott*, 58 Me. 73,—holding heirs, though not expressly mentioned, may re-enter for breach of condition; *Jenkins v. Horwitz*, 92 Md. 34, 47 Atl. 1022, holding devise on condition, without limitation over, goes to heirs and not to residuary legatees upon a forfeiture.

Distinguished in *Stamper v. Venable*, 117 Tenn. 557, 97 S. W. 812, holding right of revocation personal to grantor not available to unnamed heirs in deed.

Ejectment as remedy on breach of condition.

Cited in *Martin v. Ohio River R. Co.* 37 W. Va. 349, 16 S. E. 589, holding it a

proper remedy to recover real estate upon breach of condition subsequent; *Cruger v. McLaurry*, 41 N. Y. 219 (affirming 51 Barb. 642), holding ejectment maintainable by one of a number of heirs with right of re-entry for nonpayment of rent; *Moore v. Wingate*, 53 Mo. 398, holding transferee of grantor after entry for condition broken has adequate remedy by ejectment so as to bar relief in chancery; *Upington v. Corrigan*, 79 Hun, 488, 29 N. Y. Supp. 1002, holding a Roman Catholic bishop taking by devise was proper defendant to an action to enforce a forfeiture.

Cited in note in 44 A. D. 757, on ejectment or writ of entry for condition broken.

Disfavor toward forfeitures.

Cited in *Worden v. Guardian Mut. L. Ins. Co.* 7 Jones & S. 317, holding they are not enforced unless that intent is shown by the actual agreement; *New York Indians v. United States*, 30 Ct. Cl. 413, holding interpretation which creates a forfeiture is not to be favored; *Pearson v. Lovejoy*, 53 Barb. 407, 35 How. Pr. 193, holding statutes giving right of appeal liberally construed to guard against forfeiture of the right.

Distinguished in *Wiseman v. McNulty*, 25 Cal. 230, on inapplicability of doctrine of forfeiture.

Grammatical rules in construction of writing.

Cited in *Kent v. Binghamton*, 40 Misc. 1, 81 N. Y. Supp. 198; *Atty. Gen. v. West Wisconsin R. Co.* 36 Wis. 466; *People v. Lytle*, 7 App. Div. 553, 40 N. Y. Supp. 153, 11 N. Y. Crim. Rep. 229,—holding same as to statutes; *Hill v. Hartford Acci. Ins. Co.* 22 Hun. 187 (dissenting opinion), on construction of statutes and contracts according to ordinary and popular meaning of the words.

— In construction of deeds.

Cited in *Long Island R. Co. v. Conklin*, 32 Barb. 381, holding technical grammatical rules will be disregarded to effect the intention in deed; *Decker v. Carr*, 11 App. Div. 432, 42 N. Y. Supp. 243, holding same as to instrument transferring interest in an estate; *Zimmerman v. Mechanics' Sav. Bank*, 75 Conn. 645, 54 Atl. 1120, holding same as to will.

Cited in reference note in 59 A. D. 563, on construction of words in deed according to apparent intent.

— Substitution of words.

Cited in *Fairchild v. Lynch*, 10 Jones & S. 265, changing word "first" descriptive of party to pay off encumbrance into "second" to effect intention.

Cited in reference note in 22 A. D. 198, on construing of word "and" as "or."

Cited in note in 48 A. D. 574, on changing "or" into "and" and *vice versa* in statutes, deeds, bond, etc.

— Repugnant and inconsistent words.

Cited in *Tucker v. Meeker*, 2 Sweeney, 736, holding inconsistent provisions of deed yield to intent provided no rule of law is violated; *Sanders v. Betts*, 7 Wend. 287, holding repugnant words in covenant of warranty may be rejected as surplusage; *Eldridge v. See Yup Co.* 17 Cal. 44, holding restriction in habendum in bargain and sale deed, requiring grantee to hold for use of a Chinese church, void.

Conditions in favor of third person.

Cited in *Craig v. Wells*, 11 N. Y. 315, holding condition or reservation in deed in favor of stranger, void.

Possibility of reversion.

Cited in *Lougheed v. Dykeman Baptist Church & Soc.* 40 N. Y. Supp. 586, on

inapplicability of statutes forbidding restraints on alienation to possibilities of reversion.

19 AM. DEC. 522, JACKSON v. VICKORY, 1 WEND. 406.

Certificates by notaries to identity of acknowledging party.

Cited in *Peck v. Mallams*, 10 N. Y. 509, holding certificate in form of statute good without reciting evidence of identity of grantor or particulars of wife's examination; *People v. Schooley*, 89 Hun, 391, 69 N. Y. S. R. 841, 35 N. Y. Supp. 429, 11 N. Y. Crim. Rep. 28, on impropriety of notary certifying on mere introduction that a party was personally known to him.

Proof of will.

Cited in *Rogers v. Wilson*, 13 Ark. 474; *Hunt v. Johnson*, 19 N. Y. 279,—holding testimony of one witness to due execution sufficient; *Nichols v. Romaine*, 3 Abb. Pr. 122, on same point; *Re Page*, 118 Ill. 576, 59 A. R. 395, 8 N. E. 852, holding it provable by testimony of one of two attesting witnesses; *Chapman v. Rodgers*, 12 Hun, 342 (dissenting opinion), on sufficiency of proof by one witness either under common law or the statutes; *Weir v. Fitzgerald*, 2 Bradf. 42, holding clear proof of execution from one witness sufficient, though recollection of other is hazy; *Trammell v. Thurmond*, 17 Ark. 203, holding certificate of probate on proof of person other than subscribing witness without showing of their death or absence, bad; *Re Oliver*, 25 N. Y. Civ. Proc. Rep. 25, 34 N. Y. Supp. 706, 1 Gibbons, 318, 13 Misc. 466, holding death of one witness and absence of other, unheard from for six years, allows proof by handwriting of testator and witnesses; *Re Allison*, 104 Iowa, 130, 73 N. W. 489, holding testimony of third person as to presence at execution and that witnesses reside outside state prima facie proof of execution; *Price v. Brown*, 1 Bradf. 291; *Arrington v. Tupper*, 10 Cal. 464,—holding due execution established by proof of signatures of witnesses and testator where they are dead or outside jurisdiction.

Cited in reference notes in 35 A. S. R. 868, on proof of execution of will; 34 A. D. 139, on what may be proved by one of subscribing witnesses; 45 A. S. R. 158, on proving handwriting of attesting witnesses where they cannot be found.

Cited in notes in 15 A. D. 400, on proof of wills; 40 A. D. 232, on proof of will by subscribing witnesses; 51 A. D. 575, on proof of will by one witness; 77 A. S. R. 470, 471, 472, on number of witnesses required for proof of will; 110 A. S. R. 460, on effect of number of witnesses testifying to execution or contents of lost or destroyed will.

Distinguished in *Wetty v. Wetly*, 8 Md. 15, holding testimony of one surviving witness of will sufficient though he did not see others, now deceased, sign it.

— In trial at law.

Cited in *Cornwell v. Wooley*, 1 Abb. App. Dec. 441, 4 Abb. Pr. N. S. 41, 43 How. Pr. 475, 3 Keyes, 378, holding execution of will provable by one witness testifying as to a perfect execution; *Norris v. Norris*, 32 Hun, 175; *Corley v. McEneel*, 31 Abb. N. C. 113, 60 N. Y. S. R. 53, 28 N. Y. Supp. 785,—holding statutes still allow offer of will in evidence in action at law without its having been probated; *Upton v. Bernstein*, 76 Hun, 516, 27 N. Y. Supp. 1078, holding will establishable by testimony of single witness upon issue as to ownership of realty in supreme court; *Re Briggs*, 49 App. Div. 47, 62 N. Y. Supp. 294, on proof of will at law by one witness.

Proof of ancient wills.

Cited in *Welty v. Welty*, 8 Md. 15, holding the law looks with lenity upon failure of memory of witnesses to ancient wills.

Necessity of publication of will.

Cited in *Remsen v. Brinkerhoff*, 26 Wend. 325, 37 A. D. 251, holding that words to witnesses showing intention to make will necessary by statute.

Construction of description of land as a "square" in a "corner" of larger tract.

Cited in *Marsh v. Ne-ha-sa-ne Park Asso.* 25 App. Div. 34, 49 N. Y. Supp. 384, holding "250 acres in the northeast corner of the northeast quarter" should be taken off in form of square; *Hanse v. Mead*, 27 Hun, 162, 2 N. Y. Civ. Proc. Rep. 175, holding that a call for quantity to be laid out square in a corner was not restricted to a square of such area as could be inscribed in the corner; *Saranac Land & Timber Co. v. Comptroller* (*Saranac Land & Timber Co. v. Roberts*) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642, holding description "1,000 acres lying in northwest corner of the northwest quarter" of a tract, in assessment, sufficient; *Benjamin v. Welch*, 73 Hun, 371, 26 N. Y. Supp. 158, holding designation of "24 acres in northeast corner" of a tract, in a will sufficient.

19 AM. DEC. 529, REED v. VAN OSTRAND, 1 WEND. 424.**Giving of note as a payment.**

Cited in *Hollehan v. Roughan*, 62 Wis. 64, 22 N. W. 163, holding note given for chattel purchased, a mere promise and not a payment; *Wylly v. Collins*, 9 Ga. 223, holding estate not relieved of liability by creditors taking note of trustee as a settlement; *Rodman v. Hedden*, 10 Wend. 498, holding judgment extinguished by acceptance of a certain sum of money and debtor's note as a full satisfaction; *Coville v. Bealy*, 2 Denio, 139, holding note given for failed consideration a payment after transfer to third person.

Cited in reference notes in 28 A. S. 136, on note as extinguishment of pre-existing debt; 44 A. D. 144, as to when giving of note operates as payment of pre-existing debt; 24 A. D. 640; 27 A. D. 192,—as to when note given by debtor or third person operates as payment; 27 A. D. 641, on presumption of payment arising from taking of note.

Cited in notes in 20 A. D. 462, on payment by note; 37 A. D. 48, on extinguishment of debt by note or order.

Distinguished in *Lewis v. Lozee*, 3 Wend. 79, holding note no payment where it was intended only as collateral security.

Action for money had and received.

Cited in reference note in 6 A. D. 391, as to when action for money had and received may be supported.

Cited in notes in 52 A. D. 753, on count for money had and received lying for money only; 17 A. D. 537, on action for money paid or money had and received where property is received as payment in lieu of money.

Necessity of authority under seal to execute specialty.

Cited in *Blood v. Goodrich*, 9 Wend. 68, 24 A. D. 121; *Shuetze v. Bailey*, 40 Mo. 69,—holding it necessary to agent attempting to bind principal by deed; *Tappan v. Redfield*, 5 N. J. Eq. 339, holding it necessary to one executing deed for an absent owner; *Whelan v. Sherron*, Ga. Dec. pt. 2, p. 54, holding authority to bind one as security on appeal can be given, if at all, only under seal; *Hughes*

v. Holliday, 3 G. Greene, 30, holding deed executed under a power inadmissible without production of authority.

Cited in reference notes in 5 A. S. R. 412, on authority to execute instrument in writing; 24 A. D. 128, on necessity of seal to authority to execute deed; 55 A. D. 343, on necessity that authority to execute sealed instrument be under seal; 53 A. D. 605, as to how delegation of authority to execute sealed instrument must be given.

Cited in notes in 40 A. D. 409, as to how authority to execute deed must be given; 8 E. R. C. 630, on necessity that power of attorney to execute deed be under seal; 2 E. R. C. 280, on sufficiency of agent's authority to assign interest in invention.

Validity of patent-right note.

Cited in note in 20 L.R.A. 605, on validity of notes given for patent rights where patent is invalid.

Parol evidence as to writings.

Cited in *Howard v. Thomas*, 12 Ohio St. 201, holding it inadmissible to add provision to lease as to repairs of proof; *Welz v. Rhodius*, 87 Ind. 1, 44 A. R. 747, holding it competent to prove contemporaneous agreement not to engage in rival business in consideration of execution of lease; *Oiler v. Gard*, 23 Ind. 212, holding it inadmissible to vary contract expressed in a receipt; *Niles v. Culver*, 8 Barb. 205, holding same as to terms of receipt expressing a contract of carriage; *Stapleton v. King*, 33 Iowa, 28, 11 A. R. 109, holding rule allowing parol explanation of receipts strictly confined to pure receipts; *Miller v. Lockwood*, 32 N. Y. 293 (dissenting opinion), on presumption of completeness in instrument giving details of a contract.

Cited in reference notes in 51 A. D. 546, on admissibility of evidence of prior or contemporaneous parol agreement to control written contract; 37 A. S. R. 501, on presumption that prior parol agreements are merged in written contract; 68 A. S. R. 73, on presumption that contract consummated by writing contains entire agreement.

Distinguished in *Liebke v. Methudy*, 14 Mo. App. 65, holding it admissible to prove contemporaneous agreement supplementary of a defective writing; *Silliman v. Tuttle*, 45 Barb. 171, holding agreement, as to profits on voyage then being made contemporaneous with execution of bill of sale, provable by parol.

— Parol proof of warranty.

Cited in *Bush v. Bradford*, 15 Ala. 317; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 A. S. R. 599, 58 N. W. 320; *Sparks v. Messick*, 65 N. C. 440; *Waters' Patent Heater Co. v. Tompkins*, 14 Hun, 219; *Wason v. Rowe*, 16 Vt. 525; *Ottawa Bottle & Flint-Glass Co. v. Gunther*, 31 Fed. 208,—holding it inadmissible to add warranty in written bill of sale; *Worland v. Secrest*, 106 Ky. 711, 51 S. W. 445; *Mast v. Pearce*, 58 Iowa, 579, 43 A. R. 125, 12 N. W. 597,—holding same in absence of fraud or mistake; *Rodgers v. Perrault*, 41 Kan. 385, 21 Pac. 287; *DeWitt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536,—holding it inadmissible to vary written warranty in bill of sale; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017; *Buchtel v. Mason Lumber Co.* 1 Flipp. 640, Fed. Cas. No. 2,077,—holding same in absence of fraud or mistake; *Ketchum v. Hawks*, 2 N. Y. Leg. Obs. 384, as to whether it is admissible to add agreement to defend title in bill of sale; *Jackson v. Helmer*, 73 App. Div. 134, 77 N. Y. Supp. 835, holding it inadmissible to add warranty to lease; *Naumberg v.*

Young, 44 N. J. L. 331, 43 A. R. 380, holding it inadmissible to add warranty as to power of engines in building demised by written lease.

Cited in notes in 12 L.R.A. 694, on right to prove oral warranty at time of sale by written contract; 19 L.R.A. (N.S.) 1192, on right to show parol warranty in connection with contract of sale of personalty.

Distinguished in *Miller v. Van Tassel*, 24 Cal. 458, holding it admissible to vary implied warranty of title in written bill of sale; *Filkins v. Whyland*, 24 N. Y. 338, holding it admissible to show warranty where only writing executed was a receipt.

— **Parol warranty of assigned patent.**

Cited in *State v. Baker*, 21 Mo. 338; *McClure v. Jeffrey*, 8 Ind. 79,—holding it inadmissible to add warranty to written assignment of patent in absence of fraud; *Johnson v. McCabe*, 37 Ind. 535; *Jones v. Alley*, 17 Minn. 292, Gil. 269; *Galpin v. Atwater*, 29 Conn. 93,—holding it inadmissible to add warranty to deed of a patent right.

Necessity of best evidence.

Cited in *Barnett v. Williams*, 7 Kan. 339, holding error not to strike out oral testimony as to contract where cross-examination showed that it had been reduced to writing.

19 AM. DEC. 535, BUCK v. AIKIN, 1 WEND. 466.

Actionable right of possession.

Cited in *Matthews v. Smith's Exp. Co.* 1 Misc. 238, 23 N. Y. Supp. 132, holding actual possession will sustain trespass for chattel taken by wrong-doer; *Cannon v. Kinney*, 4 Ill. 9, holding right to reduce to possession will sustain trespass for injury to chattel; *Cary v. Hotailing*, 1 Hill, 311, 37 A. D. 323, holding defrauded vendor of chattels can maintain replevin in *cepit* against his purchaser; *Ash v. Putnam*, 1 Hill, 302, on same point; *Butler v. Collins*, 12 Cal. 457, holding constructive possession of chattels will sustain trespass, though actual possession is in another; *Carter v. Wallace*, 2 Tex. 206, holding absolute ownership will sustain trespass or trover, though actual possession was in another; *Kinney v. Service*, 91 Mich. 629, 52 N. W. 53, holding it competent for plaintiffs in trespass for breaking close to show actual or constructive possession; *Butts v. Collins*, 13 Wend. 139, on maintenance of trespass by receptor for goods taken from his possession by wrongdoer.

Cited in reference notes in 25 A. D. 121, on requisites to maintain action of trespass; 22 A. D. 41, on necessity of possession to maintain trespass *quare clausum fregit*; 31 A. D. 548, on necessity of possession to maintenance of trespass or trover; 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 38 A. D. 546, on what possession is necessary to authorize maintenance of trespass.

Cited in note in 18 A. D. 554, on sufficiency of constructive possession to maintain trespass.

— **To recover for severed trees.**

Cited in *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185, holding actual or constructive possession of land necessary to sustain trespass for timber severed; *Mason v. Lewis*, 1 G. Greene, 494, holding right of property and immediate possession will sustain trespass for crops severed, though land was in possession of another.

Distinguished in *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 40 L. ed. 1002, 16

Sup. Ct. Rep. 831, holding one shown to be without right of possession or title, or ownership of timber, cannot maintain trespass on case for its destruction.

— Right in stranger as defense.

Cited in *Colton v. Jones*, 7 Robt. 164; *Kissam v. Roberts*, 6 Bosw. 154; *King v. Orser*, 4 Duer, 431,—holding trespass for injury to chattels not defendable by proof of title in stranger; *Neff v. Thompson*, 8 Barb. 213, holding lien on sheep will not defeat trespass or replevin by owner against third person.

Cited in reference notes in 88 A. D. 675, on right to plead property in stranger in replevin; 1 A. D. 589, on right to set up *just tertii* as defense in trover; 44 A. D. 708, as to when purchaser under execution must show title or possession in execution, defendant to recover in ejectment.

Distinguished in *Grubb v. Guilford*, 4 Watts, 223, 28 A. D. 700, where plaintiff had a title to mine ore and was in possession, but another grant existed.

Possession without color of title.

Cited in *Oneida Common Pleas Judges v. People*, 18 Wend. 79, holding such possession of uninclosed land confined to actual area of possession.

Distinguished in *Brown v. Majors*, 7 Wend. 495, where a small tract, though uninclosed, had buildings on it occupied by claimant.

Right to timber severed from vacant lands before purchase.

Cited in *Keeton v. Audsley*, 19 Mo. 362, 61 A. D. 560, denying right in entry man to timber cut and lying on land.

Sheriff's deed as evidence.

Cited in reference note in 38 A. D. 712, on necessity for proof of judgment and execution to admissibility of sheriff's deed as evidence of title.

Cited in note in 43 A. D. 52, on admissibility of sheriff's deed as evidence of title.

Powers of executors.

Cited in note in 78 A. S. R. 188, on power of executors as to compromise, composition, and release of claims.

19 AM. DEC. 537, MURRAY v. BLATCHFORD, 1 WEND. 583, Modified as to costs in 2 Wend. 221.

Powers of representative.

Cited in *Parker v. Providence & S. S. B. Co.* 17 R. I. 376, 33 A. S. R. 869, 14 L.R.A. 414, 23 Atl. 102, holding statute allows executor to settle claim for death of deceased without assent of next of kin.

Cited in reference note in 33 A. S. R. 877, on executor's and administrator's power to compromise or arbitrate.

Cited in note in 78 A. S. R. 171, on common-law powers of executors.

— When there are more than one.

Cited in *Dwight v. Newell*, 15 Ill. 333, holding assignment of note by one administrator binding on all; *Barry v. Lambert*, 98 N. Y. 300, 50 A. R. 677, holding same of declaration of trust by one provided the two together could have acted; *Camp v. Moseley*, 2 Fla. 171, holding admissions of one administrator amounting to an estoppel bind all; *Dean v. Duffield*, 8 Tex. 235, 58 A. D. 108, holding rejection of claim by one administrator sufficient to allow suit; *Vernor v. Coville*, 64 Mich. 281, 20 N. W. 75, holding power to executors "to sell and convey any real estate" survives to one after renouncement by other; *Jackson ex dem. Jenkins v. Robinson*, 4 Wend. 436, holding all administrators need not join in

petition for license to sell; *Willis v. Farley*, 24 Cal. 490, holding statute makes allowance of claim by one administrator binding on all; *Farmers' Bank v. Wright*, 158 Fed. 848, holding statute does not require all executors as parties to suit by creditor to establish claim; *Boughton v. Flint*, 13 Hun, 206, on power of one co-administrator or executor to act alone at his peril; *Re Haight*, 32 App. Div. 496, 53 N. Y. Supp. 226; *People ex rel. Neustadt v. Coleman*, 42 Hun, 581; *People ex rel. Campbell v. Taxes & A. Comrs.* 38 Hun, 536,—on act of one executor as to testator's goods as the act of all.

Cited in notes in 9 L.R.A. 223, on several executors considered as one person; 14 A. D. 158, on release by one executor.

Cited as modified by statute in *Chambers v. Cruikshank*, 5 Dem. 414, holding surrogate may direct joint custody by executors of property of estate.

Distinguished in *Allen v. Corn Exchange Bank*, 87 App. Div. 335, 84 N. Y. Supp. 1001, holding commercial paper payable to two or more not partners must be indorsed by each.

—Release or compromise by single co-representative.

Cited in *People ex rel. Eagle v. Keyser*, 28 N. Y. 220, 84 A. D. 338, 17 Abb. Pr. 214, holding mortgage running to two persons as "executors" releasable by one after death of other; *Weir v. Mosher*, 19 Wis. 312, holding one of two executors can release mortgage without signature or assent of the other; *Clift v. White*, 15 Barb. 70, holding acts of one executor as to delivery, sale, or release of testator's goods, binding on all; *D'Invilliers v. Abbot*, 4 W. N. C. 124, 12 Phila. 462, 34 Phila. Leg. Int. 158, holding one of several executors can discharge a mortgage whether running to themselves or to their testator; *Black's Estate*, 1 Tucker, 145, holding executors and administrators cannot, by mutual receipts, release each other from their obligations to the estate; *Williams v. DeHaven*, 80 Pa. 480, 9 Phila. 173, 31 Phila. Leg. Int. 20, 2 W. N. C. 294, on inability of one coexecutor to release a debtor for deposit made in names of both executors; *Herald v. Harper*, 3 Blackf. 170, holding compromise of obligations by one administrator binding on rest; *Gilman v. Gilman*, 6 Thomp. & C. 211, 4 Hun, 69, holding statute allows compromise of legatee's counterclaim by majority of executors with consent of surrogate; *Com. v. Smith*, 4 Phila. 270, 18 Phila. Leg. Int. 125, on validity of compromise by one of several executors or administrators.

Distinction between executors and administrators.

Cited in reference notes in 88 A. D. 308, on executors and administrators being alike responsible for administration of estate; 58 A. D. 703, on executors and administrators standing on same ground in regard to powers and liabilities.

Cited in note in 14 L.R.A. 414, on distinction between executors and administrators.

Care required of representatives selling or compromising.

Cited in *Leland v. Manning*, 4 Hun, 7, holding discretion and prudence required of executors compromising debts; *Re Scott*, 1 Redf. 234, 5 N. Y. Legal. Obs. 378, holding executor selling debt in good faith, prudently and discreetly, not liable; *Re Thomas*, 39 Misc. 223, 79 N. Y. Supp. 571, on impropriety of charging administratrix with loss on an honest and prudent settlement.

Nondisclosure as avoiding compromise.

Cited in *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143, holding debtor compromising with creditor after assignment not bound to give him benefit of what he knows of his own affairs.

Creditors' duty to prevent removal of property.

Cited in note in 45 A. S. R. 665, on duty of creditors to prevent executor or administrator from removing property out of state.

Lis pendens.

Cited in *Meux v. Anthony*, 11 Ark. 411, 52 A. D. 274, holding purchaser of property in suit and custody of law takes at his peril; *Leitch v. Wells*, 48 N. Y. 585, in applicability of doctrine of *lis pendens* to stocks.

Cited in reference notes in 20 A. D. 381; 25 A. D. 675; 48 A. D. 111,—on doctrine of *lis pendens*; 11 A. S. R. 856, on general doctrine of *lis pendens*; 23 A. D. 186; 40 A. S. R. 189,—as to when *lis pendens* commences; 35 A. D. 155, on purchase *pendente lite*; 33 A. S. R. 49, on purchaser's rights of realty *pendente lite*.

Cited in notes in 56 A. S. R. 859, 860, on the law of *lis pendens*; 2 L.R.A. 48, on validity of alienation pending suit in which *lis pendens* has been filed.

Answer as evidence in equity.

Cited in *Branch Bank v. Marshall*, 4 Ala. 60, holding it conclusive as to denial of matter charged in bill, unless contradicted, though otherwise as to matters in avoidance; *Bellows v. Stone*, 18 N. H. 465, holding it evidence of matter of affirmance if in relation to a matter required to be answered by bill.

Cited in reference note in 52 A. D. 690, on denial on oath putting complainant on proof.

— Where fraud is charged.

Cited in *Audenreid v. Walker*, 11 Phila. 183, 33 Phila. Leg. Int. 82; *Eberly v. Groff*, 21 Pa. 251; *Wharton v. Clements*, 3 Del. Ch. 209,—holding responsive answer evidence as to fraud, same as in other cases.

Pursuing trust property.

Cited in reference note in 72 A. S. R. 814, on right to pursue property into hands of one colluding with executor to produce devastavit.

19 AM. DEC. 549, OCEAN INS. CO. v. FRANCIS, 2 WEND. 64.**Waiver of sufficiency of preliminary proof of loss under insurance.**

Cited in *Rogers v. Traders Ins. Co.* 6 Paige, 583; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385, 30 A. D. 90,—holding defect in preliminary proof waived where company bases refusal to pay on some other ground; *Miller v. Eagle Life & Health Ins. Co.* 2 E. D. Smith, 268, holding same of objection to sufficiency of proof of death, in life policy.

Cited in reference notes in 57 A. S. R. 144, on waiver of preliminary proofs of loss or death; 49 A. D. 81, on waiver by insurer of defects in preliminary proofs.

Distinguished in *Edwards v. Baltimore F. Ins. Co.* 3 Gill, 176, holding objection that preliminary proof not furnished within time provided, not waived by denial of responsibility because of concealment as to character of risk.

Secondary evidence of writing.

Cited in reference notes in 57 A. D. 300, on secondary evidence of writing; 56 A. D. 107, on secondary evidence of contents of lost instruments; 22 A. D. 179, on parol evidence of contents of lost writing.

Conclusiveness of judgment.

Cited in reference notes in 30 A. D. 168, on conclusiveness of judgment of court of competent jurisdiction; 52 A. D. 628, on conclusiveness until reversal of
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judgment of court having jurisdiction; 48 A. D. 591, on conclusiveness of decree in admiralty; 65 A. D. 704, on conclusiveness of judgment whether foreign or domestic upon parties; 60 A. D. 181, on conclusiveness of decree of orphans' court as to point necessary to be decided; 52 A. D. 392, on collateral attack on judgment.

Cited in note in 75 A. D. 723, on judgments and decrees in admiralty and their effect as *res judicata*.

— Foreign judgment.

Cited in *Durant v. Abendroth*, 97 N. Y. 132, holding as to proceeding *in rem* where property is within jurisdiction, judgment is valid everywhere; *Townsend v. Van Buskirk*, 22 App. Div. 441, 48 N. Y. Supp. 260, holding decree of foreign state granting divorce and reciting fact of marriage, not conclusive on issue of a former marriage in action attacking legitimacy of issue of second marriage.

Cited in reference note in 65 A. D. 704, on right to attack foreign judgments by inquiring into jurisdiction of court and its power over parties and things in controversy.

Cited in notes in 94 A. S. R. 551, on foreign judgments *in rem*; 5 E. R. C. 928, on conclusiveness of foreign judgment *in rem*; 20 L.R.A. 670, on conclusiveness of sentences of foreign courts of admiralty in actions on marine insurance policies.

Jurisdiction to render judgment.

Cited in note in 94 A. S. R. 535, on what will disprove jurisdiction to render foreign judgment.

Judicial notice.

Cited in reference note in 37 A. D. 84, on what falls within judicial notice.

Cited in notes in 89 A. D. 604, on court's judicial notice of law of forum; 83 A. D. 451, on judicial notice of laws of other states; 89 A. D. 672, on judicial notice of foreign laws and laws of sister state.

Proof of foreign laws.

Cited in reference note in 39 A. D. 406, on proof of foreign laws and laws of sister states.

Right of abandonment.

Cited in note in 1 E. R. C. 20, on right of abandonment as affected by supercargo's neglect to claim vessel.

Time to object to deposition.

Cited in reference note in 40 A. D. 782, as to when objections to testimony in depositions may be taken.

Copies of records of marine register as evidence.

Cited in *Spann v. Baltzell*, 1 Fla. 338, 46 A. D. 346, holding entries of protest in register by notary, made in usual mode of business, duly authenticated by oath, admissible, though party making them cannot remember facts contained in entries; *Pacific Ins. Co. v. Catlett*, 4 Wend. 75, holding exemplified copy of register, under seal of Treasury Department, with indorsement that vessel had been condemned, *prima facie* evidence that register was on board vessel for voyage.

Imputing to insured acts of his own government.

Cited in note in 14 E. R. C. 146, as to imputing to insured acts of government of his country so as to deprive him of benefit of policy which is expressed so as to cover loss caused by such acts.

Insurance as affected by war of insured's country.

Cited in *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610, 10 A. R. 522, holding war between states not the act of individual citizen so as to subject him to rule of law that he who by own conduct renders performance of contract impossible shall not take advantage of nonperformance on other side; *Merchants Ins. Co. v. Edmond*, 17 Gratt. 138, on right of recovery, though loss is occasioned by acts of government of insured, and insurer is subject of different state.

Recovery of costs of suit incurred in defense before abandonment to insurer.

Cited in *Pride v. Providence-Washington Ins. Co.* 6 Pa. Dist. R. 227, on allowance of recovery of costs incurred bona fide by assured in prosecuting claim for proceeds of vessel seized and sold under order of admiralty court.

19 AM. DEC. 561, CAMPBELL v. STAKES, 2 WEND. 137.**Trespass as proper remedy against tort feasant infant.**

Disapproved in *Eaton v. Hill*, 50 N. H. 235, 9 A. R. 189, holding action on the case would lie against infant for his positive and wilful tort.

Action on case for wrong founded on breach of contract.

Cited in *Campbell v. Perkins*, 8 N. Y. 430, holding action on the case for loss of baggage by common carrier, although in form for a wrong, is founded on contract, and discharge of debtor in bankruptcy discharges claim.

Validity of infant's contracts.

Cited in reference notes in 23 A. D. 529; 26 A. D. 254; 30 A. D. 82,—as to when contracts of infants are void, voidable, or binding.

Cited in note in 21 A. D. 86, on validity and ratification of infants' contracts.

Liability of infant for torts.

Cited in *Hewitt v. Warren*, 10 Hun, 560, holding infant not liable for false representation on sale of horse, the purchaser not having returned or offered to return same or disaffirmed contract; *Robbins v. Mount*, 33 How. Pr. 24, 4 Robt. 553, holding infant principal not liable for negligence of agent; *Conway v. Reed*, 66 Mo. 346, 27 A. R. 354, holding infant liable for unlawful assault by shooting; *Scott v. Watson*, 46 Me. 362, 74 A. D. 457, holding infant liable for trespass *quare clausum*; *Hartfield v. Roper*, 21 Wend. 615, 34 A. D. 273, on right of action against infant for trespass; *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487, on liability for divulging trade secrets learned while infant employee; *Huchting v. Engel*, 17 Wis. 231, 84 A. D. 741, holding infant six years of age liable for compensatory damages for trespass committed by him.

Cited in reference notes in 24 A. D. 359, on infant's liability for torts; 34 A. D. 280, on infant's liability for negligence.

Cited in notes in 33 A. D. 179, on liability of infants for their torts; 44 A. D. 287, on liability of infants for torts.

—Torts arising out of contract.

Cited in *Fitts v. Hall*, 9 N. H. 441, holding infant liable for tort, arising from breach of contract, if it be subsequent to contract and a distinct, wilful, and positive wrong of itself.

Cited in reference note in 56 A. D. 88, on infant's liability for torts growing out of or connected with contracts.

Cited in notes in 18 A. S. R. 722, 723, on torts of infants connected with contracts; 33 A. D. 181, 182, on liability of infant for torts growing out of or connected with contracts.

— Injury to property bailed.

Cited in *Moore v. Eastman*, 4 *Thomp. & C.* 37, 1 *Hun.* 578, holding infant not liable for injury to thing bailed arising from his unskilfulness or want of judgment, and not from wilful or positive acts of negligence; *Towne v. Wiley*, 23 *Vt.* 355, 56 *A. D.* 85; *Fish v. Ferris*, 5 *Duer.* 49,—holding wilful departure from object of bailment renders infant liable in trover; *Freeman v. Boland*, 14 *R. I.* 39, 51 *A. R.* 340, holding same of infant who hires horse to go to particular place but goes to another; *Lewis v. Littlefield*, 15 *Me.* 233, holding infant liable in trover for conversion of money held by him as stakeholder in gambling transaction; *Young v. Muhling*, 48 *App. Div.* 617, 63 *N. Y. Supp.* 181, holding infant bailee of team not liable for injuries thereto caused by driving during hottest portion of day, in absence of evidence of material departure from purpose of bailment.

Cited in reference note in 24 *A. D.* 359, on infancy as defense to action on the case for injury to hired horse.

Cited in note in 57 *L.R.A.* 681, 682, on liability of infant for damage to bailed property by wilful act.

Bad faith as destroying legal immunity.

Cited in *Winter v. Peterson*, 24 *N. J. L.* 524, 61 *A. D.* 678, holding public ministerial officer who acts without authority of law, also *mala fide*, is liable as trespasser *ab initio*.

Liability of bailee for conversion.

Cited in *Wentworth v. McDuffie*, 48 *N. H.* 402, holding wilful and intentional misuse or abuse of thing bailed renders bailee liable in trover; *Cotton v. Sharpstein*, 14 *Wis.* 226, 80 *A. D.* 774, holding attorney who sells property of judgment debtor, and converts proceeds to his own use, liable in trover; *Beach v. Raritan & D. B. R. Co.* 37 *N. Y.* 457, holding hirer liable where article is hired for particular purpose, and hirer uses it for different purpose without consent of owner, whereby it is destroyed.

— Where bailment was illegal.

Cited in *Hall v. Corcoran*, 107 *Mass.* 251, 9 *A. R.* 30, holding although contract for hiring horse for particular purpose made on Sunday was illegal, trover could be maintained for using horse in different manner causing injury.

Questions first raised on appeal.

Cited in *Pettus v. Perry*, 4 *Tex.* 486, holding if matter is presented to but not considered by court below, appellate court will examine it; *Houghton v. Starr*, 4 *Wend.* 175; *Wood v. Young*, 5 *Wend.* 620,—holding court of appeals would not reverse judgment of supreme court on point not raised in that court; *Davis v. Packard*, 10 *Wend.* 50 (reversing 6 *Wend.* 327), holding same as to error of fact; *People v. White*, 24 *Wend.* 520, holding want of jurisdiction in lower court, although not urged but contained in general assignments of error, would be considered by appellate court; *Stevens v. Townsend*, 1 *Dougl. (Mich.)* 77, on review by appellate court of decisions by other tribunals on questions actually presented to them; *Wyche v. Greene*, 16 *Ga.* 49, on refusal of appellate court to hear matter assigned as error not actually passed on by court below; *Coles v. Kelsey*, 2 *Tex.* 541, 47 *A. D.* 661, on reversal by appellate court for error urged for first time in such court; *Beaubien v. Hamilton*, 4 *Ill.* 213, on refusal of court of appellate jurisdiction to reverse judgment of court below for error in fact not examined and decided upon writ of error *coram nobis* in that court.

Cited in reference notes in 51 *A. D.* 50, on objections not made in court below

not considered on writ of error or appeal; 30 A. D. 561, on practice on writ of error.

Review of default judgments.

Cited in *Kane v. Whittick*, 8 Wend. 219, holding appeal will not lie from decree entered by default; *McMahon v. Rauhr*, 47 N. Y. 67, holding on appeal from judgment of affirmance by default, stipulation by parties, that cause be argued on its merits, does not confer jurisdiction on appellate court; *Dorr v. Birge*, 8 Barb. 351, 5 How. Pr. 323, holding supreme court, being court of last resort of causes originating in justice court, could not reverse judgment obtained by default in county court on appeal from judgment of justice court.

Distinguished in *Kanouse v. Martin*, 8 N. Y. Leg. Obs. 159, 3 Sandf. 653, holding supreme court would entertain writ of error where judgment is obtained by default in court below of party seeking its reversal.

19 AM. DEC. 568, COMBS v. JACKSON, 2 WEND. 153.

Who may be guardian in socage.

Cited in reference notes in 34 A. S. R. 462, on guardianship in socage; 22 A. D. 586, on guardian by nature and by socage.

Distinguished in *Holmes v. Seely*, 17 Wend. 75; *Fonda v. Van Horne*, 15 Wend. 631, 30 A. D. 77,—holding under statute father is guardian in socage although inheritance may descend to him; *Freeman v. Bradford*, 5 Port (Ala.) 270, holding under statute of distribution whereby inheritance descends to all of kin, guardian in socage would be one in name only.

Powers of guardian in socage and chivalry.

Cited in *Porter v. Bleiter*, 17 Barb. 149, on powers of guardian in socage at common law.

Cited in reference note in 76 A. S. R. 293, on estate of guardian in socage.

Cited in note in 89 A. S. R. 262, 263, on common-law powers of guardians in chivalry.

Rights of parent as natural guardian.

Cited in *Fonda v. Van Horne*, 15 Wend. 631, 30 A. D. 77, holding father as natural guardian has no control over property of child, and sale by father of infant's personalty void; *Young v. Gammel*, 4 G. Green, 207, holding mother as natural guardian of minor children, could not lease property of such children; *Miles v. Kaigler*, 10 Yerg. 10, 30 A. D. 425, holding father who sues as next friend for infant child has no power to compound judgment obtained in suit.

Cited in reference notes in 29 A. D. 89, on extent of guardianship by nature; 25 A. D. 523, on father's right as guardian of his infant children.

Cited in notes in 25 A. D. 467; 11 L.R.A. 440,—on guardians by nature.

Allodial grants.

Cited in *Porter v. Bleiler*, 17 Barb. 149, holding lands granted by people since Declaration of Independence are allodial, and not feudal.

19 AM. DEC. 571, VARICK v. JACKSON, 2 WEND. 166. Later suits under same will in 13 Wend. 178, affirming 11 Wend. 110; and 5 Denio, 664, reversing 11 Paige, 289, which affirmed Hoffm. Ch. 382.

Right of examination and cross-examination generally.

Cited in reference note in 27 A. D. 115, on right of other party to examine witness generally.

Cited in notes in 11 E. R. C. 170, on extent of right of cross-examination; 21 L.R.A. 418, on right to impeach one's own witness.

Effect of examination of adverse witness.

Cited in *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Young v. Montgomery*, 161 Ind. 68, 67 N. E. 684,—holding party who calls and examines adversary as witness renders him competent as a witness for all purposes; *Pollock v. Pollock*, 71 N. Y. 137, holding in divorce for adultery, if defendant puts alleged paramour on stand as witness, he thereby admits credibility of such witness; *Combs v. Bateman*, 10 Barb. 573, holding objection to competency because of interest waived by calling and examining adverse witness, who becomes witness generally in action; *Legg v. Drake*, 1 Ohio St. 286, holding party who calls adversary on trial waives objection of competency; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, holding in chancery witness who is interested in one part of case, but not in another, may be examined as to part in which he is not interested.

—Right to cross-examine in full.

Cited in *Bogert v. Bogert*, 2 Edw. Ch. 399; *Bonney v. Seely*, 2 Wend. 481,—holding where witness has been sworn and testified in chief, opposite party may cross-examine him on any matter embraced in issue, and objection of interest comes too late; *Mask v. State*, 32 Miss. 405 (dissenting opinion), on same point; *Fralick v. Presley*, 29 Ala. 457, 65 A. D. 413, holding adverse witness who has been examined in chief may be cross-examined fully on any and all facts material in case; *Livingston v. Keech*, 2 Jones & S. 547, holding party who calls himself as witness as to particular matter may be cross-examined in whole case; *Mattice v. Allen*, 33 Barb. 543, holding full cross-examination, of witness examined on particular point, by party calling, does not make him witness of adverse party, so as to preclude right of impeachment.

Distinguished in *Montgomery v. Miller*, 3 Redf. 154, holding under statute, examination of witness on one point did not preclude party so calling from objection of incompetency because of interest adduced on cross-examination.

Limited in *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, holding where adverse witness has testified to any material point to party calling him, he may be cross-examined fully by other party, except on exclusively new matter.

Disapproved in *People v. Horton*, 4 Mich. 67, holding party cannot, on cross-examination, examine witness on any other matter than that brought out in examination in chief.

Waiver of objection to witness.

Cited in reference note in 68 A. D. 150, on waiver of objection to incompetency of witness.

Disseisin, what constitutes.

Cited in *Allen v. Holton*, 20 Pick. 458, holding cutting of tree and erection of fence sufficient injury to entitle demandant, by admission of disseisin, to recover in writ of entry; *McGregor v. Comstock*, 17 N. Y. 162, holding wrongful entry of unoccupied premises, accompanied by execution of common-law conveyance with livery of seisin, is disseisin; *Bates v. Norcross*, 14 Pick. 224, holding deed by one who has no title, under statute providing that deed by one having good and lawful right or authority shall pass title, will not disseise rightful owner.

—Adverse possession under claim less than freehold.

Cited in *New York v. Law*, 6 N. Y. Supp. 628, holding title to freehold estate by adverse possession cannot be obtained under claim less than freehold;

Altschul v. O'Neil, 35 Or. 202, 58 Pac. 95, holding possession by one not claiming freehold not adverse to one holding legal title.

— **Holding over, under tenant for life.**

Cited in **Griffin v. Sheffield**, 38 Miss. 359, 77 A. D. 646, holding one who holds under deed from tenant by curtesy does not, after death of such tenant, hold adversely to heirs; **Day v. Cochran**, 24 Miss. 261, holding purchasers in possession under contract of sale who take deed in fee simple from persons having only life estate do not, by holding over term, hold adversely to reversioners.

Cited in reference note in 9 A. S. R. 806, on life tenant's right to set up adverse possession against remainderman or reversioner.

— **Adverse possession under execution.**

Cited in **Foust v. Moorman**, 2 Ind. 17, holding possession of defendant under execution not adverse.

Alienability of interest not descendible.

Cited in **Wright v. Methodist Episcopal Church**, Hoffm. Ch. 202, on power to devise interest not descendible, under statute of wills.

Distinguished in **Williams v. Woodward**, 7 Wend. 250, holding devisee could not sustain writ of right on seisin of devisor.

Devises, as affected by statute against champerty.

Cited in **McMahon v. Allen**, 34 Barb. 56, 12 Abb. Pr. 275, holding statute against champerty not applicable to devises.

Cited in reference notes in 29 A. D. 136; 37 A. D. 562,—on what constitutes champerty.

Doctrine of relation.

Cited in reference note in 44 A. D. 708, on relation of sheriff's deed to time when party is entitled thereto.

19 AM. DEC. 581, STEELE v. LOWRY, 4 OHIO, 72.

What constitutes delivery of deed.

Cited in **Le Roy v. Clayton**, 2 Sawy. 493, Fed. Cas. No. 8,268, holding record of patent in proper records, and transmission to surveyor general to be delivered to patentee, sufficient delivery, and title passed; **McCalla v. Bane**, 45 Fed. 828, holding absolute delivery of deed to third person to be given to grantee on happening of future event, valid delivery from beginning; **Mitchell v. Ryan**, 3 Ohio St. 377, holding record of deed prima facie evidence of delivery; **Black v. Hoyt**, 33 Ohio St. 203, holding delivery to third person known by grantee is good.

Cited in note in 12 L.R.A. 171, on necessity of manual delivery of deed to transfer title.

Effect of judgment in replevin where plaintiff is not real owner.

Cited in **Heyns v. Norton**, 5 Ohio C. C. 452, 3 Ohio C. D. 222, holding replevin plaintiff who gave to owner possession of property replevied from purchaser at execution sale against another in possession, liable on the bond to such purchaser for loss of possession only, and not value of property.

Finding as to ownership of property replevied.

Cited as changed by statute in **Kelley v. Blakeley**, 2 Ohio Dec. Reprint, 251, holding jury on finding for defendant in replevin must pass upon his rights to the property replevied.

19 AM. DEC. 585, LOWE v. LOWRY, 4 OHIO, 77.

Equitable relief from judgment in law.

Cited in *Steele v. Lowry*, 4 Ohio, 72, 19 A. D. 581, on denial of relief in equity from judgment in groundless action at law.

Injunction against replevin suits.

Distinguished in *Pindell v. Quinn*, 7 Ill. App. 605, holding equity will enjoin replevin suits where parties are copartners, and one is in possession, under stipulation in action pending in another state for dissolution, giving power to sell under direction of receiver.

Bill of peace by possessor under equitable title.

Cited in *Mains v. Henkle*, 2 Ohio Dec. Reprint, 530, holding one in possession by even an equitable title may maintain a petition to quiet title.

Cited in note in 50 A. D. 453, as to when bill of peace is maintainable.

19 AM. DEC. 586, HAINES v. LINDSEY, 4 OHIO, 88.

Effect of execution of instruments by deputy officer.

Cited in *Whitford v. Lynch*, 10 Kan. 180, holding tax deed executed and acknowledged by deputy county clerk valid.

— Sale or deed by deputy sheriff.

Cited in *Ogden v. Walters*, 12 Kan. 282, holding sale of property under execution by deputy sheriff and after confirmation by court execution of deed by sheriff, passed valid title; *Anderson v. Brown*, 9 Ohio, 151, holding at common law sale and deed made by deputy sheriff valid.

Sheriff's liability for acts of deputy.

Cited in reference note in 41 A. D. 683, on sheriff's liability for deputy's acts and defaults.

What constitutes filing.

Cited in *Hook v. Fenner*, 18 Colo. 283, 36 A. S. R. 277, 32 Pac. 614, holding leaving paper with proper officer for filing within proper time constitutes filing, although officer fails to indorse it as filed; *King v. Penn*, 43 Ohio St. 57, 1 N. E. 84, holding paper in good faith delivered to proper officer to be filed and received by him to be kept in proper place, is filed, although not so indorsed; *Nimmons v. Westfall*, 33 Ohio St. 213, holding transfer of original papers from office of clerk of common pleas to files in office of clerk of district court, by proper officer, without additional file marks as evidence thereof, sufficient filing in latter court; *Stokes v. Logan County*, 2 Ohio Dec. Reprint, 688, holding tax statements left with auditor but as to which he has no duty to perform not "filed" by him within statute allowing compensation for filing.

Indorsement as proof of time of filing.

Cited in *Kalb v. Wise*, 5 Ohio N. P. 5, 5 Ohio S. & C. P. Dec. 533, holding indorsement by recorder is not conclusive evidence of time of filing instrument for record.

19 AM. DEC. 588, GOFORTH v. LONGWORTH, 4 OHIO, 129.

Necessity of order for sale of decedents' realty.

Cited in reference note in 68 A. D. 100, on court order as prerequisite to sale of realty by executor.

Cited in note in 56 A. D. 56, on form and contents of administrator's deed.

Collateral attack on judicial sale.

Cited in *Hubermann v. Evans*, 46 Neb. 784, 65 N. W. 1045, holding title of good faith purchaser at guardian's sale under order of court, not affected by defects and irregularities in the proceedings, the statutory essentials having been complied with; *Dengenhart v. Cracraft*, 36 Ohio St. 549, holding order for sale of minor's land made on application of husband by virtue of his marital rights, void; *Miami Exporting Co. v. Halley*, 7 Ohio, pt. 1, p. 11; *Newcomb v. Smith*, 5 Ohio, 447,—holding order for sale before return of valuation by appraisers, invalid; *Ludlow v. Wade*, 5 Ohio, 494, holding if court have jurisdiction of subject-matter, order of sale of equal validity as judgment, so far as rights of purchaser are concerned.

—Sale of real estate of intestate under order of court.

Cited in *Lynch v. Baxter*, 4 Tex. 431, 51 A. D. 735, holding order of sale by probate court, having competent jurisdiction, cannot be attacked collaterally for irregularity or defect; *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 A. D. 677, holding order of orphans' court for sale not void for irregularity until reversed by appellate court, unless founded on usurpation of authority; *Bibb v. Bishop Cobbs Orphan Home*, 61 Ala. 326, holding petition for sale describing lands and averring they cannot be equitably divided, sufficient show of necessity to give court jurisdiction to order sale; *Murchison v. White*, 54 Tex. 78, holding where probate court has assumed jurisdiction in proceedings apparently regular, presumption that jurisdiction property attached is conclusive on collateral attack; *Ewing v. Higby*, 7 Ohio, pt. 1, p. 198, 28 A. D. 633, holding purchaser at administrator's sale under order of court having jurisdiction obtains good title, though decree or order be irregular; *Campau v. Gillett*, 1 Mich. 416, 53 A. D. 73, on validity of title acquired under order of sale by court having competent jurisdiction; *King v. Kent*, 29 Ala. 542, on presumption of validity in support of sale by administrator.

Distinguished in *Ludlow v. Wade*, 5 Ohio, 494, holding order of sale remaining unexecuted until after repeal of statute authorizing it, not a judgment which would remain unaffected by legislative act, and sale under such order void.

Mode of proving judicial sale.

Cited in *Newcomb v. Smith*, 5 Ohio, 447, holding order of sale of decedent's property can only be proved by record of court; *Newcomb v. Smith*, *Wright* (Ohio) 208, holding same can only be proved by record or minutes of court, and memorandum thereof not sufficient.

Validity of judgment of court of limited jurisdiction.

Cited in *Bigelow v. Bigelow*, 4 Ohio, 138, 19 A. D. 591, holding decree made by court of competent jurisdiction cannot be impeached collaterally; *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52, holding decree of court of limited jurisdiction, where jurisdiction is shown, cannot be impeached collaterally for irregularity.

Averment of appointment of administratrix.

Cited in *Neil v. Cherry*, 2 Ohio Dec. Reprint, 28, holding in action by administratrix her appointment as such must be averred.

19 AM. DEC. 591, BIGELOW v. BIGELOW, 4 OHIO, 138.**Effect of appointment of debtor as executor or administrator of creditor.**

Cited in *Miller v. Irby*, 63 Ala. 477, holding appointment of debtor as administrator extinguishes the debt; *Re Kingan*, 5 Luzerne Leg. Reg. 225, holding

payment of debt presumed where debtor takes out letters of administration on estate of creditor; *Savery v. Sypher*, 39 Iowa, 675, holding debtor who is appointed administrator of creditor holds amount of debt as assets for use of estate; *Tracy v. Card*, 2 Ohio St. 431, holding same and that appointment does not extinguish debt; *Perkins v. Scott*, 9 Ohio C. C. 207, 2 Ohio S. & C. P. Dec. 496, 6 Ohio C. D. 226, holding rule that on appointment of debtor as executor he holds amount of debt as assets, applies equally to administrator; *Perkins v. Scott*, 9 Ohio C. C. 207, 2 Ohio Dec. 496, 6 Ohio C. Dec. 226, holding surety liable for debt of administrator due estate, regardless of solvency or insolvency of administrator; *Tracy v. Card*, 2 Ohio St. 431, on liability of surety on debt due estate from administrator who holds it as assets in his hands; *Martin v. Train*, 6 Ohio C. C. 49, 3 Ohio C. D. 344, holding debt due estate from one appointed administrator *de bonis non*, although created after death of testator, becomes assets in hands of administrator on such appointment; *Hall v. Pratt*, 5 Ohio, 72, on extinguishment of debt by granting administration to one indebted to estate.

Cited in reference note in 30 A. S. R. 431, on effect of appointing debtor as executor.

Distinguished in *Miller v. Donaldson*, 17 Ohio, 264, holding appointment of mortgagee executor by mortgagor does not extinguish mortgage; *Shields v. Odell*, 27 Ohio St. 398, holding appointment as administrator *de bonis non* of one conditionally liable to estate, does not render amount assets in his hands.

Limited in *James v. West*, 67 Ohio St. 28, 65 N. E. 156, holding rule that debts owed by administrator to estate are regarded as assets in his hands, should be confined to debts which administrator owes individually and unconditionally; *Brown v. Harshman*, 9 Ohio C. C. 1, 2 Ohio S. & C. P. Dec. 19, 6 Ohio C. D. 10, holding presumption raised by statute that debt of executor to estate becomes assets in his hands not conclusive.

Modified in *McCoy v. Allen*, 9 Ohio C. C. 607, 6 Ohio C. D. 659, holding debt of debtor becomes assets in his hands on appointment as administrator, but he is not accountable therefor if at time of appointment and during administration he be insolvent.

Disapproved in *Utterback v. Cooper*, 28 Gratt. 233, holding granting of administration to debtor of intestate did not release debt but temporarily suspends remedy.

— Satisfaction of debt by.

Cited in *Hall v. Pratt*, 5 Ohio, 72, holding appointment of creditor as administrator does not satisfy debt, where he dies before assets come to his hands.

Cited in reference note in 40 A. D. 460, on effect upon debt of creditor's making one joint debtor his executor.

Revival of debt of administrator on resignation.

Cited in *Tarbell v. Jewett*, 129 Mass. 457, holding debt becomes assets in his hands, and cause of action is extinguished, and on resignation of executor cause of action cannot be revived by administrator with will annexed; *Collins v. Nugent*, 7 Ohio Dec. Reprint, 485, 3 Ohio L. J. 519, holding debt due from executor to decedent sufficient consideration for mortgage given by executor after resignation to administrator.

Effect of assignment by creditor to debtor as trustee.

Distinguished in *Rossman v. McFarland*, 9 Ohio St. 369, holding assignment by

creditor to debtor as trustee of note of which debtor is a joint and several maker, does not render amount thereof assets in hands of trustees.

Invalidity of probate.

Cited in note in 33 A. D. 240, 241, as to when probate of will or letters of administration are void for want of jurisdiction.

Effect on acts of administrator of revocation of letters of administration.

Cited in notes in 21 L.R.A. 152, on validity of acts done by personal representative under letters subsequently revoked where the court had jurisdiction; 21 L.R.A. 154, on validity of payments by personal representative under letters subsequently revoked in case where the court had jurisdiction; 21 L.R.A. 155, on validity of sales, etc., by personal representative under letters subsequently revoked where court had jurisdiction.

Effect of discovery of will and appointment of executor on acts of administrator.

Cited in *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61, holding subsequent discovery and admission of will to probate does not render acts of administrator void, but they are valid until revoked; *Morgan v. Dodge*, 44 N. H. 255, 82 A. D. 213, on same point; *Brock v. Frank*, 51 Ala. 85, holding appointment of general administrator where will has been admitted to probate in another state, not void, where will is subsequently admitted to probate in forum; *Floyd v. Clayton*, 67 Ala. 285, holding acts done by administrator under voidable grant, are as to third persons valid, and operative against executor; *Re Hurst*, 111 App. Div. 460, 97 N. Y. Supp. 697, holding administrator appointed before discovery of will and acting in good faith, entitled to commissions on being superseded by appointment of executor.

Cited in notes in 90 A. D. 137, on validity of acts of executor under first will, where subsequent will is discovered; 17 L.R.A.(N.S.) 879, on payment to administrator as discharge of debt when will is subsequently discovered and probated.

Collateral attack on judgments.

Cited in *Walter v. Drapp*, 7 Ohio N. P. 232, holding judgment of court having jurisdiction of parties and subject-matter, valid until reversed, no matter how erroneous.

Cited in note in 11 E. R. C. 15, on conclusiveness of judgment until reversed.

Jurisdiction of foreign estates.

Cited in *Broughton v. Bradley*, 34 Ala. 694, 73 A. D. 474, on right of court to appoint general administrator of nonresident estate, where foreign executor institutes suit in such state.

19 AM. DEC. 595, OLIVER v. PRAY, 4 OHIO, 175.

Equitable relief from judgment at law.

Cited in *Hildebrand v. Windisch*, 6 Ohio Dec. Reprint, 784, refusing to enjoin judgment where nature of defense thereto is not shown.

Cited in reference notes in 30 A. D. 504; 37 A. D. 607; 41 A. D. 628; 52 A. D. 102; 43 A. S. R. 117; 50 A. S. R. 56; 60 A. S. R. 933; 61 A. S. R. 464; 72 A. S. R. 804,—on relief in equity from judgment at law; 21 A. D. 530, 631; 22 A. D. 444; 24 A. D. 426, 498, 553; 27 A. D. 650; 46 A. D. 426; 25 A. S. R. 165; 45 A. S. R. 53; 54 A. S. R. 218,—on power of equity to relieve against judgments at law; 25 A. D. 741; 28 A. D. 36; 31 A. D. 642; 43 A. D. 288,—on when equity

will decree new trial at law; 53 A. D. 185, as to when and how new trial at law is obtainable in equity.

Cited in notes in 54 A. D. 466, on equitable relief against judgment at law; 54 A. S. R. 220, on proceedings or judgments subject to equitable relief.

Distinguished in *Green v. Dodge*, 6 Ohio, 80, 25 A. D. 736, holding equity will not grant relief from judgment of law obtained through party's negligence in preparing or conducting defense.

— Grounds for relief generally.

Cited in *Campbell v. White*, 77 Ala. 397, holding equity will not grant new trial upon grounds considered and determined at law, although based on erroneous action of law court; *Vallentine v. Holland*, 40 Ark. 338, holding equity will grant new trial on judgment at law obtained through fraud or mistake without fault or negligence on part of defendant, also citing with approval annotation on this point; *Camp v. Ward*, 69 Vt. 286, 60 A. S. R. 929, 37 Atl. 747, holding equity will set aside judgment at law, obtained through fraud collateral or extrinsic to matter on which judgment was rendered, and citing note on this point; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773, holding equity will allow redemption on foreclosure of mortgage prevented through fraud of defendant, or through surprise, accident, or mistake on part of plaintiff.

Cited in reference notes in 19 A. S. R. 218, on setting aside judgments for want of jurisdiction; 31 A. S. R. 910, on action to set aside judgment rendered without service of process; 42 A. D. 669, on relief in equity against judgment at law without service on or appearance of defendant; 29 A. D. 106, on relief in equity against judgments caused by mistake or negligence; 40 A. S. R. 498, on vacation for fraud of judgments taken by default; 22 A. S. R. 555; 32 A. S. R. 276,—on relief in equity against judgments procured by fraud.

Cited in notes in 55 A. S. R. 519, on ignorance of one's rights as grounds of relief; 30 L.R.A. 798, on injunctions against judgment obtained by mistake of law; 30 L.R.A. 560, on injunction against judgment for lack of remedy by appeal or new trial due to mistake; 54 A. S. R. 241, on effect of mistake, accident, or surprise on right to equitable relief against judgment, decree, or other judicial determination.

— Where review by law courts is prevented.

Cited in *Torbet v. Coffin*, 6 Ohio, 33, holding remedy for failure to enter appeal at term next succeeding day appeal taken, must be sought in chancery; *Grafton & G. R. Co. v. Davison*, 45 W. Va. 12, 72 A. S. R. 799, 29 S. E. 1028, holding equity will grant relief where defendant, against whom judgment is rendered by justice of peace, having good ground for certiorari, is unable to have bill of exceptions signed because of death of justice of peace; *Kansas & A. Valley R. Co. v. Fitzhugh*, 61 Ark. 341, 54 A. S. R. 211, 33 S. W. 960, holding where unjust judgment has been rendered, and party is without fault, equity will grant new trial where presiding judge dies before bill of exceptions for appeal could be signed; *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067, holding where judgment is taken on failure to appear because of sickness, and on mistaken ground, equity will grant relief where party has lost right to have judgment set aside through fraudulent representations of opponent.

Distinguished in *Proctor v. Wilcox*, 68 Tex. 219, 4 S. W. 375, holding original petition for new trial, where party had through delay in mails lost right to present case on writ of error, could not be sustained where court only has appellate jurisdiction.

Necessity of perfecting appeal.

Cited in *Burris v. Peacock*, 2 Ohio Dec. Reprint, 482, holding appellate court is without jurisdiction unless appeal is perfected in statutory mode.

Dismissal of appeal for want of good bond.

Cited in *Hubble v. Renick*, 1 Ohio St. 171, on dismissal of appeal for defect in appeal bond, by whomsoever's fault occasioned.

Amendment by adding verification.

Cited in *Meade v. Thorne*, 2 Ohio Dec. Reprint, 289, holding petition the verification of which is a nullity may be amended by adding a new verification.

19 AM. DEC. 612, BUTLER v. COWLES, 4 OHIO, 205.**Assumpsit for use and occupation.**

Cited in *Edmonson v. Kite*, 43 Mo. 176, holding action will not lie where relation of landlord and tenant does not exist; *Heidlebach v. Slader*, 1 Handy (Ohio) 456, holding purchaser at sale under execution cannot recover for use and occupation of premises between date of sale and date of confirmation of sale by court; *Richey v. Hinde*, 6 Ohio, 371, holding action cannot be maintained where entry is tortious and no relation of tenancy exists; *Peters v. Elkins*, 14 Ohio, 344, holding action would not lie by purchaser of mortgaged premises on foreclosure against tenant of mortgagor under lease made after condition broken; *Cincinnati v. Walls*, 1 Ohio St. 222, holding action will not lie against one holding adversely under claim of title; *Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 598, holding action not maintainable against trespasser; *Murdock v. Ratcliffe*, 7 Ohio, pt. 1, p. 119, on the nature of a leasehold; *Carey v. Richards*, 2 Ohio Dec. Reprint, 630, holding agreed rent under lease evidence of value under count for use and occupation.

Cited in reference note in 20 A. D. 447, as to when action for use and occupation lies.

Cited in notes in 23 A. D. 407, on assumpsit for use and occupation; 89 A. D. 428, on assumpsit not being proper action to try title.

19 AM. DEC. 615, CUMMINGS v. LEBOWITZ, 2 RAWLE, 23.**Treating word "not" as omitted from averment.**

Cited in reference note in 71 A. D. 250, as to when word "not" is considered as omitted from averment.

Error in the record cured by judgment.

Cited in *Townsend v. Jemison*, 7 How. 706, 12 L. ed. 880, holding that where undisposed of demurrer appears on the record, the appellate court will presume that it was withdrawn or overruled; *Kraft v. Gilchrist*, 31 Pa. 470, holding that mistake in laying cause of action to have accrued after suit is cured by verdict on the merits.

19 AM. DEC. 616, ALEXANDER v. KERR, 2 RAWLE, 83.**Injury making nuisance actionable.**

Cited in *Pittsburg v. Scott*, 1 Pa. St. 309; *Brown v. Watson*, 47 Me. 161, 74 A. D. 482,—holding that action may be maintained for injury however inconsiderable to a particular person from a common nuisance; *Casebeer v. Mowry*, 55 Pa. 419, 93 A. D. 766; *Humphrey v. Irvin*, 43 Phila. Leg. Int. 436, 3 Sadler (Pa.) 272, 6 Atl. 479, 18 W. N. C. 449; *Pastorius v. Fisher*, 1 Rawle, 27,—holding that law implies at least nominal damage for flooding the land of another.

Right of taker of property affected by existing nuisance.

Cited in *Smith v. Phillips*, 8 Phila. 10, 28 Phila. Leg. Int. 116; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745,—holding that tenant of premises affected by nuisance may maintain action therefor though nuisance existed at time of taking lease; *Brady v. Weeks*, 3 Barb. 157, holding that purchaser of property affected by nuisance has ground for action because continuation of nuisance is considered new nuisance; *Bonner v. Welborn*, 7 Ga. 296, holding that action lies against constructor of nuisance by alienee of property affected, without request for abatement; *Beidelman v. Foulk*, 5 Watts, 308, holding that purchaser of land on which dam is situated is charged with notice as to flooding lands of another.

Relative rights of riparian proprietors.

Cited in notes in 59 L.R.A. 822, on natural right to dam back water of stream; 41 L.R.A. 766, on what will give right of action as between upper and lower proprietors as to use and flow of water in stream.

Silence as estoppel.

Cited in *Pocahontas Light & Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267; *Com. v. Rogers*, 4 Clark (Pa.) 252, *Brightly (Pa.)* 450,—holding that silence will not create an estoppel in absence of fraud; *Knouff v. Thompson*, 16 Pa. 357; *Ferris v. Coover*, 10 Cal. 589,—holding that silence cannot be pleaded as an estoppel by one whose rights are known or readily ascertained; *Glidden v. Strupler*, 52 Pa. 400, 23 Phila. Leg. Int. 388, holding that silence or even acts of encouragement as to improvement by stranger on her property does not create an estoppel if by married woman; *Rhodes v. Frick*, 6 Watts, 315, on silence as creating estoppel.

Cited in notes in 19 A. D. 626; 27 A. D. 356,—on estoppel by silence; 59 L.R.A. 904, on estoppel as defense to action for damming back water of stream.

Distinguished in *Carr v. Wallace*, 7 Watts, 394, holding that where purchaser acts under delusion as to title which is well known to owner who stands by in silence, he is estopped from setting up his claim:

Estoppel as to title.

Cited in *Innis v. Templeton*, 95 Pa. 262, 40 A. R. 643, 37 Phila. Leg. Int. 494, holding that doctrine of estoppel cannot be invoked in case of contract for sale of real property by married woman, which is otherwise void; *Miller v. Cresson*, 5 Watts & S. 284, on estoppel by declarations as to title.

Effect of notice as to title.

Cited in *Bird v. Smith*, 8 Watts, 434, 34 A. D. 483, holding that where premises are such as to put purchaser on guard as to existence of easement, he is charged with notice; *Rohr v. Kindt*, 3 Watts & S. 563, 39 A. D. 53, holding that purchaser of land with knowledge of defect in title takes the risk of such defect; *Guthrie v. Watson*, 33 Phila. Leg. Int. 444, holding purchaser of land with knowledge of judgment against vendor bound to inquire into incipency of latter's title; *Crest v. Jack*, 3 Watts, 238, 27 A. D. 353, holding that improvements erected by stranger on land of another belong to owner of land though he had knowledge of the improvements being made and failed to object.

19 AM. DEC. 627, CARSON v. McFARLAND, 2 RAWLE, 118.**Recovery of money voluntarily paid.**

Cited in *Pennsylvania Royal Arcanum v. Cornelius*, 198 Pa. 46, 47 Atl. 1124; *Heppard v. Beylard*, 1 Whart. 223,—holding that money paid by mistake in dis-

charge of a just debt, cannot be recovered back; *Ege v. Koontz*, 3 Pa. St. 109, holding that money paid under mistake of law, is not recoverable; *Boas v. Updegrove*, 5 Pa. 516, 47 A. D. 425, holding money paid to sheriff under execution, by mistake as to property subject thereto, not recoverable; *During's Appeal*, 13 Pa. 224, holding that money conscientiously received by creditor may be retained by him; *Daily v. Daviess County*, 165 Ind. 99, 74 N. E. 977, on law not implying promise to repay unless refund is necessary in order to do equity.

— By executors, administrators, or trustees.

Cited in *Findlay v. Trigg*, 83 Va. 539, 3 S. E. 142; *Miller v. Hulme*, 126 Pa. 277, 17 Atl. 587, 19 Pittsb. L. J. N. S. 456, 24 W. N. C. 131; *Montgomery's Appeal*, 92 Pa. 202, 37 A. R. 670, 38 Phila. Leg. Int. 349,—holding that administrator cannot recover money voluntarily paid in excess of proportionate share of assets; *Edgar v. Shields*, 1 Grant, Cas. 361 (opinion of lower court); *Presbyterian Corp. v. Wallace*, 3 Rawle, 109,—on the same point; *Re Rahm*, 32 Pittsb. L. J. N. S. 283, holding trustee not entitled to recover from heirs amount overpaid them by his predecessor under color of right; *Yocum v. Commercial Nat. Bank*, 8 Pa. Dist. R. 631, holding that executor cannot recover money paid on note indorsed by decedent but not protested, though payment of note was not enforceable at law; *Hinkle v. Eichelberger*, 2 Pa. St. 483, holding executor incompetent as witness to establish a will, in suit to set aside the probate by reason of interest, where he had paid legacy as executor.

Distinguished in *Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315, holding that where administrator takes refunding receipt, he may recover money paid in excess of amount justified by assets.

Liability of executor for payments in excess of proportionate shares.

Cited in *Robin's Estate*, 180 Pa. 630, 37 Atl. 121, holding that executor who fails to take refunding bonds is liable to creditors for money paid out in excess of proportionate shares.

Dividend on unsecured indebtedness.

Distinguished in *Gerhard's Estate*, 4 Legal Gaz. 74, 30 Phila. Leg. Int. 13, holding creditor receiving *pro rata* dividend on aggregate indebtedness and surrendering securities not entitled to dividend on unsecured indebtedness.

19 AM. DEC. 629, FLEMING v. BEAVER, 2 RAWLE, 128.

Right of subrogation.

Cited in *Foster v. Fox*, 4 Watts & S. 92, holding that purchaser of debt, is entitled to judgment secured thereon, and may enforce it; *Hartz Estate*, 20 Lanc. L. Rev. 25, holding judgment paid by third person not extinguished if justice requires that it be kept alive; *Ackerman's Appeal*, 106 Pa. 1, 15 W. N. C. 294, 41 Phila. Leg. Int. 387, holding that where one of two joint debtors pays entire debt, he will be subrogated to rights of creditor so as to enforce contribution from joint debtor; *Gearhart v. Jordan*, 11 Pa. 325, holding that one tenant in common of estate subject to joint lien, who pays lien is subrogated to rights of lienholder so as to enforce contribution; *Miller v. Miller*, 119 Pa. 620, 21 W. N. C. 311, 45 Phila. Leg. Int. 307, holding that principle of subrogation applies to payments by one of joint tenants of estate subject to charges; *Shaw v. Chalfant*, 13 Pittsb. L. J. N. S. 317, holding payment of debt by process of law will not prevent subrogation if equity requires it to be done; *Morris v. Oakford*, 9 Pa. 498, holding that where mortgagor sells premises subject to mortgage as part of price, and afterwards pays interest on mortgage debt, he is subrogated to

rights of mortgagee as against subsequent liens; New York L. Ins. Co's Appeal, 48 Phila. Leg. Int. 188, postponing subrogation of general creditors whose dividends have been decreased by part payment of mortgage, until full satisfaction of mortgage; Hull v. Myers, 90 Ga. 674, 16 S. E. 653, on the equitable doctrine of subrogation as embracing the primary security as well as all others; Blodgett v. Hitt, 29 Wis. 169, on necessity of reimbursing innocent purchaser at void execution sale in suit to recover property.

Cited in note in 99 A. S. R. 488, on priority of right to be subrogated over other claims.

— Surety's right on paying debt.

Cited in Lathrop's Appeal, 1 Pa. St. 512; Gossin v. Brown, 11 Pa. 527; McClure v. Johnson, 10 Okla. 668, 65 Pac. 104,—holding surety who pays debt subrogated to rights of creditor which he may enforce against principal debtor; Yard v. Patton, 13 Pa. 278, on same point; Faires v. Cockerell, 88 Tex. 428, 28 L.R.A. 528, 31 S. W. 190; German American Sav. Bank v. Fritz, 68 Wis. 390, 32 N. W. 123; Croft v. Moore, 9 Watts, 451,—holding that surety paying debt is subrogated to rights of creditor so as to enforce contribution from cosureties; Richey's Appeal, 22 W. N. C. 154, 10 Sadler (Pa.) 395 (opinion of lower court); Springer v. Springer, 43 Pa. 518,—on same point; Moore v. Bray, 10 Pa. 519, holding that creditors of surety who pays debt are subrogated to rights of creditor so as to enforce contribution from cosurety; McCormick v. Irwin, 35 Pa. 111, holding that surety paying debt may enforce the rights of the creditor against the principal and subsequent surety; Brown v. Black, 96 Pa. 482; Merchants' Nat. Bank v. Great Falls Opera House Co. 23 Mont. 33, 75 A. S. R. 499, 45 L.R.A. 285, 57 Pac. 445,—holding that one surety paying judgment and satisfying it of record, may still enforce it as against a cosurety to compel contribution; Boltz's Estate, 133 Pa. 77, 19 Atl. 303, holding that surety on official bond who pays the obligation is subrogated to rights of municipality so as to enforce repayment by principal; Philadelphia v. Shallcross, 14 Phila. 135, on the same point.

Cited in reference notes in 90 A. D. 415, on subrogation of surety to rights of creditor; 54 A. D. 599, on right of surety paying debt to recover from principal; 79 A. D. 571, on subrogation of surety paying judgment against principal.

Cited in notes in 99 A. S. R. 507, on surety's right to subrogation; 16 L.R.A. 117, on right of surety who has paid judgment to enforce it for his own benefit in equity; 68 L.R.A. 528, on equitable doctrine of subrogation of sureties paying judgment against principal where adequate remedy at law exists; 68 L.R.A. 529, on subrogation of sureties paying judgment against principals to collateral securities; 68 L.R.A. 534, on subrogation of sureties paying judgments against principals to rights and remedies; 68 L.R.A. 551, 552, on survival of primary obligation on sureties' payment of judgment against principal.

— Mode of effecting substitution.

Cited in Lloyd v. Barr, 11 Pa. 41, holding that subsequent indorser of note, who pays judgment thereon, is subrogated to rights of creditor so as to recover from prior indorser, without actual assignment; Wright v. Grover & B. Sewing Mach. Co. 82 Pa. 80, 2 W. N. C. 667, 33 Phila. Leg. Int. 312, holding that surety paying debt, may have judgment in name of legal plaintiff and have execution to enforce contribution from cosurety.

Cited in note in 68 L.R.A. 574, on need of formal assignment to sureties paying judgments against principal.

Distinguished in Hutcheson v. Reash, 15 Pa. Super. Ct. 96, holding that right

of subrogation can only be enforced within time prescribed by statute of limitations for enforcement of simple contracts; *Rittenhouse v. Lovering*, 6 Watts & S. 190, holding that surety who pays bond is not subrogated to rights of creditor where remedy thereon in court of law is barred by lapse of time or destruction of the bond.

Satisfaction of judgment.

Cited in reference notes in 44 A. D. 738, on what constitutes satisfaction of judgment; 30 A. D. 174, on payment as discharging judgment at law but not in equity; 73 A. D. 184, on payment of judgment by sheriff as extinguishing judgment; 48 A. D. 727, on payment of judgment by sheriff as a discharge.

Payment as release of co-obligor.

Cited in *Gratz v. Farmers' Bank*, 5 Watts, 99, holding that payment by a mortgagee of judgment debt, satisfies the judgment as to a surety therefor, where principal's estate is sufficient to repay advancement; *Burson v. Kincaid*, 3 Penr. & W. 57, holding that release of surety from lien of judgment will not release the principal codefendant, where he assented to the release; *Milligan's Appeal*, 104 Pa. 503, 41 Phila. Leg. Int. 470, 14 Pittsb. L. J. N. S. 257, holding that actual payment discharges a judgment at law, but it may still subsist in equity if justice requires it; *Hoobaugh's Appeal*, 122 Pa. 88, 22 W. N. C. 377, 15 Atl. 669; *Graff's Estate*, 139 Pa. 69, 21 Atl. 233, 27 W. N. C. 228, 21 Pittsb. L. J. N. S. 303,—on same point.

19 AM. DEC. 632, STUMP v. FINDLAY, 2 RAWLE, 168.

Estoppel to dispute instrument and also receive benefit thereunder.

Cited in *Re Bank of United States*, 2 Pars. Sel. Eq. Cas. 110, holding that party cannot contest any part of an instrument under which he derives a benefit.

— Election under will.

Cited in *Preston v. Jones*, 9 Pa. 456; *Tompkins v. Merriman*, 155 Pa. 440, 32 W. N. C. 364, 26 Atl. 659; *Barber's Estate*, 14 Pa. Co. Ct. 167, 3 Pa. Dist. R. 53,—holding legatee accepting benefit under will, estopped to set up claim repugnant to its provisions; *Beem v. Kimberly*, 72 Wis. 343, 39 N. W. 542, holding that legatee taking under will may hold property bequeathed by widow who subsequently elected not to take under will but died before getting her share of estate; *Armstrong v. Walker*, 160 Pa. 585, 31 W. N. C. 66, 25 Atl. 52, 23 Pittsb. L. J. N. S. 129, holding that devisee, being executor, who wastes personal estate of testator to an amount exceeding his share under will, and is insolvent, may be treated as having received his share of the whole estate.

Distinguished in *Whelen v. Whelen*, 11 Pa. Dist. R. 14, 27 Pa. Co. Ct. 161, holding that doctrine of equitable election applies only where face of will shows such intent.

Estates created by devise with alternatice gifts over.

Citing in *Buzby's Appeal*, 61 Pa. 111, 1 Legal Gaz. 12, 26 Phila. Leg. Int. 316, holding that where estate was devised to son for life then to his issue, and if none then to testator's heirs, and son died without issue, estate would go to heirs of testator at time of his death; *Guthrie's Appeal*, 37 Pa. 31 W. N. C. 66, on words of distribution with words of limitation added showing that remaindermen though described as heirs, take as new stock of descent; *Re Frank*, 21 Pittsb. L. J. N. S. 190, holding renewal of leasehold by devisee for life inures to benefit of those interested in old lease; *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. 683,

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on definition of contingent remainders; Peirce's Appeal, 4 W. N. C. 439, 34 Phila. Leg. Int. 206 (opinion of lower court), on estate in fee for life with concurrent contingent remainders in fee.

Disapproved in *Baldridge v. McFarland*, 26 Pa. 338, holding that grant to one and the heirs of her body as tenants in common, and to their heirs in fee, creates an estate tail.

Common recovery.

Cited in *Campbell v. Kent*, 3 Penr. & W. 72 (dissenting opinion), on abatement of common recovery by entry and plea.

Cited in note in 26 A. D. 725, on common recoveries.

Vested and contingent remainders.

Cited in reference notes in 37 A. S. R. 218, on what constitutes contingent remainder; 60 A. D. 230; 37 A. S. R. 146,—as to when remainders are vested and when contingent.

Cited in notes in 62 A. D. 316; 10 E. R. C. 820,—on contingent remainders.

Equitable estate by prescription.

Cited in *McCullough v. Seitz*, 28 Pa. Super. Ct. 458, holding that statute of limitations will run against party having equitable estate in land with right to possession as against an intruder.

19 AM. DEC. 638, MILES v. RICHWINE, 2 RAWLE, 199.

Sheriff's right to assume debt.

Cited in reference note in 40 A. D. 658, on right of sheriff having an execution to assume the debt himself.

Set-off of agent's debt against principal's demand.

Cited in *Chambers v. Miller*, 7 Watts, 63, holding inoperative, a receipt by attorney for amount of judgment, without payment but upon private transaction between attorney and judgment debtor.

— Of private debt of officer at execution sale.

Cited in *Fitch's Appeal*, 10 Pa. 461, 51 A. D. 495, holding that sheriff has no claim upon surplus at execution sale for private debt due him from judgment debtor; *Irwin v. Workman*, 3 Watts, 357, holding that sheriff cannot set off a claim for attorney's fees which has been assigned to him, in suit for money collected upon execution; *Coffman v. Hampton*, 2 Watts & S. 377, 37 A. D. 511, holding that in action on bid at constable's sale bidder cannot set off a debt due him from the constable.

Satisfaction of judgment.

Cited in reference note in 44 A. D. 738, on what constitutes satisfaction of judgment.

19 AM. DEC. 640, McCOY v. SCOTT, 2 RAWLE, 222.

Right to rents from real property during administration of estate.

Cited in *Howard's Estate*, 22 Pa. Co. Ct. 256, 8 Pa. Dist. R. 125; *Winkle v. Meany*, 30 Pa. Super. Ct. 339,—holding that rents or proceeds from realty are not assets of estate for the payment of debts; *Morrison's Estate*, 196 Pa. 80, 46 Atl. 257, on same point; *Graham's Estate*, 6 Kulp, 269, 8 Lanc. L. Rev. 367, holding that administrator is liable to heir for rents from land; *Evans v. Hardy*, 76 Ind. 527, holding that rents from real estate received by administrator are held in trust for heirs; *Schwartz's Estate*, 14 Pa. 42; *Bailey v. Bailey*, 67 Vt. 494,

48 A. S. R. 826, 32 Atl. 470; Pepper's Estate, 1 Phila. 562, 12 Phila. Leg. Int. 183,—on same point; Green v. Massie, 13 Ill. 363, holding that rents accruing after death of lessor descend to the heir and not to the executor; McPike v. McPike, 111 Mo. 216, 20 S. W. 12; Head v. Sutton, 31 Kan. 616, 3 Pac. 280, holding that administrator receiving rents is not liable in his fiduciary character to account therefor to the estate; Belcher v. Branch, 11 R. I. 226, holding administrator not accountable in probate court for rents received under special trust; Fidelity Ins. Co. v. Norris, 14 W. N. C. 225, 17 Phila. 258, 41 Phila. Leg. Int. 74, holding trustee liable to heir for payment of income from realty to another under mistake; Bakes v. Reese, 150 Pa. 44, 30 W. N. C. 437, 24 Atl. 634, 9 Lanc. L. Rev. 299, 23 Pittsb. L. J. N. S. 50, holding that administrator cannot set off claim for services to intestate in suit by heirs for rent of realty; Adams v. Adams, 4 Watts, 160, holding heir not accountable to administrator or to creditors of intestate for rents and profits of real estate accruing after death of ancestor; Brotzman's Appeal, 119 Pa. 645, 21 W. N. C. 318, 13 Atl. 483, on devisees of land holding rent paid to them as trustees for one to whom bequeathed annuity which he made a charge on such land; Engle v. Conrad, 12 Montg. Co. L. Rep. 76, holding rents belong to widow and heirs or devisees until delivery of deed to purchaser on sale for payment of debts.

Cited in note in 40 L.R.A. 337, on right to rents on lease of intestate's property.

Distinguished in Huffman's Estate, 19 Pa. Co. Ct. 558, holding that administrator collecting rents and paying debts therewith, by agreement with heirs, and receiving credit for such payment in orphan's court, must account to court for rents collected.

Right of administrator to rent land.

Cited in Watson's Estate, 6 Luzerne Leg. Reg. 13, holding administrator without authority to rent real estate.

Right of administrator to growing crops.

Cited in Gracey v. Mellinger, 30 Phila. Leg. Int. 192, on right of administrator to crops growing at death of decedent.

Administrator as trustee.

Cited in reference note in 32 A. D. 380, on administrator as trustee for heirs, but not for creditors.

Cited in note in 38 L. ed. U. S. 56, as to when relation of trustees *ex maleficio* arises.

Liability of sureties on administrator's bond for misappropriation of rents.

Cited in Com. v. Hilgert, 55 Pa. 236; Com. v. Reed, 8 Phila. 20, 28 Phila. Leg. Int. 212,—holding sureties on administrator's bond not liable for his misappropriation of proceeds of real property; Gregg v. Currier, 36 N. H. 200, holding same as to misappropriation of rents collected by him; Com. v. Keil, 9 Phila. 140, 30 Phila. Leg. Int. 232, 5 Legal Gaz. 231, holding sureties liable to heirs on bond of administrator who embezzles personalty and sells real estate for payment of decedent's debts.

Cited in note in 40 L.R.A. 344, on liability of administrator for rents of intestate's property.

Title of heirs in lands.

Cited in McElroy's Estate, 8 W. N. C. 184, 13 Phila. 320, 37 Phila. Leg. Int. 94, holding children of insolvent decedent entitled to statutory exemption though

they have already received greater amount in rents; *Kreider v. Kreider*, 1 Miles (Pa.) 220, on absolute title of heirs to lands of ancestor until divested by judicial sale.

Cited in reference notes in 21 A. S. R. 862, on right of heirs to decedent's realty; 76 A. D. 357, on vesting of ancestor's property both real and personal in heir or devisee.

Cited in note in 23 A. D. 200, on actions by heirs to recover possession of real or personal property of their ancestor before distribution in probate.

Land or proceeds as fund for payment of personal debts.

Cited in *Torr's Estate*, 2 Rawle, 250, holding that administrator may pay bond secured by mortgage out of personal estate but ground rents must be paid by the land; *De Witt v. Lehigh Valley R. Co.* 21 Pa. Super. Ct. 10, holding that fund paid for damage to property in possession of life tenant subject to lien held by remainderman who subsequently dies, is subject to his debts; *Curry v. Lloyd*, 22 Fed. 258, holding that voluntary improvements put upon son's land by father who immediately thereafter became bankrupt, are not subject to his debts, in the absence of fraud.

19 AM. DEC. 643, STODDARD v. MARTIN, 1 R. I. 1.

Invalidity of wagering contracts.

Cited in *Love v. Harvey*, 114 Mass. 80, holding that money paid on wager after stakeholder has been forbidden to pay it, may be recovered; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084, holding wager in form of purchase and sale of options on stock upon margin illegal without express statutory prohibition.

Cited in reference notes in 36 A. D. 216, on validity of wagers; 25 A. D. 452; 44 A. D. 361,—on illegality of wagers.

Cited in notes in 18 L.R.A. 859, on legality of wagers; 5 L.R.A. 200, on wagers and wagering contracts; 37 A. S. R. 698, on definitions and examples of wagers; 117 A. S. R. 173, 174, 175, on common-law defenses to notes and other obligations given for gambling debts.

—Wagers on elections.

Cited in *Ball v. Gilbert*, 12 Met. 397, holding wager on result of an election illegal and void.

Cited in reference note in 36 A. D. 458, on wagers on result of election.

Cited in note in 37 A. S. R. 703, on validity and enforceability of election wagers.

Recovery back of money paid under illegal contract.

Cited in note in 6 E. R. C. 491, on right of party to recover money paid under an illegal contract.

19 AM. DEC. 648, LYLES v. McCLURE, 1 BAIL. L. 7.

Effect of decree in probate court.

Cited in *Workman v. Bolling*, 2 S. C. 458, holding that ordinary's decree as to amount due legatees is conclusive and can only be satisfied by payment thereof; *Selleck v. Mathews*, 7 Rich. L. 26, presuming that an ordinary's decree for distribution to an assignee, was regular; *Charleston v. Mortimer*, 4 Rich. L. 271 (dissenting opinion), on sufficiency of ordinary's decree to sustain action on administrator's bond; *McClure v. Miller*, Bail. Eq. 107, 21 A. D. 522 (opinion of lower court), on decree of ordinary being conclusive as to accounts cognizable before him.

— Enforcement.

Cited in *Gilliam v. McJunkin*, 2 S. C. 442, holding that judge of probate has no power to arrest and imprison administrator for failure to comply with decree for payment of money into court.

Decrees as evidence.

Cited in *Patrick v. Gibbs*, 17 Tex. 275, holding decree of chancery upon proper record admissible as evidence in courts of another state.

Sufficiency of judgment to sustain appeal.

Cited in *Warren v. Shuman*, 5 Tex. 441; *Hall v. Patterson*, 45 Fla. 353, 33 So. 982,—holding that judgment for costs, without judgment on merits, will not support writ of error; *Barrett v. Garragan*, 16 Iowa, 47, holding that judgment upon record showing time, place, parties, matters in dispute, and result of hearing is sufficient to sustain appeal; *Stowers v. Milledge*, 1 Iowa, 150, 63 A. D. 434, holding judgment of justice of the peace sufficient though not technically in good form; *Spence v. Simmons*, 16 Ala. 828, holding that conditional judgment not designating party in whose favor rendered, will not support final judgment.

Jurisdiction of appeals in probate.

Cited in *Walker v. Pinson*, 12 Rich. Eq. 445 (opinion of lower court), as illustrating embarrassment arising from concurrent jurisdiction of common pleas and court of appeals over cases appealed from court of ordinary.

19 AM. DEC. 651, ROWLAND v. WOLFE, 1 BAIL. L. 56.**Necessity of proving adverse user of prescriptive way.**

Cited in *Hutto v. Tindall*, 6 Rich. L. 396, holding that as to uninclosed woodland, use of way must be shown to have been adverse; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206, holding that use of path across railroad track for twenty years, without showing adverse use, will not give right to public; *Craven v. Rose*, 3 S. C. 72, holding that where way through inclosed lands of another was used for necessary period, court need not necessarily instruct the jury as to its being adverse; *Colvin v. Burnet*, 17 Wend. 564, holding allegation that use was adverse necessary in plea of prescriptive uninterrupted use for flowing lands; *Kirby v. Southern R. Co.* 63 S. C. 494, 41 S. E. 765; *Earle v. Poat*, 63 S. C. 439, 41 S. E. 525 (dissenting opinion),—on adverse use being necessary to establish private way by prescription; *M'Kee v. Garrett*, 1 Bail. L. 341, on both adverse and exclusive use being necessary to establish way by prescription.

Cited in reference note in 30 A. D. 278, on presumption of grant of right of way.

Criticized in *Sims v. Davis*, Cheves, L. 1, 34 A. D. 581, holding that right of way by prescription may in certain cases be acquired over uninclosed woodlands of another.

Common roads not public.

Cited in *State v. Mobley*, 1 McMull. L. 44, as illustrating road essentially public but without liability to keep in repair.

Way of necessity.

Cited in reference note in 100 A. D. 116, on ways by necessity.

19 AM. DEC. 653, MEEK v. ATKINSON, 1 BAIL. L. 84.**Duress and its effect.**

Cited in notes in 26 A. D. 375; 27 A. D. 301, on what constitutes duress; 45

A. D. 158, on kind of compulsion which will justify recovery of money paid under compulsion.

— As defense to contract.

Cited in *Holmes v. Hill*, 19 Mo. 159, holding that instruments executed to avoid imprisonment under legal process without abuse thereof, cannot be avoided for duress; *Re Pinson*, 11 Rich. Eq. 110, holding that contract by party under legal restraint is not invalid.

Distinguished in *Bush v. Brown*, 49 Ind. 573, 19 A. R. 695, holding that instrument executed under well-grounded fear of illegal imprisonment, may be avoided for duress.

19 AM. DEC. 656, TOMKINS v. TOMKINS, 1 BAIL. L. 92.

Definition of "will."

Cited in note in 10 L.R.A. 94, on definition of "will."

Testamentary capacity.

Cited in *Harvey v. Sullens*, 46 Mo. 147, 2 A. R. 491, holding that person incapable of transacting ordinary business, is incapable of making a will; *Coleman v. Robertson*, 17 Ala. 84, holding that testator of sound mind may dispose of his property in any way he sees fit, provided will is not procured by fraud or undue influence.

Cited in reference notes in 21 A. D. 737; 22 A. D. 86; 52 A. D. 60,—on testamentary capacity; 25 A. D. 301, on what constitutes testamentary capacity.

— Proof of.

Cited in reference notes in 18 A. S. R. 506, on will as proof of testamentary capacity; 117 A. S. R. 223, on reasonableness of will as evidence of testamentary capacity.

Cited in note in 39 L.R.A. 328, on weight of expert opinion as to sanity or insanity.

Necessity of proving testator's knowledge of contents of will.

Cited in *Harvey v. Anderson*, 12 Ga. 69; *Boyd v. Boyd*, 3 Hill, L. 341; *McCartney v. Bone*, 33 Ala. 601,—holding that where testator's capacity is doubtful, it should be affirmatively shown that he gave instructions, or was made acquainted with its contents; *Dillard v. Dillard*, 2 Strobb. L. 89 (opinion of lower court), on same point; *Black v. Ellis*, 3 Hill, L. 68, *Riley L. 73*, holding that where testator is shown to have been generally capable at time of making will, it is unnecessary to prove instructions or that contents were made known to him.

Distinguished in *McNinch v. Charles*, 2 Rich. L. 229, holding that in case of doubtful capacity knowledge and consent to will may be shown by other evidence than proof of instructions or reading over will.

Evidence on probate of will generally.

Cited in notes in 36 L.R.A. 738, on burden of proof as to fraud and undue influence in execution of will; 77 A. S. R. 474, on weight and effect of testimony of subscribing witness on probate of will.

Validity of will drawn, dictated, or procured, by beneficiary.

Cited in *Drake's Appeal*, 45 Conn. 9; *McDaniel v. Crosby*, 19 Ark. 533,—holding that where will is written by party benefiting thereunder, stricter proof as to mental capacity and freedom of action is required; *Hobby v. Bobo*, 12 Rich. L. 247 note, holding that where testator in common health and understanding, signs will prepared by legatee, the presumption favors the will; *Re Welsh*, 1 Redf. 238.

holding that will leaving legacy for benefit of church, to be under supervision of rector who procures will to be drawn, raises presumption of undue influence.

Cited in note in 71 A. D. 130, 131, on will written by beneficiary.

19 AM. DEC. 660, ROSS v. SUTTON, 1 BAIL. L. 126.

Liability on administrator's contract.

Cited in *Cook v. Cook*, 24 S. C. 204, holding evidence of agreement by administrator to credit certain improvements to be made upon lands of estate, not admissible in suit on note due administrator as such; *Ex parte Simmons*, 69 S. C. 385, 48 S. E. 279, holding broker's contract with administrator and heirs, for commissions on sale of lands of estate not enforceable against estate but only against contracting parties individually.

Powers and liability of administrator *de bonis non*.

Cited in reference notes in 39 A. D. 724, on powers of administrator *de bonis non*; 44 A. D. 472, on powers and liabilities of administrators *de bonis non*; 22 A. D. 37, on rights of administrator *de bonis non* to proceeds of property sold by first administrator.

Cited in notes in 40 L.R.A. 62, 71, on choses in action passing to administrator *de bonis non*; 2 E. R. C. 199, on liability of administrator *de bonis non* for loss by predecessor's default.

Meaning of "administered."

Cited in note in 24 A. D. 388, on meaning of term "administered."

19 AM. DEC. 661, CHOICE v. MOSELEY, 1 BAIL. L. 126.

Rights under alternative contracts.

Cited in *Murrell v. Whiting*, 32 Ala. 54, holding that optional right to annul voyage granted in charter party must be exercised within reasonable time after contingency arises; *Bickett v. White*, 1 Cin. Sup. Ct. Rep. 170, holding that agreement for payment in six or ten years gives payor option of either term; *Homesley v. Elias*, 75 N. C. 564, on obligor in alternative contract having option to discharge himself by either, until breach.

Cited in note in 12 L.R.A. 690, on right of election under option contract.

— As to medium of payment.

Cited in *Drake v. Harrison*, 69 Wis. 99, 2 A. S. R. 717, 33 N. W. 81, holding that right of option as to mode of payment under alternative contract, is absolute in obligor until time specified therein is past; *Amanda Gold Min. & Mill Co. v. People's Min. & Mill Co.* 28 Colo. 251, 64 Pac. 218, holding that where promisor fails to exercise option of paying money or conveying land within time specified, promisee may enforce either; *Wetzel & T. R. Co. v. Tennis Bros. Co.* 75 C. C. A. 266, 145 Fed. 458, 7 A. & E. Ann. Cas. 426, holding right to optional payment in bonds or money lost by canceling contract and refusing payment thereunder; *Marlor v. Texas & R. Co.* 22 Blatchf. 464, 21 Fed. 383, holding that where interest on bond was payable in money or scrip at option of obligor, right to election is lost unless exercised before interest becomes due; *Barrett v. Twin City Power Co.* 118 Fed. 861, holding company bound to make cash payment upon failure to deliver bonds under alternative contract for delivery of bonds or payment of their value in money; *Butcher v. Carlile*, 12 Gratt. 520, holding that action for money will lie after breach of contract to pay a certain sum, which may be discharged by notes or bonds; *Howard v. Brower*, 37 Ohio St. 402 (dissenting opinion), on

right of promisee to choose payment in money on alternative contract for conveyance of land or payment of money, after breach of verbal promise.

Cited in reference note in 38 A. D. 433, on negotiability of note payable in something other than money.

Cited in notes in 21 A. D. 424, on notes payable in specific articles; 21 A. D. 425, as to when right to pay in specific articles as provided in note is lost.

19 AM. DEC. 663, HAWES v. HUNTON, 1 BAIL. L. 146.

Liability of firm on contract of a member.

Cited in *Vannerson v. Cheatham*, 41 S. C. 327, 19 S. E. 614, holding that married woman cannot be member of partnership where statute prohibits her from becoming liable in any way for debt of another.

— On note.

Cited in reference notes in 43 A. D. 685, on partner's power to bind firm on negotiable instrument; 10 A. S. R. 35, on liability of firm on note signed in firm name by partner for his own benefit; 45 A. D. 768, on power of partner to bind firm by accommodation indorsement or acceptance; 48 A. D. 668, on sufficiency of indorsement of bill of exchange by one member of firm to charge other members.

Cited in note in 26 A. D. 611, on partner's use of firm name for purpose distinct from firm business.

Explained in *Duncan v. Clark*, 2 Rich. L. 587, holding partnership liable on note signed by one partner in firm name, though for private debt, where note was in hands of innocent indorsee.

19 AM. DEC. 664, ADAIR v. McDANIEL, 1 BAIL. L. 158.

Rights under indemnity bond to sheriff.

Cited in *Perry v. Williams*, Dud. L. 44, holding execution satisfied by creditors' purchasing at sheriff's sale, though his title to the property failed and his indemnity bond was enforced; *Murphy v. Higginbottom*, 2 Hill, L. 397, 27 A. D. 395, denying right of purchaser at sheriff's sale to recover on judgment creditors' indemnity bond, where title to property purchased failed.

Cited in notes in 16 A. D. 552, on sheriff's right to indemnity; 89 A. S. R. 415, on sheriff's right to indemnity while executing civil process.

Effect of indulgence after judgment.

Cited in *Weinges v. Cash*, 15 S. C. 44 (opinion of lower court), on indulgence after judgment not being a badge of fraud in South Carolina.

Cited in reference note in 34 A. D. 116, on how lien of execution may be lost or postponed.

19 AM. DEC. 668, CARNOCHAN v. GOULD, 1 BAIL. L. 179.

Implied warranty of goods sold.

Cited in *Muller v. Eno*, 3 Duer, 421, holding that purchaser of goods with implied warranty of soundness, is bound to make prompt examination in order to benefit by warranty.

Cited in reference notes in 23 A. D. 101; 35 A. D. 143, on implied warranty on sale of chattels; 90 A. D. 431, on applicability of rule of *caveat emptor*; 35 A. D. 177, on implied warranty that thing will answer vendee's purpose; 58 A. D. 152, as to whether warranty is implied that chattel is fit for particular use for which it was purchased.

Cited in notes in 54 A. D. 145, on implied warranty of quality in sale of goods:

43 A. D. 680, on implied warranty of fitness of goods purchased; 43 A. D. 680, on implication of warranty from sound price paid for goods; 70 L.R.A. 662, on nature and extent of warranty on sale of goods by sample.

Sales by factor.

Cited in note in 58 A. D. 163, on manner, time, and place of sales by factor.

Agents' power to submit to arbitration.

Cited in reference note in 56 A. D. 257, on power of agent to submit to arbitration.

Cited in note in 30 A. D. 627, on who may submit to arbitration when acting for another.

19 AM. DEC. 672, FOSTER v. BROWN, 1 BAIL. L. 221.

Validity of acts of personal representative prior to, or on revocation of probate.

Cited in *Floyd v. Clayton*, 67 Ala. 265; *Brock v. Frank*, 51 Ala. 85,—holding acts of administrator appointed prior to probate of will, valid and binding upon the estate; *Price v. Nesbit*, 1 Hill, Eq. 445, holding sale by administrator prior to probate of will, valid in absence of fraud, though administrator was purchaser; *Re Mears*, 75 S. C. 482, 56 S. E. 7, 9 A. & E. Ann. Cas. 960, holding that prior administration of estate terminates upon probate of will and administration thereunder; *Morgan v. Dodge*, 44 N. H. 255, 82 A. D. 213, on acts by *de facto* administrator being valid.

Cited in note in 21 L.R.A. 152, on validity of acts done by personal representative under letters subsequently revoked where the court had jurisdiction.

19 AM. DEC. 675, GUPHILL v. ISBELL, 1 BAIL. L. 230.

Trustee's right to maintain trover.

Cited in *Schley v. Lyon*, 6 Ga. 530, holding that trustees may maintain trover for conversion of trust property as long as trust is not fully executed.

Cited in reference notes in 30 A. S. R. 163, on trustee's power to sue in his own name; 26 A. D. 430, on trover by trustee against beneficiary.

Removal or resignation of trustee.

Cited in reference notes in 1 A. S. R. 479, on power of court to remove trustee; 55 A. D. 620, on trustee's right to relinquish trust of his own accord.

Enforcement of trusts.

Cited in reference note in 27 A. S. R. 478, on equitable enforcement of trusts.

Resulting trust.

Cited in reference notes in 26 A. D. 68; 36 A. D. 166,—on trust resulting in favor of party paying consideration; 39 A. D. 46; 57 A. D. 618,—on resulting trust where one pays purchase price of land and deed is taken in name of another.

Cited in note in 34 L. ed. U. S. 1092, on resulting trusts.

Statute of limitations in cases of trust.

Cited in reference notes in 24 A. D. 569, on lapse of time in equity; 37 A. D. 454; 47 A. D. 638,—on statute of limitations in cases of trusts.

19 AM. DEC. 679, STATE v. SMITH, 1 BAIL. L. 233.

Power to grant conditional pardon.

Cited in *Ex parte Wells*, 18 How. 307, 15 L. ed. 421, holding that President can

grant conditional pardon; *Ex parte Marks*, 64 Cal. 29, 49 A. R. 684, 28 Pac. 109; *State v. Horne*, 52 Fla. 125, 7 L.R.A.(N.S.) 719, 42 So. 388,—holding that pardon may be granted upon conditions, the breach of which will defeat the pardon; *Carr v. State*, 19 Tex. App. 635, 53 A. R. 395, on distinction between absolute and conditional pardon.

Cited in reference note in 53 A. R. 400, on conditional pardons.

Cited in notes in 59 A. D. 576, on power of executive to grant conditional pardon; 14 L.R.A. 287, on acceptance of conditional pardon.

— **Condition of permanent departure from state or nation.**

Cited in *Com. v. Haggerty*, 4 Brewst. (Pa.) 326; *State v. Barnes*, 32 S. C. 14, 17 A. S. R. 832, 6 L.R.A. 743, 10 S. E. 611; *Ex parte Lockhart*, 1 Disney (Ohio) 105,—holding that pardon may be granted upon condition that person leave the state and remain away; *State v. Addington*, 2 Bail. L. 516, 23 A. D. 150, holding that pardon upon conditions that prisoner should submit to certain punishment and then leave the state, is valid; *People v. Potter*, 1 Edm. Sel. Cas. 235, 1 Park. Crim. Rep. 47, holding that governor may grant pardon upon condition that the person shall leave and remain away from the United States.

Cited in note in 111 A. S. R. 111, on condition in pardon for leaving state.

Effect of breach of condition of pardon.

Cited in *State v. Chancellor*, 1 Strobb. L. 347, 47 A. D. 557, holding that prisoner pardoned upon condition of leaving the state and not returning, is subject to original punishment upon returning; *State ex rel. Davis v. Hunter*, 124 Iowa, 569, 104 A. S. R. 361, 100 N. W. 510, holding that conditional pardon revocable at pleasure of pardoning power, may be granted, but it cannot work forfeiture of statutory right to diminution of sentence for good conduct; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *Re Prout*, 12 Idaho, 494, 5 L.R.A.(N.S.) 1064, 86 Pac. 275, 10 A. & E. Ann. Cas. 199,—holding that prisoner rearrested for breach of condition of parol cannot be held beyond expiration of original term; *Re Crow*, 60 Wis. 349, 19 N. W. 713, holding habeas corpus proper where imprisonment after expiration of term is alleged.

Cited in reference notes in 47 A. D. 559, on conditional pardon and effect of failure to perform condition; 27 A. D. 412, on right to rearrest and inflict death penalty on breach of condition of pardon of one sentenced to death.

Cited in notes in 14 L.R.A. 288, on breach of condition of pardon; 59 A. D. 577, on effect of prisoner's failure to perform condition in pardon; 23 A. D. 153, on vacation of conditional pardon by failure to perform condition; 16 L.R.A.(N.S.) 306, as to whether time prisoner is out on parole or conditional pardon is to be deducted from term of sentence.

Disapproved in *People v. Moore*, 62 Mich. 496, 29 N. W. 80, holding that convict rearrested for breach of conditional pardon, must be tried in same manner as other offenders.

Rights of accused unlawfully brought within jurisdiction of court.

Cited in *Kingen v. Kelley*, 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 A. & E. Ann. Cas. 1047; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204,—holding (affirming judgment which affirmed 34 Fed. 525) person forcibly abducted from one state and brought into another and seized for trial there, not entitled to release on writ of habeas corpus; *Young v. Green*, 10 Rich. Eq. 19, on same point; *State v. Ross*, 21 Iowa, 467, holding that person convicted of crime is not entitled to release because unlawfully brought within jurisdiction of court; *Ex*

parte *Ah Men*, 77 Cal. 198, 11 A. S. R. 263, 19 Pac. 380, holding that prisoner convicted will not be discharged on habeas corpus on account of irregularities in proceedings under which he was brought before the court; *Re Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735, on forcible abduction and bringing within jurisdiction of court being no valid objection to trial for criminal offense; *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, on rights of prisoner forcibly transported within jurisdiction of court for trial.

Cited in reference notes in 26 A. S. R. 380, on punishment of escaped felon illegally kidnapped from another state; 26 A. S. R. 604, on kidnapping fugitive from justice in another state as ground for release.

Cited in notes in 15 L.R.A. 177, on wrongfully bringing accused within jurisdiction as defense to prosecution; 58 A. D. 693, on jurisdiction as dependent on sovereignty of states.

— Of accused improperly extradited.

Cited in *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *State v. Glover*, 112 N. C. 896, 17 S. E. 525; *Williams v. Weber*, 1 Colo. App. 191, 28 Pac. 21,—holding that person returned to state upon requisition may be tried for any offense committed; *Re Moyer*, 12 Idaho, 250, 118 A. S. R. 214, 12 L.R.A. (N.S.) 227, 85 Pac. 897; *New Jersey v. Noyes*, 35 Phila. Leg. Int. 341, Fed. Cas. No. 10,164 (re-reported as Fed. Cas. No. 15,487),—holding that prisoner extradited from another state may be held for trial though some of proceedings were illegal; *Re Ezeta*, 62 Fed. 964, holding that in proceedings for extraditing persons to foreign country, evidence of how they were brought within the jurisdiction is not admissible; *Re Collins*, 151 Cal. 340, 90 Pac. 827, as illustrating that immunity of extradited prisoner from prosecution for offense other than that for which extradited, rests upon treaty rights of states.

Cited in notes in 57 A. D. 400, as to whether arrest of fugitive from justice must be legal in order to detain him; 10 A. S. R. 209, on right to try extradited person for other offense.

Satisfaction of sentence of death.

Cited in *Ex parte Nixon*, 2 S. C. 4; *State v. Kitchens*, 2 Hill, L. 612, 27 A. D. 410,—holding that sentence of death is satisfied only by execution or pardon, and if not executed on day set, a new day may be fixed.

Evidence in mitigation of damages.

Cited in *Boynton v. Tidwell*, 19 Tex. 118, on admissibility of evidence of ground for arrest in another state in mitigation of damages in suit for false imprisonment.

19 AM. DEC. 686, *BELL v. NEALY*, 1 BAIL. L. 312.

What will bar dower.

Cited in reference note in 12 A. S. R. 877, on effect, on dower right, of wife's desertion of husband.

Cited in notes in 28 L. ed. U. S. 506, on what will bar dower; 12 A. S. R. 91, on forfeiture of husband's or wife's rights in property of the other; 39 A. S. R. 30, as to whom dower may be assigned.

Wife's adultery as bar to dower.

Cited in reference notes in 57 A. D. 562, on bar of dower by wife's adultery; 78 A. D. 456, on elopement and adultery of wife as bar to dower.

Cited in notes in 19 A. D. 689, on adultery as bar to dower; 11 L.R.A. 791,

on effect of abandonment of marriage obligations by wife on her right to dower.

Distinguished in *Beatty v. Richardson*, 56 S. C. 173, 46 L.R.A. 517, 34 S. E. 73, holding wife's right of dower not barred where husband deserts her, though she afterward live in adultery; *Payne v. Dotson*, 81 Mo. 145, 51 A. R. 225, holding same where husband deserted her and she remarried under mistaken supposition that he was dead; *Reel v. Elder*, 62 Pa. 308, 1 A. D. 414, 26 Phila. Leg. Int. 324, holding same where husband deserted her and obtained invalid decree of divorce in foreign state, though wife afterward cohabited with another.

19 AM. DEC. 690, ADAMS v. HALL, 2 VT. 9.

Liability for concurrent torts producing common injury.

Cited in *Mansfield v. Brostor*, 76 Ohio St. 270, 118 A. S. R. 852, 10 L.R.A. (N.S.) 806, 81 N. E. 631, 7 A. & E. Ann. Cas. 767, holding parties discharging sewage into a stream are not jointly liable where there is no common design or concert of action; *Railroad Co. v. Gries*, 25 Phila. Leg. Int. 220; *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 A. D. 209,—holding same where different coal-mine companies dumped coal dirt in a stream; *Gallagher v. Kemmerer*, 144 Pa. 509, 27 A. S. R. 673, 22 Atl. 970, 29 W. N. C. 87, 22 Pittsb. L. J. N. S. 363, 48 Phila. Leg. Int. 475, holding same where accumulations from different companies caused an overflow of stream; *Swain v. Tennessee Copper Co.* 111 Tenn. 430, 78 S. W. 93, holding same where poisonous gases from works of two distinct corporations created an actionable nuisance.

Cited in notes in 118 A. S. R. 873, on action at law against two or more persons for damages for creating or maintaining private nuisance; 73 A. D. 141, on joint liability of trespasser with one commanding commission of trespass; 73 A. D. 139, on necessity of co-operation in alleged act of trespass to constitute one a cotrespasser; 10 L.R.A. (N.S.) 169, on character of the liability of several persons whose independent wrongs of the same kind contribute to enhance the degree or extent of the injury sustained by plaintiff.

Liability for trespass by animals of different owners.

Cited in *Anderson v. Halverson*, 126 Iowa, 125, 101 N. W. 781; *State, Nierenberg, Prosecutor, v. Wood*, 59 N. J. L. 112, 35 Atl. 654; *Auchmuty v. Ham*, 1 Denio, 495; *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 A. D. 310; *Denny v. Correll*, 9 Ind. 72,—holding owner of dog liable only for acts of his own dog where dogs belonging to several persons kill sheep together; *Partenheimer v. Van Order*, 20 Barb. 479, holding same as to trespass committed by cows; *Nohre v. Wright*, 98 Minn. 477, 108 N. W. 865, 8 A. & E. Ann. Cas. 1071, holding statute has not changed the above rule; *Yeazel v. Alexander*, 58 Ill. 254, holding there is no joint liability where disease is imparted to one's cattle by reason of owners of different droves driving their cattle over herding ground of another.

Cited in reference notes in 94 A. D. 407, on necessity of joint interest in animal to authorize joint recovery for damages occasioned by it; 52 A. D. 70, on actions against different owners for injuries committed by vicious dogs; 31 A. D. 312, on joint liability of separate owners of animals for injuries done by them; 80 A. S. R. 53, on liability for injury by dogs owned by separate owners.

Cited in notes in 49 A. D. 258, on who are liable for trespasses of cattle; 73 A. D. 149, on joint liability for damages caused by animals.

Distinguished in *Moulton v. Moore*, 56 Vt. 700, holding one in possession, control, and use of cows is liable for all the damage done, irrespective of ownership of some of the cows.

19 AM. DEC. 693, WILLIAMS v. HICKS, 2 VT. 36.**Partial failure of consideration as defense to suit on note.**

Cited in *Thrall v. Horton*, 44 Vt. 386, holding a partial failure of consideration cannot be set up as a defense; *Stone v. Peake*, 16 Vt. 213, holding fraud cannot be set up as a defense, merely to reduce the damages, where the sum to be reduced is not of certain computation.

— Note for worthless patent.

Cited in *Thomas v. Quintard*, 5 Duer, 80, holding buyer's reassignment precludes him from saying the thing bought was valueless.

Cited in note in 20 L.R.A. 606, on invalidity, for failure of consideration, of note given for patent right.

Distinguished in *Clough v. Patrick*, 37 Vt. 421, holding the worthlessness of a patent right by reason of defect in construction a full defense to an action on note given for purchase price.

Actionable misrepresentations.

Cited in reference notes in 34 A. D. 503, on effect of false representations of vendor; 31 A. D. 737, as to when false representations by vendor do not avoid contract; 52 A. D. 343, on vendor's liability for fraud in absence of warranty; 32 A. D. 51, on effect on sale of misrepresentation the falsity of which might have been discovered by using due diligence.

Cited in note in 37 L.R.A. 606, on right to rely on trade talk as to value made to effect contract as basis for charge of fraud.

Distinguished in *Childs v. Merrill*, 63 Vt. 463, 14 L.R.A. 264, 22 Atl. 626, holding false representations as to one's pecuniary resources, which led to the indorsement of a note to his injury, are actionable.

19 AM. DEC. 697, REED v. SHEPARDSON, 2 VT. 120.**Priority between joint and individual creditors.**

Cited in *Gassett v. Sargeant*, 26 Vt. 424, holding the defendant, upon the process against one of the joint tenants, had the right to take the whole property; *Cleghorn v. Insurance Bank*, 9 Ga. 319, holding the right acquired by an execution at law by joint creditors against the separate estate will not be made to give way to the equity in favor of the separate creditors.

— Between creditors of firm and of partners.

Cited in *Lamoille Valley R. Co. v. Bixby*, 55 Vt. 235, holding at law defendant may attach and sell firm property in satisfaction of a debt against one partner; *Jaques v. Greenwood*, 12 Abb. Pr. 232, holding general assignee for the benefit of partnership creditors cannot retain property as against an individual creditor of one partner where assignment was fraudulent.

Cited in reference note in 25 A. D. 745, on preference between partnership and individual creditors.

Cited in notes in 23 A. D. 180, on preference given to partnership creditors; 21 A. D. 374, on extent of partner's interest in partnership property, and right of partnership and individual creditors; 43 A. S. R. 371, on rights and remedies of partnership creditors as against individual creditors proceeding by attachment or execution.

Distinguished in *Jarvis v. Brooks*, 23 N. H. 136, holding the separate creditor has preference over his debtor's separate property.

Disapproved in *Leonard v. Scarborough*, 2 Ga. 73, holding as to property held in common the undivided interest of one may be sold under execution and the

purchaser becomes a tenant in common with the others; *Allen v. Wells*, 39 Mass. 450, 33 A. D. 757, holding where separate property is attached for firm debt the lien is not defeated by a subsequent attachment by a separate creditor; *Ferson v. Monroe*, 21 N. H. 462, holding a sale of the partnership stock in trade in payment of the separate debt of one partner is void as to creditors of the firm.

Validity of levy for joint debt on individual property.

Cited in *Whitney v. Ladd*, 10 Vt. 165, holding trespass may be maintained against one joint owner for forcibly taking from an officer property taken on legal process against the other joint owner; *Welch v. Clark*, 12 Vt. 681, 36 A. D. 368, holding a tenant in common may not maintain trespass against one who attaches the common property for the debt of the other co-owner; *Burton v. Kennedy*, 63 Vt. 350, 25 A. S. R. 769, 21 Atl. 529, holding levy upon the whole chattel owned by two jointly is valid where the debt is of one only; *Washburn v. Bank of Belows Falls*, 19 Vt. 278, holding attachment of a separate creditor valid without regard to the ultimate balance, but this does not limit the equities of partnership creditors in court of equity.

Cited in reference notes in 51 A. D. 601, on partnership property being first liable for partnership debts; 83 A. D. 502, on attachment of partner's share in firm goods for individual debt; 85 A. D. 642, on right of separate creditor of partnership to attach and sell joint property.

Cited in notes in 57 A. S. R. 439, on levy on partnership assets of attachment writ against one partner only; 57 A. S. R. 439, on possession of partnership assets, which may be taken under writ against one partner only; 46 L.R.A. 481, on sheriff taking partnership property into his possession on levy for debt of partner; 46 L.R.A. 496, on levy on partnership property of executions against both partners.

Disapproved in *Phillips v. Cook*, 24 Wend. 389, holding sheriff may levy on and sell the right of the individual partner, yet purchaser takes subject to an account between the partners.

19 AM. DEC. 703, NEWBURY v. BRUNSWICK, 2 VT. 151.

Derivative settlement of family from father.

Cited in *Rowell v. Vershire*, 62 Vt. 405, 8 L.R.A. 708, 19 Atl. 990, holding aid given to unemancipated daughter is legally given to the father and an agreement to pay him therefor is void.

Removal of pauper and family.

Distinguished in *Manchester v. Springfield*, 15 Vt. 385, holding the warning out of a man and his family can have no legal effect as to the woman and her children where no marriage existed.

Disapproved in *Landgrove v. Plymouth*, 52 Vt. 503, holding the wife and minor children are presumed to be a part of the pauper's family, and naming them in an order of removal adds nothing to its legal effect; *Landgrove v. Pawlet*, 20 Vt. 309, holding an order for the removal of a pauper, "his family and effects" is good without inserting the names of the family therein; *Chester v. Wheelock*, 28 Vt. 554, holding an order for the removal of a man and a particular woman named his wife is conclusive as to the relationship of husband and wife between them, if not appealed from.

Validity of marriage.

Cited in reference note in 22 A. D. 163, on cohabitation as evidence of marriage.

Cited in note in 57 L.R.A. 159, on conflict of laws as to preliminaries and manner or form of solemnization of marriage.

—Marriage per verba de præsenti.

Cited in *Askew v. Dupree*, 30 Ga. 173; *Dyer v. Brannock*, 66 Mo. 391, 27 A. R. 359; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609; *Hutchins v. Kimmell*, 31 Mich. 126, 18 A. R. 164,—holding a marriage *per verba de præsenti* valid; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281, holding marriage good at the common law to be good unless the statute contain express words of nullity; *State v. Murphy*, 6 Ala. 765, 41 A. D. 79, on marriages *per verba de præsenti*; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, holding the word “consummation” as used by the courts generally means the completion of the marriage relation and not necessarily as the act of sexual intercourse; *Wilcox v. Wilcox*, 46 Hun, 32, holding a contract to marry *per verba de præsenti* treated as valid when followed by cohabitation.

Cited in reference note in 33 A. S. R. 144, on validity of marriage *per verba de præsenti* followed by cohabitation.

Cited in notes in 124 A. S. R. 106, on essentials of common-law marriage; 9 A. D. 73, on marriage *per verba de præsenti*.

Cited as overruled in *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829, holding a marriage *per verba de præsenti* not valid in Vermont.

19 AM. DEC. 707, BATCHELDER v. CARTER, 2 VT. 168.

Retention of possession on sale of personalty as fraud.

Cited in *Rogers v. Vail*, 16 Vt. 327, holding an assignment of personal property without change of possession void as against an attachment for debts though the assignment was made for the benefit of creditors.

Cited in reference notes in 29 A. D. 363, on retention of possession of personal property by vendor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 21 A. D. 732; 53 A. D. 94; 30 A. S. R. 484,—on retention of possession of chattels by seller as evidence of fraud; 28 A. D. 45; 30 A. D. 262,—on retention of possession by vendor or mortgagor as evidence of fraud.

—In execution sales.

Cited in *Fitzpatrick v. Peabody*, 51 Vt. 195, holding a sale on execution in substantial compliance with the law, will protect the purchaser without a change of possession.

Cited in reference notes in 69 A. S. R. 64, on change of possession after execution sale; 47 A. D. 89, on effect of leaving execution debtor in possession after sale; 24 A. D. 409, on retention of possession by defendant in execution after sheriff's sale; 64 A. D. 655, on effect of possession of personal property being retained by defendant in execution after sale.

Cited in note in 15 A. D. 672, on retention of possession of chattels sold on execution.

Fraud in execution sale as question for jury.

Cited in *Caswell v. Jones*, 65 Vt. 457, 36 A. S. R. 879, 20 L.R.A. 503, 26 Atl. 529, holding that where sale regular, on its face is impeached for fraud, it is for the jury to decide whether the sale was bona fide, giving the presumption in favor of its validity due weight.

19 AM. DEC. 711, SPENCER v. WILLIAMS, 2 VT. 209.**Liability of receptor on refusal to redeliver levy.**

Cited in *Sibley v. Story*, 8 Vt. 15, holding trover will lie against a receipt man who refuses to redeliver on request.

Conclusiveness of receipt to officer for goods taken on process.

Cited in *Bell v. Shafer*, 58 Wis. 223, 16 N. W. 628, holding receptor, estopped to deny that he still holds possession of goods, only so far as the attachment is concerned; *Cooper v. Davis Mill Co.* 48 Neb. 420, 67 N. W. 178, holding he cannot set up title adversely, after judgment and order of sale in the attachment case.

Cited in reference note in 26 A. D. 421, on estoppel by giving receipt on attachment.

— As to fact and validity of seizure.

Cited in *Morrison v. Blodgett*, 8 N. H. 238, 29 A. D. 653, holding receptor responsible and estopped to deny seizure or assert want of consideration for his agreement; *Lowry v. Cady*, 4 Vt. 504, 24 A. D. 628, holding he is not permitted to deny the attachment in a suit brought against him on the receipt; *Burk v. Webb*, 32 Mich. 173, holding receptor cannot deny a delivery to him of the goods or question the validity of the execution, where sheriff has made himself liable by reason of his levy; *Colbath v. Hoefer*, 43 Or. 366, 73 Pac. 10, holding receipt by garnishees showing delivery of property of judgment creditor by sheriff, conclusive of levy and possession of the property by sheriff; *Stimson v. Ward*, 47 Vt. 624, holding officer's return and receipt sufficient evidence of actual attachment and delivery to the receptor, in a suit on the receipt.

Parol evidence as to receptor's agreement or liability.

Cited in *Brown v. Gleed*, 33 Vt. 147, holding receipt a contract and parol evidence not admissible to show an agreement to sell; *Bowley v. Angire*, 49 Vt. 41, holding parol evidence inadmissible to establish facts tending to limit liability to account for property described in a receipt for property attached; *Parsons v. Strong*, 13 Vt. 235, holding parol evidence inadmissible in an action by sheriff against a receipt man, to show property was of greater value than expressed in the receipt.

Distinguished in *Roberts v. Carpenter*, 53 Vt. 678, holding evidence admissible in an action against a receptor, to prove nonliability of officer in attachment.

Nature of receipt to levying officer for goods taken.

Cited in *Miller v. Adsit*, 16 Wend. 335, holding the receptor, where bound to produce goods on a specific day may maintain an action in replevin against one holding the goods.

Effect of estoppel as evidence.

Cited in *Phillips v. Cooper*, 50 Miss. 722, on estoppels which obviate the need of producing existing records as best evidence.

Effect of covenant not to sue joint debtor paying part of debt.

Cited in *Seely v. Spencer*, 3 Vt. 334, holding it not a discharge of other debtors; *Ellis v. Esson*, 50 Wis. 138, 36 A. R. 830, 6 N. W. 518; *Chamberlin v. Murphy*, 41 Vt. 110,—holding it reduced the recovery *pro tanto*, but was no defense to a recovery of the balance due; *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 111 A. S. R. 273, 64 L.R.A. 574, 79 S. W. 261, holding the acceptance of a sum of money from one joint tortfeasor in part payment, and in consideration of his release, does not preclude recovery against the other.

Cited in reference note in 43 A. D. 590, on effect of covenant not to sue one of two joint debtors.

Release of joint debtors or tort feorsors.

Cited in *Eastman v. Grant*, 34 Vt. 387, holding a release in writing of two of several tort feorsors discharged all.

Cited in note in 92 A. S. R. 877, on effect of release under seal of one joint tort feorsor on liability of others.

— By discontinuance of suit as to one.

Cited in *Sloan v. Herrick*, 49 Vt. 327, holding where suit is begun against two joint tort feorsors, a discontinuance as to one is no bar to a full recovery from the other.

— By agreement to wait on some.

Cited in *Pinney v. Bugbee*, 13 Vt. 623, holding an agreement not to pursue one joint debtor for his part of the debt constitutes no defense to an action on the debt.

19 AM. DEC. 714, ISHAM v. EGGLESTON, 2 VT. 270.

Liability of levying officer.

Cited in reference note in 49 A. D. 56, on liability of sheriff for neglect in levying execution.

— Of officer delegating service of writ to another.

Cited in *Dix v. Batchelder*, 55 Vt. 562, holding officer liable where he received the writ without objection and turned it over to another person to serve.

— For failure to serve or return execution.

Cited in reference notes in 33 A. D. 224, on damages for failure to serve execution; 66 A. D. 250, on officer's liability for failure to return execution.

Damages for failure to return execution.

Cited in reference note in 49 A. D. 513, on measure of damages for failure to return execution.

19 AM. DEC. 718, LEAVITT v. METCALF, 2 VT. 342.

What property is exempt.

Cited in *Chase v. Swayne*, 88 Tex. 218, 53 A. S. R. 742, 30 S. W. 1049; *Reynolds v. Haines*, 83 Iowa, 342, 32 A. S. R. 311, 13 L.R.A. 719, 49 N. W. 851,—holding where exempt property is destroyed by fire, the avails of an insurance policy on the property is exempt; *Re Steele*, 2 Flipp. 324, Fed. Cas. No. 13,346, holding plain and not extravagantly costly watch necessary to a commercial man exempt in bankruptcy.

Cited in reference notes in 29 A. D. 204; 31 A. D. 156,—on exemptions from execution; 30 A. S. R. 327, on exemption of articles of food.

Cited in note in 24 A. D. 648, on exemption of butter from milk of one's only cow.

Distinguished in *Dunlap v. Edgerton*, 30 Vt. 224, holding a piano not exempt from attachment, as an article of furniture necessary to uphold life.

Construction of statutes of exemption.

Cited in *Montague v. Richardson*, 24 Conn. 338, 63 A. D. 173, holding statutes exempting property from execution should be liberally construed in furtherance of their objects.

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Cited in note in 45 A. D. 256, on meaning of term "household furniture" as used in exemption statutes.

Object of exemption.

Cited in *Moran v. King*, 49 C. C. A. 578, 111 Fed. 730, holding the statute of exemption looks to the relief and well-being of the family rather than the debtor himself; *Re Seabolt*, 113 Fed. 766, holding exempt property on the death of the debtor remains a part of his estate and descends to his administrator and not to a trustee in bankruptcy.

Trespass for taking exempt property.

Cited in *Dow v. Smith*, 7 Vt. 465, 29 A. D. 202, holding trespass the form of action for taking property, exempt from execution.

Cited in note in 20 A. D. 699, on action for possession of chattels levied upon under execution.

19 AM. DEC. 720, BARNEY v. BROWN, 2 VT. 374.

Sufficiency of change of possession of goods sold.

Cited in *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707, holding an immediate delivery and change of possession resulted from payment, execution, and delivery of a bill of sale and branding of horses thereupon turned from vendor's corral upon the "range."

Cited in reference notes in 44 A. D. 538, on sufficiency of symbolical or constructive delivery; 37 A. D. 617, on sufficiency of delivery accompanying sale of property in stranger's possession; 50 A. D. 760, on necessity and sufficiency of delivery of goods sold to pass property.

— Chattels left with third person for buyer.

Cited in *Williams v. Lerch*, 56 Cal. 330; *Harding v. Janes*, 4 Vt. 462,—holding sale not fraudulent where personal property was in possession of third party who was notified of the sale, and kept it for the vendee; *Marshall v. Town*, 28 Vt. 14, holding where property is in hands of third party, notice of ownership must be given by the vendee as against attaching creditors; *Wing v. Peabody*, 57 Vt. 19, holding repurchase by the vendor, good as against attaching creditors where notice of resale was given and the third party agreed to keep goods for the owner; *Hutchins v. Gilchrist*, 23 Vt. 82, holding a sale of logs deposited on the land of a third party, with his consent good, as against attaching creditors of vendor; *Hunter v. Wright*, 12 Allen, 548, holding delivery to a warehouseman for buyer after goods are purchased and paid for, is a sufficient delivery, though the warehouseman have no communication with the purchaser; *High v. Emerson*, 23 Wash. 103, 62 Pac. 455, holding there was a sufficient delivery where subject-matter of a judgment in replevin, turned over to plaintiff's attorney under the terms of a compromise and settlement, was left in hands of a tenant of defendant after notice to him of the transfer; *Re Pease Car & Locomotive Works*, 134 Fed. 919, holding there was a sufficient delivery where railroad engines were repaired, and purchaser's name painted on them where accepted and paid for, though there was no change of possession because of high water which delayed shipment.

Distinguished in *Lockwood v. Collamer*, 14 Vt. 141, holding sale void as to creditors when made by a tenant who continues in possession of the farm on which property is kept notwithstanding an agreement by owner of farm to keep the property for the buyer; *Flanagan v. Wood*, 33 Vt. 332, holding sale void where property sold is left in the possession of the servant of the vendor, there being no visible change of ownership.

Trespass by purchaser before obtaining possession.

Cited in note in 18 A. D. 559, on right of purchaser of chattels to maintain trespass before delivery.

19 AM. DEC. 722, SALLING v. MCKINNEY, 1 LEIGH, 42.**Validity of contracts.**

Cited in reference notes in 40 A. D. 524, on contracts deemed void as against public policy; 47 A. D. 424, on validity of contracts for procuring official appointment.

For farming or sale of office to deputies.

Cited in Cecil v. Early, 10 Gratt. 198, holding office of sheriff was considered a reward of the justices for public service and its sale to others was considered legal; Com. v. Tate, 3 Leigh, 802 (dissenting opinion), on the incompatibility of office of deputy sheriff with office of justice of the peace.

Cited in reference notes in 67 A. D. 547, on validity of contracts for sale of offices; 67 A. D. 400, on invalidity of contracts for sale of offices.

Cited in note in 48 A. R. 333, on contract selling office or its salary.

Distinguished in Becker v. Ten Eyck, 6 Paige, 68, holding the granting of an office to a deputy with its fees, with a reservation of a certain sum to be paid at all events is a sale of the office and void by statute; White v. Cook, 51 W. Va. 201, 90 A. S. R. 775, 57 L.R.A. 417, 41 S. E. 410, holding contract between a sheriff and deputy providing for sale of office for a gross sum is prohibited as farming the office, but where a fixed sum is to be paid deputy from fees collected the statute is not violated.

Construction of statutes.

Cited in Erskine v. Nelson County, 4 N. D. 66, 27 L.R.A. 696, 58 N. W. 348, (dissenting opinion), on the construction of statutes according to their plain terms.

Cited in reference notes in 28 A. D. 333; 50 A. S. R. 597,—on statutory construction; 34 A. D. 236; 38 A. D. 328,—on considering intent of legislature in construing statutes.

Cited in note in 58 A. D. 600, on rules for construction of statutes.

Constitutionality of statutes.

Cited in reference note in 25 A. D. 705, as to when statutes are unconstitutional as assumptions of judicial function.

Privity between sheriff and subdeputies.

Distinguished in Holland v. Helm, 7 Gratt. 245, holding where office of sheriff was farmed out to deputies and they employed subdeputies, the sheriff was considered privy to the act where no indemnity bond was given him by the subdeputies.

19 AM. DEC. 739, NEWSUM v. NEWSUM, 1 LEIGH, 86.**Personal liability of administrator as to goods not of estate.**

Cited in Catlett v. Russell, 6 Leigh, 344, holding an action for wrongful detention will lie against an executor personally where he has come into actual possession before suit; Thompson v. Thompson, 5 W. Va. 190, holding an administrator liable personally for money had and received, where he knowingly collected the bonds for the hire of a slave though he accounted for the same to the estate; McCustian v. Ramey, 33 Ark. 141, holding an administrator liable

to the owner where he received and administered money by mistake as belonging to the decedent's estate.

Cited in reference note in 29 A. D. 208, on personal liability of administrator, in trover, for sale of third person's chattels.

Cited in note in 51 L.R.A. 265, on liability of executor or administrator for conversion.

Liability of subbailee to unknown owner.

Cited in *Jones v. Fort*, 36 Ala. 449, holding a subbailee liable to the owner of slave killed regardless of degree of care exercised although he had reason to suppose the one he hired the slave of was the owner.

Demand and refusal to fix conversion.

Cited in *Houston v. Dyche*, Meigs, 76, holding proof of wrongful taking sufficient without showing demand and refusal; *Haines v. Cochran Bros.* 26 W. Va. 719, holding demand and refusal need not be shown where there is sufficient proof of actual conversion; *Robinson v. Hartridge*, 13 Fla. 501, holding same where goods have been sold without authority and money received; *Draper v. Moseley*, 3 Baxt. 201, holding demand not necessary to action in replevin.

Cited in reference notes in 25 A. D. 400, as to when trover lies without demand and refusal; 34 A. S. R. 588, on necessity of proof of demand and refusal in action for conversion; 28 A. D. 176, on necessity of demand in trover where there has been a conversion; 22 A. D. 555, on necessity of proving demand and refusal after actual conversion.

Scope of review on appeal.

Cited in *Rose v. Burgess*, 10 Leigh, 186, holding points that might have been made and objections that could have been raised in the court below will not be noticed where first raised on appeal; *Gray v. Belden*, 3 Fla. 110, on writ of error the function of the court is to pass on the points stated; *Pons v. Hart*, 5 Fla. 457, holding the court confined to the questions made by the bill of exceptions; *Ottawa, O. & F. R. Valley R. Co. v. McMath*, 1 Ill. App. 429, holding an appellate court will take notice of nothing not specifically stated in the record, as ground of exceptions.

Cited in reference note in 51 A. D. 50, on objections not made in court below not considered on writ of error or appeal.

19 AM. DEC. 743, HALEYS v. WILLIAMS, 1 LEIGH, 140.

Priority between creditors.

Cited in reference note in 43 A. D. 527, on priority among judgment liens.

Cited in notes in 17 L.R.A. 348, on priority among judgment creditors; 90 A. D. 296, on priority as between judgment creditors in reaching real estate of debtor.

— Of creditors payable from equitable fund or interest.

Cited in *Yates v. Seitz*, 7 D. C. 11, holding liens upon equitable fund payable according to priority in point of time; *Hale v. Horne*, 21 Gratt. 112, holding the equity of redemption in land conveyed in trust, subject to the lien of judgments subsequently obtained in order of their priority in time; *Findlay v. Toncray*, 2 Rob. (Va.) 374, holding a decree against the debtor a lien on his equity of redemption under his deed of trust, and as such entitled to priority over subsequent liens.

Equitable liens and priorities.

Cited in *Michaux v. Brown*, 10 Gratt. 612, holding an equity of redemption

bound by encumbrances in equity, as it would have been bound in law if it had been a legal estate; *Coutts v. Walker*, 2 Leigh, 268, holding the lien of a judgment creditor, in equity on the equitable estate, holds in like manner as his lien at law on the legal estate.

Cited in reference notes in 22 A. D. 279; 84 A. D. 510,—on lien of judgment on realty; 95 A. D. 349, on judgment liens in equity; 47 A. D. 717, on judgment liens upon equitable estates in realty; 38 A. D. 455, on operation of judgment liens in equity; 90 A. D. 295, on creditors' bill as lien.

Cited in notes in 93 A. D. 348, on applicability of judgment lien to equitable interests; 117 A. S. R. 781, on judgment lien as affecting equitable estates or interests in general.

Distinguished in *M'New v. Smith*, 5 Gratt. 84, holding where a creditor stands on his lien alone and comes into equity to remove an obstruction to his remedy at law, his rights will not be enlarged to reach property not liable at law, though the conveyance was fraudulent.

Subjection of partial interests in land to debts.

Cited in *Doub v. Barnes*, 4 Gill, 1, holding a judgment against terre-tenants may be satisfied by a sale of as much land as is necessary regardless of question of contribution between tenants; *M'Clung v. Beirne*, 10 Leigh, 394, 34 A. D. 739, holding in selling an equity of redemption the land should be sold out and out, not a moiety only, but the whole; *Nickell v. Handly*, 10 Gratt. 336, holding where one has an equitable estate which could be separated from the interests of others without impairing their rights, such estate may be subjected to his debts; *Buchanan v. Clark*, 10 Gratt. 164, holding where the judgment only authorized a charge upon a moiety of the land, a moiety only can be subjected to sale.

Decreeing satisfaction out of rents and profits.

Distinguished in *Cronie v. Hart*, 18 Gratt. 739, holding the precise limits of the discretion to be exercised in decreeing satisfaction out of rents and profits is fixed by positive enactment authorizing a sale only where rents and profits will not satisfy the judgment in five years.

Subjection of fraudulently deeded land to debts.

Cited in *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707, holding conveyance of land by a husband to his wife when he had no other property to pay his debts, was fraudulent and land remained subject to judgment liens against him.

Cited in note in 25 A. D. 313, on creditor's right to resort to equity to reach assets.

Distinguished in *Blow v. Maynard*, 2 Leigh, 29, holding equity may decree a sale of lands to satisfy debts of a deceased father where some of the land was fraudulently conveyed to the children during his lifetime and other came to them by descent.

19 AM. DEC. 748, COPLIN v. McCALLEY, 1 LEIGH, 260.

Liability on official bond.

Cited in reference notes in 80 A. D. 695, on liability of surety on official bond ceasing with term of office; 146 A. D. 388, on duration of official bond of officer holding during pleasure of court.

19 AM. DEC. 750, CREWS v. PENDLETON, 1 LEIGH, 297.

Right to emblements.

Cited in *Howell v. Schenck*, 24 N. J. L. 89, holding title paramount to that of tenant's landlord taking the emblements as against the tenant.

Cited in reference note in 53 A. S. R. 207, on mortgagee's right to growing crops.

Cited in note in 35 A. D. 741, on right to growing crops.

— **As against execution of judicial purchaser.**

Cited in *Thweat v. Stamps*, 67 Ala. 96, holding growing crops pass with the title to the land; *Jones v. Adams*, 37 Or. 473, 82 A. S. R. 766, 50 L.R.A. 388, 59 Pac. 811, holding the purchaser at judicial sale takes crops not actually severed as against one holding under a chattel mortgage; *Wootton v. White*, 90 Md. 64, 78 A. S. R. 425, 44 Atl. 1026, holding purchaser at foreclosure sale entitled to ungathered crops as against a third party holding same under a bill of sale from the mortgagor; *Salmon v. Fewell*, 17 Mo. App. 118, holding same of similar purchaser as against a lessee of the mortgagor under a lease subsequent to the mortgage.

Cited in reference notes in 81 A. S. R. 575, on right of purchaser at foreclosure sale; 20 A. S. R. 645, on right of purchaser on foreclosure to growing crops; 24 A. D. 108; 78 A. S. R. 431,—on right to growing crops on foreclosure; 97 A. S. R. 646, on title to standing crop passing on foreclosure; 19 A. S. R. 514, on title of purchaser on foreclosure of mortgage to growing crops; 48 A. S. R. 764, on ownership of crops on mortgaged land after foreclosure; 39 A. S. R. 367, on ownership of crops on execution sale of land; 12 A. S. R. 366, on who entitled to growing crops at execution sale of land; 21 A. S. R. 858, on title to growing crops on execution sale of land; 24 A. D. 341, on passing of growing crops to purchaser at execution sale of land.

Cited in notes in 23 L.R.A. 263, on crops as personal property for purpose of levy and sale; 55 A. D. 492, on passing of growing crop to purchaser at execution sale of land; 33 A. S. R. 377, on mortgage foreclosure divesting tenant's title to growing crops.

Distinguished in *Bittinger v. Baker*, 29 Pa. 66, 70 A. D. 154, holding the sale of the landlord's right in land does not defeat the tenant's right to crops sown while in possession under a lease; *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122, holding matured corn standing ungathered remained property of mortgagor who planted it as against purchaser at judicial sale where it was not considered by the appraisers in arriving at the value of the premises sold.

— **As against other purchaser.**

Cited in *Floyd v. Ricks*, 14 Ark. 286, 58 A. D. 374, holding sale of land by the United States to a purchaser passes title to crops planted by a settler on the land; *Wintermute v. Light*, 46 Barb. 278, holding the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else, not reserved by the vendor; *Kerr v. Hill*, 27 W. Va. 576, holding growing wheat goes to the purchaser of land where there is no different understanding before the sale.

Cited in reference note in 50 A. D. 237, 238, on right to growing crops on conveyance or lease of the land.

— **Where mortgagee is in possession.**

Distinguished in *Steele v. Farber*, 37 Mo. 71, holding where crops are harvested by the mortgagee in possession, they are to be applied to the payment of the debts secured.

Rights of purchaser under decree.

Cited in *Kable v. Mitchell*, 9 W. Va. 492; *Childs v. Hurd*, 25 W. Va. 530; *Cocks*

v. Gilpin, 1 Rob. (Va.) 20,—holding the purchaser under a decree acquires no right until a confirmation of the sale by the court.

— Jurisdiction as between the chancery and law courts.

Cited in Terry v. Coles, 80 Va. 695, holding before confirmation of the report and while cause is pending in the equity court, that tribunal alone is the purchaser's resort for the adjustment of his claims.

Distinguished in Taylor v. Cooper, 10 Leigh, 317, 34 A. D. 737, holding a sale under a decree, confirmed and a conveyance executed to the purchaser, entitles such purchaser to maintain an action of assumpsit for rent due from the property after date of sale.

— Effect of confirmation of sale.

Distinguished in Childers v. Loudin, 51 W. Va. 559, 42 S. E. 637, holding after confirmation of sale and vesting of title in the purchaser without objection, the title is protected notwithstanding error in the decree of sale.

Sale of growing crops.

Cited in Kerr v. Hill, 27 W. Va. 576, holding a growing crop realty and can only be sold by a contract in writing.

Cited in notes in 23 L.R.A. 451, on sale or mortgage of future crops on sale of the land; 23 L.R.A. 467, on effect of sale or mortgage of future crops as against judgment.

19 AM. DEC. 755, DUNLOP v. KEITH, 1 Leigh, 430.

What constitutes a debt.

Cited in Hardenbrook v. Ligonier, 95 Ind. 70, holding penalty accruing from a breach of a municipal ordinance is not a debt within the meaning of the Constitution, which forbids imprisonment for debt.

Imprisonment for fines.

Cited in note in 34 L.R.A. 653, on constitutionality of imprisonment for fines imposed by city authority.

Liability for misconduct in office.

Cited in note in 43 A. D. 724, on liability of public officer for misconduct in office.

19 AM. DEC. 757, RAWLINGS v. COM. 1 Leigh, 581.

Provocation of assault as mitigation.

Cited in Davis v. Collins, 69 S. C. 460, 48 S. E. 469, holding evidence of a previous difficulty cannot be considered in mitigation of damages where the person had had time to cool.

Cited in reference notes in 27 A. D. 494; 86 A. D. 768,—on admissibility of evidence of provocation to mitigate damages in actions for assault and battery; 61 A. D. 414, on what may be given in evidence under plea of not guilty to mitigate damages in action for assault and battery.

Cited in note in 1 L.R.A. (N.S.) 140, on effect of provocation to mitigate damages for assault.

Distinguished in Davis v. Franke, 33 Gratt. 413, holding evidence of offensive acts long anterior to the assault are admissible to show provocation, where made part of the *res gestæ* through allusion to them.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 20 AM. DEC.

20 AM. DEC. 33, SAYRE v. LUCAS, 2 Stew. (Ala.) 259.

Effect of seal on note.

Cited in *Muse v. Dantzler*, 85 Ala. 359, 5 So. 178, holding that maker of new sealed note, waiving exemptions, for original can set up failure of consideration against payee's purchaser; *Reed v. Scott*, 30 Ala. 640, holding evidence of sealed instrument otherwise corresponding with note declared on inadmissible.

Cited in notes in 35 L.R.A. 608, on effect of seal on negotiability of note; 11 L.R.A. 833, on effect of seal attached to commercial paper.

Rights of transferee.

Cited in *Kirk v. Glover*, 5 Stew. & P. (Ala.) 340, holding bond payable to designated person or bearer, not transferable by his agent without his consent, so as to destroy his right.

Cited in reference notes in 43 A. D. 521, on rights of transferee of note payable to person named or bearer; 65 A. D. 682, on legal title not passing to transferee by mere delivery of note payable to bearer.

—Right to sue.

Cited in *Brown v. Chambers*, 12 Ala. 697, holding assignee's action in own name, on conditional bond, maintainable by showing performance by obligee.

Distinguished in *Craig v. Vicksburg*, 31 Miss. 216, holding that innocent, bona fide holder of bond, payable to bearer for value may maintain action thereon; *Neal v. Smith*, 5 Ala. 568, holding that indorsee of promissory note may sue guarantor upon guaranty made at same time by person not party to note.

20 AM. DEC. 40, SYKES v. SYKES, 2 STEW. (Ala.) 364.

Nuncupative will.

Cited in *Scales v. Thornton*, 118 Ga. 93, 44 S. E. 857, holding communicated intention essential to nuncupative will.

Cited in reference notes in 23 A. D. 261; 26 A. D. 121; 42 A. D. 544; 68 A. D.

512; 125 A. S. R. 907,—on nuncupative wills; 79 A. D. 578, on requisites of nuncupative wills; 20 A. S. R. 384, on essential qualities of nuncupative wills; 37 A. D. 81, on validity of nuncupative wills; 40 A. D. 651, on history of nuncupative wills; 81 A. D. 230, on sufficiency of witnesses to nuncupative will; 67 A. S. R. 224, on essentials of proof of nuncupative will.

Cited in note in 67 A. S. R. 572, on nuncupative wills.

—“*In extremis*” and “last sickness.”

Cited in *Scaife v. Emmons*, 84 Ga. 619, 20 A. S. R. 383, 10 S. E. 1097, holding that nuncupative will must be made while in *extremis*, and opportunity to execute invalidates will; *Donald v. Unger*, 75 Miss. 294, 22 So. 803, holding illness affording opportunity to make written will not “last sickness” authorizing nuncupative will.

Cited in note in 13 L.R.A. (N.S.) 1092, on what is “last sickness” permitting a nuncupative will.

Distinguished in *Johnston v. Glasscock*, 2 Ala. 218, holding last sickness, not necessarily in *extremis* but that will made in fear of death, during last sickness, not invalid.

20 AM. DEC. 49, POE v. BRANDON, 2 STEW. (Ala.) 401.

Validity of conveyance by insolvent.

Cited in *Abercrombie v. Bradford*, 16 Ala. 560, holding that creditor’s assent is presumed to deed of assignment, appropriating property absolutely and unconditionally to their debts.

—**By corporation.**

Cited in *Chamberlain v. Bromberg*, 83 Ala. 576, 3 So. 434, holding that insolvent corporation, acting through directors, may make assignment for benefit of creditors; *Pyles v. Riverside Furniture Co.* 30 W. Va. 123, 2 S. E. 909, holding that insolvent corporation may prefer creditors; *De Ruyter v. St. Peter’s Church*, 3 Barb. Ch. 119, holding that corporation may make an assignment in trust for creditors unless restrained by charter or statute; *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530, holding assignment by directors of insolvent bank to trustees for payment of bank’s debts, valid.

Cited in reference note in 37 A. S. R. 610, on corporate power to make assignment for creditors.

Cited in notes in 33 A. S. R. 338, on corporation’s power to make assignments; 22 L.R.A. 802, on preference among creditors by insolvent corporations.

—**By stockholder.**

Cited in *Governor v. Baker*, 14 Ala. 652, holding that bank stockholder may mortgage slaves to bank in payment of debt he owes bank; *Button v. Hoffman*, 61 Wis. 20, 50 A. R. 131, 20 N. W. 667, holding that owner of all capital stock of private corporation cannot as legal owner, replevin property, in own name.

Inadequacy of consideration.

Cited in *Wood v. Craft*, 85 Ala. 260, 4 So. 649, holding mere inadequacy of consideration not ground for setting aside conveyance not akin unless inadequacy so gross as to shock the conscience.

Cited in reference notes in 57 A. D. 217, on inadequacy of consideration as evidence of fraud; 44 A. D. 463, on inadequacy of consideration as ground for relief; 26 A. D. 109; 60 A. D. 84,—on inadequacy of consideration as ground for setting contract aside.

Who may be assignee for creditors.

Cited in *Covert v. Rogers*, 38 Mich. 363, 31 A. R. 319, holding that insolvent person who is or was stockholder may be assignee of insolvent corporation.

Grounds for removal of assignee.

Cited in *Boatman's Bank's Appeal*, 74 Mo. App. 60, holding assignee of bank not removable for former connection with bank and refusal to let creditor inspect books examinable under court's order.

Sufficiency of description of property conveyed.

Cited in *Clark v. Few*, 62 Ala. 243, holding that assignment is not invalid because of general description of property if capable of explanation by parol.

Contracts by officer or director with corporation.

Cited in *Bank of Alabama v. Collins*, 7 Ala. 95, holding director's contract with board of directors of private bank, for extra services while director, void.

Time when judgment takes effect.

Cited in *Alabama Coal & Nav. Co. v. State*, 54 Ala. 36, holding ten days, within which to appeal, computable from day on which judgment was rendered; *Lanier v. Russell*, 74 Ala. 364, holding that entry of judgment on verdict bears date of day proceedings were had in court; *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66, holding that judgment relates to time of actual entry if case was not ready for hearing or trial on first day of term; *Quinn v. Wiswall*, 7 Ala. 645, holding that judgment binds lands only from time of its rendition; *Mansony v. United States Bank*, 4 Ala. 735, holding judgment lien, suspended where judgment is enjoined, upon complainant executing bond with surety; *Dargan v. Waring*, 11 Ala. 988, 46 A. D. 234, holding that junior judgment creditor's equitable suit prevails over prior judgment creditor neglecting to continue execution.

Cited in reference notes in 56 A. S. R. 883, as to what time lien of judgment relates to; 57 A. S. R. 818, as to when judgments are deemed to have been entered; 23 A. D. 778; 32 A. D. 683; 69 A. S. R. 776,—on relation back of lien of judgment to first day of term; 47 A. D. 368, on relation back of judgment for purpose of creating lien.

Cited in note in 38 L.R.A. 246, on priority of judgment over conveyance made after beginning of term.

Distinguished in *Norfolk State Bank v. Murphy*, 40 Neb. 735, 38 L.R.A. 243, 59 N. W. 706, holding that judgment dates from first of term and is superior to mortgage recorded during term before judgment rendered.

20 AM. DEC. 56, MOORE v. CHAPMAN, 2 STEW. (ALA.) 466.**Failure of administrator to obey order for distribution as breach of bond.**

See *Mortenson v. Bergthold*, 64 Neb. 208, 89 N. W. 742; *Stewart v. Morrison*, 81 Tex. 396, 26 A. S. R. 821, 17 S. W. 15,—holding refusal of administrator to carry out a final order of distribution, a breach of trust authorizing suit on his bond by distributees.

20 AM. DEC. 58, HEFFLIN v. McMINN, 2 STEW. (ALA.) 492.**Amendment.**

Cited in *Cunningham v. Fontaine*, 25 Ala. 644, holding judgment properly before court, where it is amended *nunc pro tunc* while writ of error pending and amendment brought up on certiorari.

— Of return.

Cited in reference notes in 26 A. D. 689; 29 A. D. 499; 41 A. D. 363; 19 A. S. R. 901; 40 A. S. R. 720,—on officer's amendment of return of process; 1 A. S. R. 91, on amendment of sheriff's return after judgment; 31 A. D. 166, on amendment of return to summons or other writ.

— Of record.

Cited in *Moore v. Horn*, 5 Ala. 234, holding record as to service of writ amendable *nunc pro tunc*, at subsequent term, after writ of error; *Cullum v. Batre*, 2 Ala. 415, holding record, as to publication made, amendable, *nunc pro tunc*, after writ of error sued out.

20 AM. DEC. 60, CHAUDRON v. HUNT, 3 STEW. (ALA.) 31.

Right of action on lost note.

Cited in *Branch Bank v. Tillman*, 12 Ala. 214, holding lost negotiable note, not negotiated at time of loss, actionable; *Adams v. Baker*, 16 R. I. 1, 27 A. S. R. 721, 11 Atl. 168, on recovery on note lost after indorsement and overdue when lost.

Cited in reference notes in 25 A. D. 513, on action on lost note; 41 A. D. 298, on actions on lost or destroyed notes; 29 A. D. 215, on right of action on lost note; 90 A. D. 516, on right to maintain action at law on lost note; 36 A. D. 354, as to when action may be maintained on lost or destroyed note.

Cited in notes in 27 A. D. 128, on actions on lost and destroyed notes; 4 E. R. C. 653, on right to maintain action on lost negotiable instrument; 13 A. D. 482, on right of action at law on destroyed bills and notes; 16 L.R.A. 207, on action upon bills or notes lost after due or otherwise subject to equities; 16 L.R.A. 206, on presumption as to lost notes being negotiable and effect upon right of action thereon.

Declaration in action on lost note.

Cited in *Bell v. Moore*, 9 Ala. 823, holding affidavit that statement of loss is true, necessary in declaration on lost note and declaration demurrable without affidavit.

Cited in note in 94 A. S. R. 478, on necessary allegations in actions on lost instruments.

Proof of lost instrument.

Cited in reference note in 64 A. D. 687, on proof of lost note or instrument.

20 AM. DEC. 64, MARTIN v. SEARCY, 3 STEW. (ALA.) 50.

Liability for rent after conveyance of premises.

Cited in *Tubb v. Fort*, 58 Ala. 277, holding that purchaser under decree of lessor's lands became entitled to rent payable at expiration of year.

Cited in reference note in 56 A. D. 584, on conveyance of fee to lessee as extinguishing rent.

20 AM. DEC. 66, STATE v. SEAY, 3 STEW. (ALA.) 123.

Crime committed in sister state.

Cited in *Murray v. State*, 18 Ala. 727, holding that bringing of stolen slave into Alabama not taking in Louisiana so as to constitute punishable crime; *State v. Adams*, 14 Ala. 486, holding proof that possessor stole slaves in Florida and brought them into Alabama necessary to conviction; *Barclay v. United States*,

11 Okla. 503, 69 Pac. 798, holding larceny of property in Indian Territory and bringing it into Oklahoma larceny in latter; *State v. Mathews*, 87 Tenn. 689, 11 S. W. 793, holding that theft of goods in Mississippi and carrying them by thief into Tennessee is larceny in latter state; *Com. v. Macloon*, 101 Mass. 1, 100 A. D. 89, holding foreign citizen liable for manslaughter in Massachusetts, where person, injured by accused on high seas, died there; *Norris v. State*, 33 Miss. 373, (dissenting opinion), on admissibility of evidence, showing that slave was stolen in Arkansas and found in Massachusetts, under indictment for larceny in Arkansas.

Cited in reference notes in 40 A. S. R. 802, on bringing stolen property within state as larceny; 41 A. D. 457, on right to indict for larceny in state to which thief carries property stolen in another state; 89 A. D. 210, on property stolen in one state and carried to another constituting larceny in latter state; 51 A. D. 174, on effect of bringing stolen property from one state into another.

Cited in note in 15 L.R.A. 722, on what law defines larceny under statute against bringing stolen property into state.

How long larceny continues.

Cited in reference note in 38 A. D. 250, on continuance of larceny during thief's retention of possession.

What indictment must allege.

Cited in *State v. Spink*, 19 R. I. 353, 36 Atl. 91, holding complaint charging owner of animals with cruelty without alleging animals were in his custody, insufficient; *Knight v. State*, 54 Ohio St. 365, 43 N. E. 995, holding failure, in indictment to allege that offense was committed in county where indictment found, fatal.

— Where offense was committed in another state.

Cited in *State v. Brown*, 8 Nev. 208, holding that indictment for larceny committed in another state must allege offense committed where indictment found; *Smith v. State*, 21 Neb. 552, 32 N. W. 594, holding complaint failing to allege charge pending against accused in state where offense was committed, insufficient; *La. Vaul v. State*, 40 Ala. 44, holding that indictment for bringing into Alabama property stolen elsewhere must conform to statute creating offense.

20 AM. DEC. 74, BARRINGER v. SNEED, 3 STEW. (ALA.) 201.

Proof of attested instrument.

Cited in reference notes in 29 A. D. 249, on necessity of producing subscribing witness to instrument to prove its execution; 33 A. D. 723, on dispensing with evidence of subscribing witness who is not within state.

Cited in note in 35 L.R.A. 339, on necessity of calling subscribing witnesses to prove attested instruments where such instrument cannot be procured.

Parol evidence to vary written instrument.

Cited in *Niles v. Culver*, 8 Barb. 205, holding that memorandum acknowledging receipt of appeals to be forwarded is contract which cannot be varied by parol; *Davis v. Lassiter*, 20 Ala. 561, holding parol evidence inadmissible to establish mortgagee's possession before day under mortgage without accounting for rents and profits; *Litchfield v. Falconer*, 2 Ala. 280, holding evidence of separate verbal agreement for payment of note on date other than expressed, inadmissible; *Clark v. Hart*, 49 Ala. 86, holding parol evidence of verbal agreement that note payable in money should be otherwise paid, inadmissible.

Cited in reference notes in 42 A. D. 395, on parol evidence to contradict, vary,

or materially affect written instruments; 53 A. D. 726, on parol evidence to show different intention from that expressed in deed.

Cited in note in 6 L.R.A. 33, on admissibility of parol evidence of written instrument.

Distinguished in *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88, holding parol evidence that offer was to remain open for specified time or understanding as to reasonable time, inadmissible.

Surviving partner's power to bind firm.

Cited in *Lang v. Waring*, 17 Ala. 145, holding that surviving partner cannot make note in partnership name in substitution of pre-existing firm debt.

Cited in reference notes in 26 A. D. 433; 36 A. D. 311,—on power of partner after dissolution of firm; 25 A. D. 363, on admissions by partner after dissolution; 22 A. D. 386, on effect of partner's admissions after dissolution.

Cited in notes in 18 L. ed. U. S. 737, on effect of admissions of partner, after dissolution of firm, on copartners; 40 A. S. R. 567, on rights, liabilities, and remedies resulting from admission of new partner after dissolution.

20 AM. DEC. 80, TOMBECKBEE BANK v. GODBOLD, 3 STEW. (ALA.) 240.

Sufficiency of entry — Of judgment.

Cited in *Hinson v. Wall*, 20 Ala. 298, holding that clerk's memorandum does not constitute judgment on which action for debt can be maintained; *Tombeckbee Bank v. Strong*, 1 Stew. & P. (Ala.) 187, 21 A. D. 657, holding that execution cannot issue from short entry of judgment made referring to another judgment complete; *Bell v. Otts*, 101 Ala. 186, 46 A. S. R. 117, 13 So. 43, holding judgment entry "and judgment is rendered against defendants, for land sued for, together with all costs, for which execution may issue" insufficient to support appeal; *Carlton v. King*, 1 Stew. & P. (Ala.) 472, 23 A. D. 295, holding production, by judgment creditor, of executions without judgments, sufficient in trial of property right.

Cited in note in 28 L.R.A. 634, on what entry or record is necessary to complete judgment or order for purpose of enforcement by action.

— Of claim.

Cited in *Speed v. Cocke*, 57 Ala. 209, holding brief abstract of record of allowance insufficient, as evidence, to establish claim against county.

Liability of sheriff.

Cited in *Pugh v. M'Rae*, 2 Ala. 393, holding damages against sheriff for escape measurable by injury sustained through breach of duty.

Distinguished in *Bondurant v. Woods*, 1 Ala. 543, holding that sheriff on failure to return execution cannot show that execution was issued on irregular judgment.

20 AM. DEC. 82, ADAMS v. GRAY, 8 CONN. 11.

Parol evidence as to collateral agreement.

Cited in *McFarland v. Sikes*, 54 Conn. 250, 1 A. S. R. 111, 7 Atl. 408, holding parol evidence of agreement that note should be returned on certain date if demanded, admissible.

Cited in reference notes in 42 A. D. 395, on parol evidence to contradict, vary, or materially affect written instruments; 51 A. D. 546, on admissibility of evidence of prior or contemporaneous parol agreement to control written contract.

Cited in note in 20 A. D. 715, on parol evidence as to written contract.

20 AM. DEC. 84, HUNTINGTON v. WINCHELL, 8 CONN. 45.

Excessiveness within maxim de minimis non curat lex—In levy.

Cited in *Spencer v. Champion*, 9 Conn. 536, holding that excess of land amounting to 14 cents taken on execution does not invalidate levy; *Dwinel v. Soper*, 32 Me. 119, 52 A. D. 643, holding that excess of 1 cent and 3 mills of land taken will not invalidate levy; *Avery v. Bowman*, 40 N. H. 453, 77 A. D. 728, holding that excess in levy through creditor's mistake will not invalidate levy but equity will remedy error.

Cited in reference notes in 33 A. D. 746, on invalidity of levy for greater sum than amount of debt; 28 A. D. 244, on fraud in sale of more land than is necessary to satisfy execution.

Distinguished in *Glidden v. Chase*, 35 Me. 90, 56 A. D. 699, holding levy of land on execution, 14 cents in excess, invalid.

— **In assessment.**

Cited in *Burt v. Hasselman*, 139 Ind. 196, 38 N. E. 598, holding notice of issuance of improvement precepts not invalidated by error of 10 cents in assessment amount.

Validity of trusts with discretionary power.

Cited in *Whelan v. Reilly*, 3 W. Va. 597, holding devise conferring discretionary power on trustees valid.

20 AM. DEC. 86, BULL v. BULL, 8 CONN. 47.

Nature of estate created by will.

Cited in *Bristol v. Austin*, 40 Conn. 438, holding that bequest to wife for life for children's support, with discretionary power, creates beneficial life estate; *Gilbert v. Chapin*, 19 Conn. 342, holding devise to wife recommending gift of same to children on discretion, an absolute not trust estate; *Anderson v. Crist*, 113 Ind. 65, 15 N. E. 9, holding that devise to wife until child reaches twenty-one and then to her and children creates trust; *White v. Howard*, 38 Conn. 342, holding devise to trustees for daughter during life vests in trustees, not heirs, and is not defeated by daughter's death.

Cited in reference notes in 62 A. D. 315, as to when vested estate in remainder is created; 49 A. D. 716, on estate taken by devisees in trust after termination of life estate.

— **Precatory trusts.**

Cited in *People v. Powers*, 8 Misc. 628, 29 N. Y. Supp. 950, 83 Hun. 449, holding words, in devise, "this gift made on trust and confidence reposed in D" sufficient to create trust.

Cited in notes in 44 A. D. 373, on precatory trusts; 106 A. S. R. 527, on precatory terms in will creating trust in favor of brothers and sisters; 106 A. S. R. 530, on precatory terms in will creating trust in favor of poor or needy relatives.

— **Charitable gifts and trusts.**

Cited in notes in 6 L.R.A. 511, on charitable gifts; 14 L.R.A.(N.S.) 54, on distinction between charities and ordinary trusts.

Uncertainty affecting validity of devise or bequest.

Cited in *Treat's Appeal*, 30 Conn. 113, holding trust bequest, with discretionary power, for education of United States Indian children not void for uncertainty; *Coit v. Comstock*, 51 Conn. 352, 50 A. R. 29, holding same as to bequest for founding home for, aged, respectable, indigent women of New London; *Power v. Cassidy*, 79 N. Y. 602, 35 A. R. 550, holding same as to bequest to Catholic

charities, institutions, schools in New York, on executor's decision; *White v. Howard*, 38 Conn. 342, on uncertainty of trust by devise to dissolved association "for diffusion of Gospel truth;" *Burr v. Smith*, 7 Vt. 241, 29 A. D. 154, holding gift to temporary treasure of American Bible Society, etc., valid; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, holding bequest to "worthy poor of La Salle" distributed as court may direct, valid and exercisable by court.

Cited in reference note in 52 A. D. 46, as to when devise is not void for uncertainty of devisees.

Cited in notes in 14 L.R.A. (N.S.) 121, on necessary certainty in bequest as to beneficiaries as applied to relief of poor; 5 L.R.A. 41, on carrying out charitable trusts where beneficiary ascertainable.

Distinguished in *Fontaine v. Thompson*, 80 Va. 229, 56 A. R. 588, holding bequest in trust for next of kin "most needy" valid as to kin, but invalid as to "needy;" *White v. Fisk*, 22 Conn. 31, holding bequest without discretionary power, to "indigent pious young men preparing for ministry" void for uncertainty.

Power to appoint trustee.

Cited in reference note in 25 A. S. R. 173, on court's power to appoint trustees.

Duty of trustee.

Cited in *Re Tompkins*, 28 Misc. 351, 59 N. Y. Supp. 902, on trustee's duty to act in accordance with will of creator of trust.

20 AM. DEC. 90, STATE v. DE WOLF, 8 CONN. 93.

Deaf and dumb person as witness.

Cited in reference note in 123 A. S. R. 258, on incompetency of deaf and dumb person as witness.

Cited in note in 24 L.R.A. 126, 127, on deaf and dumb persons as witnesses.

Evidence given through interpreter.

Cited in note in 17 L.R.A. 813, on admissibility of evidence given through an interpreter.

Corroboration of witness.

Cited in reference notes in 36 A. D. 347, on corroboration of witness by statements out of court; 49 A. D. 712, on admissibility of prior statements of witness to corroborate his testimony.

Cited in notes in 80 A. D. 371, on corroborating and rebutting evidence in rape; 82 A. S. R. 64, on rebuttal evidence to sustain credibility of witness; 12 L.R.A. (N.S.) 364, as to whether fact that a witness's testimony is contradicted by opposing testimony warrants the introduction of evidence of his reputation for truth and veracity.

Opinion evidence.

Cited in *Stewart v. Conner*, 13 Ala. 94, holding proof, in assumpsit, of one's incapacity to understand long accounts, in opinion of others, inadmissible.

Parol evidence of written instrument.

Cited in reference note in 44 A. D. 83, on parol evidence of contents of written instruments.

Admissibility of acts and declarations.

Cited in *Com. v. Mosier*, 13 Pa. Dist. R. 421, holding admissible, consonant statement, when operation was performed in abortion before motive to tell otherwise existed; *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223, holding mortgagee's testimony, in conversion, that mortgagor denied owning horse, claiming that it

was improperly included in mortgage, admissible; *State v. Cruise*, 19 Iowa, 312, holding admissible, prisoner's declarations before crime, showing occurrence on prior day where occurrence on day alleged establishes guilt.

— Of injured party in prosecution for rape.

Cited in *Barnett v. State*, 83 Ala. 40, 3 So. 512, holding proof of particulars and corroboration of complaint by others admissible where prosecutrix's testimony is being impeached in rape; *State v. Knapp*, 45 N. H. 148, holding statement, if complaints made ten days after rape because fearing to shock sickly parents, competent; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247, holding mother's testimony as to prosecutrix's complaints immediately after rape admissible; *State v. Shettleworth*, 18 Minn. 208, Gil. 191, holding evidence that prosecutrix was downhearted and gloomy after rape admissible to explain delay of disclosure; *State v. Byrne*, 47 Conn. 465; *State v. Kinney*, 44 Conn. 153, 26 A. R. 436,—holding complainant's testimony confirmable by evidence of same statement made out of court, upon indictment for rape; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666, holding declarations of prosecutrix several days after alleged rape, without justifiable explanation of delay, inadmissible; *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440, on admissibility of statements by complainant witness nine years of age in rape; *State v. Imlay*, 22 Utah, 156, 61 Pac. 557, holding prosecutrix's complaint soon after assault with intent to rape, competent in corroboration of her testimony; *State v. Reid*, 39 Minn. 277, 39 N. W. 796, holding complaint, by prosecutrix, for rape, soon after injury, competent in corroboration of her testimony; *Dobbins v. Little Rock R. & Electric Co.* 79 Ark. 85, 95 S. W. 794, 9 A. & E. Ann. Cas. 84, holding admissible deaf-mute's testimony by signs instead of writing where latter not shown best method; *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826; *People v. O'Sullivan*, 104 N. Y. 481, 58 A. R. 530, 10 N. E. 880, 5 N. Y. Crim. Rep. 235,—holding testimony of disclosure of rape over ten months after offense, inadmissible without justifiable explanation of delay; *State v. Wheeler*, 116 Iowa, 212, 93 A. S. R. 236, 89 N. W. 978, holding evidence of complaint by prosecutrix unless part of *res gestæ* of no weight on trial for rape.

Cited in reference note in 1 A. S. R. 389, on inadmissibility in chief of details of complaint by prosecutrix on trial for rape.

Cited in notes in 51 A. D. 447; 80 A. D. 371, 372,—on admissibility of statements of prosecutrix in rape.

Distinguished in *People v. Clemons*, 37 Hun, 580, 3 N. Y. Crim. Rep. 565, holding it error to include name of accused in testimony of prosecutrix's complaint made morning after rape.

Evidence of general character.

Cited in reference notes in 45 A. D. 230, on impeachment of witness by evidence of general bad character; 52 A. D. 350, on evidence of good character of witness for truth before impeachment.

Cited in note in 73 A. D. 771, on impeachment of witness on ground of character or reputation.

Distinguished in *Rogers v. Moore*, 10 Conn. 13, holding proof of general good character inadmissible where no attempt is made to impeach general character for truth.

— Of prosecutrix for rape.

Cited in *Coleman v. Com.* 84 Va. 1, 3 S. E. 878, holding evidence of prosecutrix's general character admissible where daughter living with her is proved mother of illegitimate child; *People v. Abbot*, 19 Wend. 192, holding that general character

of prosecutrix as common prostitute may be shown in rape; *People v. Hulse*, 3 Hill, 309, holding evidence of good character inadmissible where general character has not been attacked under indictment for rape.

Cited in reference note in 42 A. S. R. 111, on impeachment of prosecutrix's character in rape.

Cited in note in 80 A. D. 369, on impeachment of prosecutrix in rape by proof of bad character.

20 AM. DEC. 95, HUMPHREY v. CASE, 8 CONN. 101.

Defective process as protection.

Cited in *Bach v. Cook*, 21 Ark. 571, holding action on case injured party's remedy for voidable attachment against person as executor *de son tort*; *Stone v. Stevens*, 12 Conn. 219, 30 A. D. 611, holding action on case for malicious prosecution maintainable where proceedings, malicious, without probable cause, produce legal damage.

Cited in reference notes in 61 A. D. 409, as to when process is justification for acts done under it; 43 A. D. 765, on justification for acts of officer under void process.

Cited in note in 2 L.R.A.(N.S.) 1104, on effect of void process and failure to charge crime.

Validity of process.

Cited in *Greene v. New London County Agri. Soc.* 32 Conn. 95, holding certified writ by justice of the peace deputing indifferent person to serve, not void for want of stamp.

20 AM. DEC. 97, READING v. WESTON, 8 CONN. 117.

Equitable relief against mistake, etc.

Cited in notes in 5 L.R.A. 153, on accident, mistake, or fraud as ground for equitable relief; 12 L.R.A. 274, on equity jurisdiction to reform sealed instruments for fraud or mistake.

Parol evidence as to written contract.

Cited in reference note in 45 A. D. 242, on parol evidence to vary writing or annex conditions thereto.

Cited in notes in 5 L.R.A. 159, on showing mistake by parol evidence in equity; 11 E. R. C. 227, on parol evidence to show mistake in written contract.

— As to deed.

Cited in *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. 852, holding that cotenants' grantee may show by parol that purchaser of entire under tenant in common knew of cotenants' title; *Taylor v. Baldwin*, 10 Barb. 582, holding that persons not parties to deed may prove by parol character of transaction to prevent fraudulent operation; *Patterson v. Doe*, 8 Blackf. 237, holding parol evidence inadmissible to show land intended in irrelevant title bond was same as in ejectment suit; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796, holding grantors, in quitclaim deeds, may show by parol, deed was mortgage and understood so by grantees; *Purcell v. Burns*, 39 Conn. 429, holding that quitclaim deed was not intended absolute release, provable by parol, in action for specific performance; *Benton v. Jones*, 8 Conn. 186, holding parol evidence inadmissible in law court to show deed of land was intended as mortgage; *Brainerd v. Brainerd*, 15 Conn. 575, holding parol evidence inadmissible to prove that mortgage was fraudulently converted into deed and loan into sale.

Cited in reference notes in 22 A. D. 216; 34 A. D. 213; 29 A. S. R. 369,—on oral evidence to show that absolute deed was intended as a mortgage.

— As to note.

Cited in *Johnson v. Blackman*, 11 Conn. 342, holding testimony of assignor of non-negotiable note admissible to prove payment to him in action on the note. *Litchfield v. Falconer*, 2 Ala. 280, holding parol evidence of verbal agreement that note payable on day certain should be otherwise paid, inadmissible.

20 AM. DEC. 100, *COMSTOCK v. HADLYME ECCLESIASTICAL SOC.*
8 CONN. 254.

Burden of proof as to testator's sanity.

Cited in *Ramsdell v. Viele*, 6 Dem. 244, holding that proponent of will must prove testator's mental capacity; *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6, holding that burden of proof as to testator's sanity rests upon proponent of will; *Knox's Appeal*, 26 Conn. 120, holding that party proving will must show that testator was of sound mind; *McMechen v. McMechen*, 17 W. Va. 683, 41 A. R. 682, holding that proponents of will must prove testator's sanity but not absence of fraud or undue influence; *Williams v. Robinson*, 42 Vt. 658, 1 A. R. 359, holding that proponent of will must prove execution and capacity of testator; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470, holding that proponent must prove capacity and execution although appellants' reason of appeal from probate is undue influence; *Barber's Appeal*, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973, holding that burden of proving testator's capacity rests on proponents of will; *Evans v. Arnold*, 52 Ga. 169, holding it error to charge that after proponents proved *factum* of will burden as to sanity or insanity rests on contestants; *Crowninshield v. Crowninshield*, 2 Gray, 524, holding that proponents must prove testator's sanity and burden does not shift on subscribing witnesses' evidence of sanity; *Puryear v. Reese*, 6 Coldw. 21, holding that party propounding will has right to open and close case.

Cited in reference notes in 2 A. S. R. 532, on burden of proof of execution of will and capacity of testator; 39 A. D. 592, on necessity for proof of testamentary capacity by parties claiming under will.

Cited in notes in 17 L.R.A. 494, on burden of proof of testamentary capacity; 36 L.R.A. 739, on burden of proof after probate of will as to testator's sanity.

Order of procedure on trial.

Cited in *Gillson v. Price*, 18 Nev. 109, 1 Pac. 459, holding that plaintiffs may anticipate defense by evidence that cause was not identical with that of prior action; *Union Trust Co. v. Stamford Trust Co.* 72 Conn. 86, 43 Atl. 555, holding order of interpleader proper, where property in one's possession is claimed by two or more persons; *Scott v. Hull*, 8 Conn. 296, holding court's error in exercising right of going forward on trial no ground for new trial; *Weed's Appeal*, 35 Conn. 452, holding question of going forward in trial discretionary with court and not subject to error.

Cited in reference note in 48 A. D. 609, on discretion of court as to order of procedure on trial.

— Right to open and close.

Cited in *Omaha & R. Valley R. Co. v. Walker*, 17 Neb. 432, 23 N. E. 348, holding that landowner has right to open and close in appeal from award of damages; *Elder v. Oliver*, 30 Mo. App. 575, holding that right to open and close is with plaintiff in action for slander; *Probate Judge v. Stone*, 44 N. H. 593, holding that party having primary burden of proof has right to open and close although

burden may change; *Thurston v. Kennett*, 22 N. H. 151, holding plaintiff has right to open and close in replevin where taking is admitted but ownership disputed; *Belknap v. Wendell*, 21 N. H. 175, holding that right to open and close rests with plaintiffs asserting affirmative proposition in replevin.

Distinguished in *Huntington v. Conkey*, 33 Barb. 218, holding denial of right to defendant to open and reply error for new trial will be granted; *Probate Judge v. Stone*, 44 N. H. 593, holding that error in court's exercising right to open and close is ground for new trial.

Competency of witnesses.

Cited in reference notes in 30 A. S. R. 882, on competency of witnesses; 44 A. D. 117, on competency as witness, of assignor of chose in action or nominal party.

Parties of record as witnesses.

Cited in *Johnson v. Blackman*, 11 Conn. 342, holding plaintiff on record competent witness for maker in assignee's action on note in payee's name, against maker.

Cited in reference note in 53 A. D. 659, as to when party to record may be a witness.

Witness without beneficial interest.

Cited in *Weston v. Elliott*, 72 N. H. 433, 57 Atl. 336, holding defendant co-surety's testimony of indemnity contract in action for contribution against co-sureties admissible when not party to contract and liability unaffected; *Middletown Sav. Bank v. Bates*, 11 Conn. 519, holding trustee, without interest, neither stockholder nor depositor competent witness for bank in ejectment; *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640, holding trustee under deed not party in interest so as to be incapable of testifying to matters within deceased grantor's knowledge.

— Executors.

Cited in *Stewart v. Harriman*, 56 N. H. 25, 22 A. R. 408, holding executrix who is also testator's wife, competent attesting witness to will if taking no beneficial interest; *Richardson v. Richardson*, 35 Vt. 238, holding executor of will, taking no benefit under it, competent witness to its execution; *Rucker v. Lambdin*, 12 Smedes & M. 230, holding executors, being direct legatees, competent witnesses to prove will, legacy being void.

Liability for costs.

Cited in *Leavenworth v. Marshall*, 19 Conn. 408, holding expense of appeal from probate decree defrayable by parties in interest; *Canfield v. Bostwick*, 22 Conn. 270, holding superior court's refusal to tax costs, in favor of either party to probate appeal, not erroneous.

Admissibility of acts and declarations.

Cited in *Rockwell v. Taylor*, 41 Conn. 55, holding testimony of narratives of past occurrences inadmissible as part of *res gestæ* in assumpsit.

Cited in note in 95 A. D. 59, on necessity that acts and declarations be contemporaneous with principal transaction to be admissible as part of *res gestæ*.

— Of testator generally.

Cited in *Couch v. Eastham*, 27 W. Va. 796, 55 A. R. 346, holding testator's declarations before and after execution of will inadmissible to prove mistake; *Kennedy v. Upshaw*, 64 Tex. 411, holding testator's declarations three days after

execution inadmissible to invalidate codicil; *Throckmorton v. Holt*, 180 U. S. 552, 45 L. ed. 603, 21 Sup. Ct. Rep. 474, holding testator's oral or written declarations, not part of *res gestæ*, inadmissible to prove will forgery; *Boylan v. Meeker*, 28 N. J. L. 274, holding testator's declarations after execution of will inadmissible to prove forgery or revocation; *Fairfield v. Lawson*, 50 Conn. 501, 47 A. R. 669; *Dunham v. Averill*, 45 Conn. 61, 29 A. R. 642,—holding testator's declarations to scrivener, when making will, inadmissible to show intention other than expressed; *Warner v. Brinton*, Fed. Cas. No. 17,179, holding testator's instructions to solicitor inadmissible to show intent as to omission in unambiguous will; *Collagan v. Burns*, 57 Me. 449 (dissenting opinion), on admissibility of testator's declarations as to will and affection for wife to negative intentional cancellation.

Cited in reference notes in 26 A. D. 61; 70 A. S. R. 641,—on declarations of testator as evidence.

Cited in notes in 3 A. D. 395, on declarations of testator; 107 A. S. R. 460, on admissibility of testator's declarations where part of the *res gestæ*; 62 A. D. 81, as to when declarations of testator are admissible to impeach or invalidate will; 52 A. D. 168, on declarations of testator to impeach or invalidate his will; 3 A. D. 397, on declarations of testator where fraud, mistakes, or imposition alleged.

—To show undue influence.

Cited in *Giles v. Hodge*, 74 Wis. 360, 43 N. W. 163; *Dinges v. Branson*, 14 W. Va. 100; *Robinson v. Hutchinson*, 26 Vt. 38, 60 A. D. 298,—holding testator's declarations about time of will's execution admissible as to mental state and liability to undue influence; *La Bau v. Vanderbilt*, 3 Redf. 384, holding declarations of testator after execution of will inadmissible to show undue influence; *Gibson v. Gibson*, 24 Mo. 227, holding testator's declarations to prove undue influence in making will, inadmissible; *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797, holding testator's declarations that undue influence had been used, to show undue influence, inadmissible; *Herster v. Herster*, 122 Pa. 239, 9 A. S. R. 95, 16 Atl. 342, 23 W. N. C. 117, 46 Phila. Leg. Int. 291, holding testator's declarations after execution of will inadmissible to show undue influence.

—To show mental capacity.

Cited in *Nichol v. Thomas*, 53 Ind. 42, holding grantor's declarations previous or subsequent to deed admissible as to mental capacity; *Shailer v. Bumstead*, 99 Mass. 112; *Reynolds v. Adams*, 90 Ill. 134, 32 A. R. 15,—holding parol evidence inadmissible to show undue influence but admissible as to testator's mental capacity; *Barber's Appeal*, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973, holding diaries kept by testator admissible to prove mental capacity but not as to truth of entries; *Waterman v. Whitney*, 11 N. Y. 157, 62 A. D. 71, holding testator's declarations after execution inadmissible to invalidate will but admissible as to mental capacity.

Cited in note in 107 A. S. R. 463, on admissibility of testator's declarations on question of condition of mind or testamentary capacity.

Opinion evidence as to testamentary capacity.

Cited in *Dunham's Appeal*, 27 Conn. 192, holding opinion of nonexpert witness as to whether testatrix were insane, if facts true, inadmissible.

Mistakes affecting validity of will.

Cited with special approval in *Martin v. Ballou*, 13 Barb. 119, holding will, with clauses respecting payment to heirs by devisees, of unspecified sums, not void.

Cited in *Wallize v. Wallize*, 55 Pa. 242, holding it error, to give instructions that if names were omitted from will through scrivener's mistake, will was void; *Barker v. Comins*, 110 Mass. 477, holding mistake as to will's legal effect not caused by incapacity, will not invalidate will.

Attestation of will.

Cited in *Re High*, 2 Dougl. (Mich.) 515, holding will of personal property, executed abroad, where testator died, but whose domicil is here, valid though unattested by three witnesses.

Testamentary capacity.

Cited in *Cornwell v. Ricker*, 2 Dem. 354, holding that old age does not of itself render one incompetent to make will; *Kirkwood v. Gordon*, 7 Rich. L. 474, 62 A. D. 418; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555,—overruling exception to charge that less mental capacity is required to make valid will than valid contract; *Dunham's Appeal*, 27 Conn. 192, holding that testator, with insane delusions, may make valid will, if he understands character and effect of dispositions; *Kimberly's Appeal*, 68 Conn. 428, 57 A. S. R. 101, 37 L.R.A. 261, 36 Atl. 847, holding proper, charge to jury that insane delusion was unfounded false belief, incredible to same person if of sound mind.

Cited in reference notes in 52 A. D. 60, on testamentary capacity; 33 A. S. R. 269, on requisites of wills.

What constitutes undue influence.

Cited in *Ingram's Estate*, Cof. Prob. Dec. 222, holding that influence to invalidate will must deprive party affected thereby of free agency.

Extrinsic evidence as to wills.

Cited in reference notes in 31 A. S. R. 39, on parol evidence as to wills; 78 A. D. 505; 50 A. S. R. 280,—on extrinsic evidence to explain wills; 49 A. D. 441, on admissibility of evidence to correct or explain will; 47 A. D. 431, on parol evidence to explain, vary, or control will; 57 A. D. 709, on parol evidence of mistake in will.

Cited in note in 16 A. D. 58, on extrinsic evidence to explain will.

—To show intent.

Cited in *Hanner v. Moulton*, 23 Fed. 5, holding parol evidence inadmissible to show intent where lands as devised do not exist.

Cited in reference note in 45 A. D. 719, on admissibility of extrinsic evidence as to intention of testator.

Necessity for reasons of appeal.

Cited in *St. Leger's Appeal*, 34 Conn. 434, 91 A. D. 735, holding reasons of appeal unnecessary to make issues to be tried on appeal from probate; *Re Metcalf*, 16 Misc. 180, 38 N. Y. Supp. 1131, 1 Gibbons Sur. Rep. 571, holding declarations of testator before or after execution with undoubted testamentary capacity inadmissible to show fraud or undue influence.

20 AM. DEC. 110, COIT v. TRACY, 8 CONN. 268, Reaffirmed on later appeal in 9 Conn. 1.

Conclusiveness of judgment.

Cited in *Hardy v. Mills*, 35 Wis. 141, holding immaterial issue in former action not regarded as *res judicata* in partition action; *Bank of Mobile v. Mobile & O. R. Co.* 69 Ala. 305, holding judgment recovered, by compromise less than face of bonds, conclusive and bar to action for balance; *Fulton v. Hanlow*, 20 Cal. 450,

holding decision adjudging complaint against sheriff's deed inequitable not conclusive as to title in subsequent ejectment action between parties; *Greenup v. Crooks*, 50 Ind. 410, holding judgment enforcing mechanics' lien subject to mortgage conclusive in foreclosure as to priority of mortgage; *Wales v. Lyon*, 2 Mich. 276, holding that "W" having unsuccessfully opposed "L's" bankruptcy discharge, cannot show fraudulent discharge to recover debt from L who pleads discharge; *Burhans v. Van Zandt*, 7 N. Y. 523, holding that parties' representatives cannot litigate in new suit validity of conveyance determined in former suit; *Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 250, holding that ownership and right to interlock determined in former suit bars subsequent suit as to title; *People ex rel. Reilly v. Johnson*, 38 N. Y. 63, 97 A. D. 770 (affirming 37 Barb. 502, 14 Abb. Pr. 416), holding that record, in former suit, of fact not judicially established inadmissible as evidence in subsequent suit; *Kennedy v. Scovil*, 14 Conn. 61, holding former decree not evidence of matter collateral, in subsequent water accounting action between same parties; *Sanford v. Thorp*, 45 Conn. 241, holding that facts without foundation for proof in pleadings, ought not to be considered in rendering judgment; *Dickinson v. Hayes*, 31 Conn. 417, holding decree approving personal and real estate will of minor, capable of willing only personalty, conclusive only as to personalty; *Hotchkiss v. Beach*, 10 Conn. 232, holding probate decree excluding creditors allowed in report of commissioners confirmed, erroneous; *Fairman v. Bacon*, 8 Conn. 418, holding foreclosure decree, where mortgagor claims part payment by paying mortgagee's notes without authority, no bar to action for payments; *New York Mut. L. Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756, holding deficiency judgment in foreclosure of mortgage for same debt, good plea in action on bond.

Cited in reference notes in 22 A. D. 183, on conclusiveness of judgment; 41 A. D. 682, on conclusiveness of former judgment as to matters directly in issue only.

Cited in notes in 23 A. D. 477, on conclusiveness of judgments between the parties; 7 L.R.A. 580, on matters as to which judgment is conclusive.

Questions for court or jury.

Cited in *Stone v. Stevens*, 12 Conn. 219, 30 A. D. 611, holding instruction properly refused, which if granted would leave to determination of jury fact determinable by court.

Admissions of one party to bind other.

Cited in *Fairfield County Turnp. Co. v. Thorp*, 13 Conn. 173, holding admissions of stockholder and director in incorporated turnpike company inadmissible against the corporation; *Smith v. Vincent*, 15 Conn. 1, 38 A. D. 52, holding admissions of defendant in ejectment, without interest, in codefendant's absence, evidence against self, not against others; *Munson v. Wickwire*, 21 Conn. 513, holding admissions of partner since deceased, in other's absence, of receiving money claimed in former suit, admissible in debtor's vexatious suit; *McCutchin v. Bankston*, 2 Ga. 244, holding firm member's admissions, not party, when court is satisfied partnership exists, admissible against other members; *Hoyt v. Sturges*, 28 Conn. 538, holding charge leading jury to regard witness impeached on testimony of single witness, regardless of other circumstances, error.

Cited in reference notes in 22 A. D. 386; 26 A. D. 433,—on power of partner after dissolution; 25 A. D. 363, on admissions by partner after dissolution.

—Revival of barred debt.

Cited in *Bissell v. Adams*, 35 Conn. 299, holding that partner's payments, after

dissolution, on joint and joint and several notes, bars statute against both makers; *Austin v. Bostwick*, 9 Conn. 496, 25 A. D. 42, holding insolvent partner's acknowledgment after dissolution of debt against partnership, bars statute of limitations against both; *Clark v. Sigourney*, 17 Conn. 511, holding joint maker's promise to pay note sufficient to bar statute of limitations as against other.

Cited in reference notes in 63 A. S. R. 645, on limitation of actions on negotiable instruments; 30 A. D. 348, on new promise or acknowledgment to revive debt; 53 A. S. R. 276, on new promise or payment by joint debtor as tolling statute of limitations; 28 A. D. 147, on admissions of partner to remove bar of limitations after dissolution of firm.

Cited in note in 62 A. D. 102, on promise, acknowledgment, or payment by joint debtor, partner, etc., as taking case out of statute of limitations.

Distinguished in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 A. D. 322, holding partner's promise to pay after dissolution insufficient to revive firm debt barred by statute of limitations.

20 AM. DEC. 115, TAYLOR v. OWEN, 2 BLACKF. 301.

Nature of covenants.

Cited in note in 15 L.R.A.(N.S.) 1132, on effect of recorded agreement not incorporated in conveyance, restricting use of property, upon successor in title.

— Personal.

Cited in *Tardy v. Creasy*, 81 Va. 553, 59 A. D. 676, holding covenants applying to grantor and assigns restraining mercantile privileges on land, personal, binding grantor; *Weyman v. Ringold*, 1 Bradf. 40, holding that covenant, binding lands and owners, to pay for wall, when used inures to benefit of covenantee's grantee, not executors; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946, as to whether general covenant not to open quarries on land is personal or continuing; *Wells v. Benton*, 108 Ind. 585, 8 N. E. 444, holding covenant to pay judgments not liens, not continuing, so as to bind covenantor's grantee.

— Running with the land.

Cited in notes in 82 A. S. R. 670, 671, on what covenants run with the land; 51 A. D. 306, on what are covenants in lease running with land.

Distinguished in *Hazlett v. Sinclair*, 76 Ind. 488, 40 A. R. 254, holding that general covenant in deed to maintain fence runs with land and binds covenantor's grantees; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198, holding that covenant to pay for party wall when used runs with land creating enforceable liability; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 A. R. 623, holding that covenant permitting erection and restraining sale on premises runs with land and binds assignee with notice.

What constitutes breach of covenant.

Cited in *Norman v. Wells*, 17 Wend. 136, holding demise, by lessor under covenant restraining sawing of mahogany, to others for that purpose was breach of covenant.

Validity of contract in restraint of trade.

Cited in *Beard v. Dennis*, 6 Ind. 200, 63 A. D. 380, holding contract not to resume business in certain place, valid.

20 AM. DEC. 118, STATE v. HICKS, 2 BLACKF. 336.

Liability of sheriff or constable.

Cited in *State ex rel Yater v. Hamilton*, 32 Ind. 104, holding that sheriff

taking goods of one, unknowing, to satisfy execution against another, cannot claim that one consented; *Nutzenholster v. State*, 37 Ind. 457, holding irregularity of judgment no defense to action against constable for failure to pay money collected.

Cited in reference note in 65 A. D. 503, on sheriff's liability for not paying over money.

20 AM. DEC. 119, JOHN v. FARMERS' & M. BANK, 2 BLACKF. 367.

Sufficiency of pleading.

Cited in *Way v. Billings*, 2 Mich. 397, holding production of charter and acts of user sufficient to prove corporation's existence.

—Termination of corporate existence.

Cited in *Logan v. Vernon*, G. & R. R. Co. 90 Ind. 552, holding pleading abandonment and forfeiture without allegation of forfeiture in suit by state, bad; *Hartsville University v. Hamilton*, 34 Ind. 506, holding that plea in abatement of corporation's cessation must show termination by legal process and forfeiture cannot be tried collaterally in action on note; *Ft. Wayne & B. Turnp. Co. v. Deam*, 10 Ind. 563; *Danville & W. L. Pl. Road Co. v. State*, 16 Ind. 456; *Brookville & G. Turnp. Co. v. McCarty*, 8 Ind. 392, 65 A. D. 768,—holding that pleading averring cessation of corporate powers must show manner of termination.

Forfeiture of corporate charter.

Cited in *State ex rel. Dilworth v. Council Bluffs & N. Ferry Co.* 11 Neb. 354, 9 N. W. 503, holding repeated wilful acts of misuser by corporation against charter ground of forfeiture; *State v. Vincennes University*, 5 Ind. 77, holding that failure to hold meetings would not dissolve corporation but forfeiture depends on action by government; *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 A. D. 405, holding present insolvency insufficient to support information in nature of quo warrant against corporation; *Rives v. Montgomery South Pl. Road Co.* 30 Ala. 92 (dissenting opinion), on corporation's violation of charter as defense to action for enforcement of contract with corporation.

Cited in reference notes in 30 A. D. 497, on dissolution of corporation; 26 A. D. 115, on what constitutes dissolution of corporation; 53 A. D. 110, on effect of non-user as dissolving corporation; 31 A. D. 113, on right to take advantage, in collateral action, of nonuser or misuser working forfeiture of corporate rights.

Cited in notes in 8 L.R.A. 499, on forfeiture and dissolution of corporation for misuser of franchise; 8 A. S. R. 194, on necessity for direct proceedings by state to forfeit corporate franchises.

Estoppel in pais.

Cited in *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, holding that subscriber, in action for payment of stock, cannot deny legality of director's election by corporators; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 A. D. 344, holding that subscriber cannot defend action for instalment by claiming he gave note instead of cash required by charter.

—To deny corporate existence.

Cited in *Whitney v. Robinson*, 53 Wis. 309, 10 N. W. 512, holding that one executing lease to body as corporation cannot deny its corporate existence; *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247, holding that private person cannot question existence of corporation, until dissolved by action of state; *Loaners' Bank v. Jacoby*, 10 Hun, 143, holding that party, giving bond and preventing de-

livery of property to corporation cannot deny its corporate existence; *Eppes v. Mississippi*, G. & T. R. Co. 35 Ala. 33, holding that one having contracted with corporation under amended charter name cannot deny valid acceptance of amended charter; *Judah v. American Live-Stock Ins. Co.* 4 Ind. 333, holding that person contracting with corporation as corporation cannot deny its corporate existence in absence of fraud; *Lewis v. Clarendon*, 5 Dill. 329, Fed. Cas. No. 8,320, holding city, contracting with railroad company as corporation, estopped from denying its corporate existence; *Massey v. Citizen's Bldg. & Sav. Asso.* 22 Kan. 624; *Ryan v. Vanlandingham*, 7 Ind. 416,—holding that maker of note given to corporation is estopped from denying company's corporate existence; *Morrill v. Smith County*, 89 Tex. 529, 36 S. W. 56, as to whether county issuing bond to company could deny its corporate existence after long lapse of time; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 A. D. 128, holding that one having subscribed for stock and paid instalments to corporation cannot deny its corporate existence; *Stoops v. Greensburg & B. P. R. Co.* 10 Ind. 47, holding that subscriber of stock in corporation cannot deny its corporate existence in absence of fraud; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547, holding that one promising in writing to pay corporation for stock cannot deny its existence.

Cited in reference notes in 43 A. D. 465; 29 A. S. R. 436,—on estoppel to deny corporate existence by one dealing with corporation as such.

Cited in note in 24 A. D. 59, on estoppel of one dealing with corporation.

20 AM. DEC. 123, BRACKENRIDGE v. HOLLAND, 2 BLACKF. 377.

Equity jurisdiction over accounting.

Cited in reference notes in 50 A. D. 67; 51 A. D. 142,—on equity jurisdiction in matters of account; 50 A. D. 813, on jurisdiction of chancery over settlement of executor's account; 73 A. D. 558, on how far jurisdiction of chancery is devested by probate system.

Cited in note in 63 L.R.A. 105, on remedy of distributee as to accounting of which he had no notice, by proceeding against those who have received fund.

Conclusiveness of judgment.

Cited in *Parsons v. Milford*, 67 Ind. 489, holding that final report and resignation of administrator is not final settlement to bar action on bond; *Vertner v. McMurran*, Freem. Ch. (Miss.) 136, holding administrator's final account not conclusive between him and distributees but is subject to correction; *State ex rel. Richardville v. Brutch*, 12 Ind. 381, holding item against administrator, by mistake unlitigated, not in judgment, recoverable in another action on bond; *Goodwin v. Goodwin*, 48 Ind. 584, holding that executor's partial settlement approved by court may be opened up to correct fraud; *Murdock v. Holland*, 3 Blackf. 114, holding that court of chancery may correct mistakes in settlement of administrator's accounts in probate court.

Cited in reference notes in 35 A. D. 516; 48 A. D. 119,—on conclusiveness of decrees of orphans' court.

Invalidity of purchase by trustee or other fiduciary.

Cited in *Huff v. Earl*, 3 Ind. 306, holding that trustee's purchase at own sale of *cestui que trust's* property, inures to latter and is subject to his confirmation; *Sturdevant v. Pike*, 1 Ind. 277; *Gage v. Pike*, Smith (Ind.) 145,—holding that equity will set aside unratified conveyance to himself by attorney selling for another; *Doe ex dem. Harkrider v. Harvey*, 3 Ind. 104, holding that administrator's purchase of land under own sale for payment of debts is not void; *Morgan*

v. Wattles, 69 Ind. 260, holding that administrator's sale of decedent's land to himself may be avoided by heirs; **Hawkins v. Ragan**, 20 Ind. 193, holding that sale by administrator's auctioneer to self is voidable and property resaleable except as to innocent bona fide purchasers; **Hawkins v. Ragan**, 20 Ind. 193, holding that sale of administrator's auctioneer to self was sale to third person and valid; **Martin v. Wyncoop**, 12 Ind. 266, 74 A. D. 209, holding that administrator cannot purchase, for himself or another, real estate at sheriff's sale; **Bollenbacher v. First Nat. Bank**, 8 Ind. App. 12, 35 N. E. 403, holding that surviving members of partnership on death of member, hold property in trust for partnership creditors; **Dozier v. Mitchell**, 65 Ala. 511, holding that mortgagor may ratify or disaffirm mortgagee's resale of property purchased under power of mortgage.

Cited in reference notes in 22 A. D. 302, on trustee's right to purchase on sale of trust property; 53 A. D. 125, on right of agents, trustees, executors, administrators, guardians, and attorneys to purchase for their own benefit.

Cited in note in 16 A. D. 617, on trustee dealing with *cestui que trust* in relation to trust estate.

Confusion of goods.

Cited in **Brakeley v. Tuttle**, 3 W. Va. 86, holding hides mixed by tanner with those of other person subject to any definite claim of that other; **Huff v. Earl**, 3 Ind. 306, holding that debtor cannot benefit by admixture of property set apart to creditor for satisfaction of debt; **Hesseltine v. Stockwell**, 30 Me. 227, 50 A. D. 627, as to whether confusion of goods has occurred where detached portion of logs wrongfully intermixed were sold; **Kreuzer v. Cooney**, 45 Md. 582, holding that one mingling goods under bill of sale with his own acquires no title and owner may replevy from purchaser; **Henderson v. Lauck**, 21 Pa. 359, holding that corn on delivery mixed with vendee's, unpaid for, is subject to reclamation and replevin; **Kleppner v. Lemon**, 197 Pa. 430, 47 Atl. 353, holding all oil subject to royalties where lessee to evade paying royalties drains leased land through adjoining land; **Nelson v. Goree**, 34 Ala. 565, on confusion of goods as right to recovery; **Diversey v. Johnson**, 93 Ill. 547, holding that party producing admixture of property must distinguish his own or lose it; **Tea v. Gates**, 10 Ind. 164, holding that doubts concerning amount and value of corn must be determined against party wrongfully taking; **Miller v. Stephenson**, 27 Ind. App. 271, 61 N. E. 22 (dissenting opinion), on forfeiture by person to other party, of money, commingled, which was wrongfully procured.

Cited in notes in 8 L.R.A. 789, on commingling trust funds; 54 A. D. 592, on effect of wilful and tortious confusion of goods.

20 AM. DEC. 131, ARMSTRONG v. KEITH, 3 J. J. MARSH. 153.

Duty of jury to follow instructions.

Cited in reference notes in 54 A. D. 119, on duty of jury to receive law from court; 57 A. D. 152, on duty of jury in rendering verdict to follow instructions; 33 A. D. 37, as to whether jury must follow erroneous instructions; 47 A. D. 747, as to whether jury is bound by erroneous instructions.

Erroneous instructions as ground for new trial.

Cited in **Watts v. Norfolk & W. R. Co.** 39 W. Va. 196, 45 A. S. R. 894, 23 L.R.A. 674, 19 S. E. 521, holding that new trial will not be granted because jury disregarded instruction erroneous in law; **Lazier Gas Engine Co. v. Du Bois**, 65 C. C. A. 172, 130 Fed. 834, holding new trial unwarrantable where erroneous instructions were disregarded and just verdict rendered; **Sullivan v. McMillan**, 26 Fla.

543, 8 So. 450, holding that erroneous charge is not ground for setting aside verdict in accordance with law and evidence; *Lowry v. Southern R. Co.* 117 Tenn. 507, 101 S. W. 1157, holding that harmless error in charge is no ground for new trial where complaining party is not injured; *Mason v. Harper's Ferry Bridge Co.* 20 W. Va. 223, holding that erroneous instruction warrants new trial unless record shows that exceptor is not prejudiced thereby.

Cited in reference note in 44 A. D. 766, on new trial for erroneous instructions where verdict is correct.

Cited in note in 99 A. D. 129, 130, on erroneous instructions as ground for reversal or new trial.

20 AM. DEC. 137, MAY v. ARMSTRONG, 3 J. J. MARSH. 260.

Bill to perpetuate testimony.

Cited in reference note in 47 A. D. 357, on necessity of interest to sustain bill to perpetuate testimony.

Subject-matter of cross bill.

Cited in *Kirkman v. Vanlier*, 7 Ala. 217, holding that cross bill must be confined to the subject-matter of the bill; *Draper v. Gordon*, 4 Sandf. Ch. 210, holding that cross bill is defense and must be germane to original suit; *Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51, holding that in chancery practice a cross bill must be germane to original suit; *Pindall v. Trevor*, 30 Ark. 249, holding that cross bill must not contain allegations foreign to subject-matter of original bill; *Hansford v. Chesapeake Coal Co.* 22 W. Va. 70, holding cross bill introducing new matter not embraced in original bill, demurrable; *Powers v. Hibbard*, 114 Mich. 533, 72 N. W. 339, holding that new facts bearing upon the subject-matter of original bill may be introduced in cross bill; *Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51, holding cross petition unobtainable for affirmative relief as cross suit beyond requirements of complete adjudication upon subject-matter of original suit; *Ledwith v. Jacksonville*, 32 Fla. 1, 13 So. 454, holding that supplemental cross bill must depend on original bill and not contain matter changing rights of parties; *Follansbee v. Scottish-American Mortg. Co.* 7 Ill. App. 486, holding cross bill, alleging that judgments are void, where original bill seeks their enforcement, sustainable; *Davis v. Cook*, 65 Ala. 617, holding that mortgagor may set up usury in cross bill against mortgagee's bill for mortgage debt accounting; *Cobb v. Baxter*, 1 Tenn. Ch. 405, holding that new parties cannot be introduced into cause by cross bill; *Hornor v. Hanks*, 22 Ark. 572, holding that cross bill may extend to lands involved other than those mentioned in bill in partition involving title; *Datz v. Phillips*, 137 Pa. 203, 21 A. S. R. 864, 20 Atl. 426, 24 W. N. C. 382 (reversing 46 Phila. Leg. Int. 250), holding cross bill, to restore privy well where original bill is for specific performance to build windows, demurrable.

Cited in reference note in 11 A. S. R. 355, on necessity that cross bill be confined to subject-matter of bill.

Cited in note in 83 A. D. 251, on nature and objects of cross bill.

20 AM. DEC. 140, COSBY v. ROSS, 3 J. J. MARSH. 290.

Followed without discussion in *Cosby v. Cotton*, 3 J. J. Marsh. 292.

Creditor's power to reach debtor's chose in action.

Cited in *Shaw v. Aveline*, 5 Ind. 380, holding that judgment creditor cannot by bill in equity subject debtor's chose in action to payment of his judgment;

Lee v. Citizens' Nat. Bank, 2 Cin. Sup. Ct. Rep. 298, holding that bank stock is not subject to levy and execution without consent of owner of certificate; **Doyle v. Sleeper**, 1 Dana, 531 (dissenting opinion), on prior or subsequent creditors' inability to subject father's purchase in names of infant children.

Cited in notes in 12 E. R. C. 342, on subjection of choses in action to creditor's claims; 63 L.R.A. 691, on enactment of statute evidencing jurisdiction to subject choses in action to judgment after return of no property found.

Validity of voluntary conveyances.

Cited in **Bank of United States v. Housman**, 6 Paige, 526, holding that voluntary conveyance is not *per se* fraudulent as to existing creditors; **Falkenburg v. Johnson**, 102 Ky. 543, 80 A. S. R. 369, 44 S. W. 80, holding that wages given by husband to wife for services cannot be subjected to his debts; **Enders v. Williams**, 1 Met. (Ky.) 346, holding that gift of slave, afterwards sold by donor is presumptively fraudulent as to bona fide purchaser without notice; **Mitchell v. Berry**, 1 Met. (Ky.) 602, holding voluntary deed, fraudulent and void as to antecedent creditors; **Bullitt v. Taylor**, 34 Miss. 708, 69 A. D. 412 (dissenting opinion), on voidability of fraudulent conveyance as to existing and subsequent creditors.

Cited in reference notes in 25 A. D. 59; 26 A. D. 194; 44 A. D. 305,—on voluntary conveyances; 56 A. D. 662, on validity of voluntary conveyance as to subsequent creditors; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers; 20 A. D. 158, on validity of fraudulent voluntary conveyance as against subsequent bona fide purchaser from grantor.

20 AM. DEC. 142, BROWN v. MOORE, 3 J. J. MARSH. 306.

Compensation of witnesses.

Cited in reference note in 77 A. D. 769, on compensation of witness for attendance in pursuance of subpoena.

20 AM. DEC. 142, JACKSON v. BRYAN, 3 J. J. MARSH. 308.

Liability of personal representative for selling property exempt.

Cited in **Graves v. Graves**, 10 B. Mon. 31, holding that widow may maintain trover against executor selling property reserved by law for her, without demand.

Cited in reference note in 45 A. D. 612, as to when administrators or executors are liable for misapplication of assets of estate.

Cited in note in 51 L.R.A. 265, on capacity in which an executor or administrator may be sued for conversion.

20 AM. DEC. 143, DAVENPORT v. MUIR, 3 J. J. MARSH. 310.

Necessity of notice to covenantor of pendency of action.

Cited in **Walton v. Campbell**, 51 Neb. 788, 71 N. W. 737, holding verbal notice to grantor by grantee of pendency of action sufficient in suit for breach of warranty; **Teague v. Whaley**, 20 Ind. App. 26, 50 N. E. 41, on necessity of verbal or written notice of pendency of action to covenantor by covenantee in suit for breach of covenant.

Cited in note in 13 L.R.A.(N.S.) 733, on necessity of demand or request upon covenantor to defend in order to bind him by decree against grantee.

Conclusiveness against covenantor of judgment against covenantee.

Cited in **Peterson v. Steinhoff**, 44 Wash. 189, 87 Pac. 118, holding judg-

ment by default in ejectment not conclusive of defective title against covenantor with notice, unless title was in issue.

Cited in reference note in 37 A. D. 620, on judgment in ejectment as evidence against warrantor.

20 AM. DEC. 145, EDRINGTON v. HARPER, 3 J. J. MARSH. 353.

Contract construed as mortgage.

Cited in *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394; *Scott v. Henry*, 13 Ark. 112; *Matthews v. Sheehan*, 69 N. Y. 585,—holding that in doubtful cases contract will be construed as mortgage instead of conditional sale; *Russell v. Southard*, 12 How. 139, 13 L. ed. 927; *Stephens v. Allen*, 11 Or. 188, 3 Pac. 168; *Vangilder v. Hoffman*, 22 W. Va. 1,—holding that in doubtful cases equity will declare contracts, mortgages rather than deeds; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394, holding that intention evinced by whole transaction and circumstances decides whether doubtful instrument constitutes deed, conditional sale, or mortgage; *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410, holding that presumption that deed was mortgage arises where price inadequate; *Rogan v. Walker*, 1 Wis. 527, holding that equity will consider conveyance made as security for loan of money, a mortgage; *Keithley v. Wood*, 151 Ill. 566, 42 A. S. R. 265, 38 N. E. 149, holding that transaction will be treated as mortgage where doubt arises as to whether conditional sale or mortgage; *Brown v. Dewey*, 1 Sandf. Ch. 56, holding deed with agreement to resell for stipulated sum, a security merely; *Bright v. Wagle*, 3 Dana, 252, holding that contract conveying property to secure loan is mortgage and parol evidence admissible to prove fraud; *Perkins v. Drye*, 3 Dana, 170, holding instrument, stipulating for vendor's redemption and loss to vendor if property perishes, a mortgage; *Hart v. Burton*, 7 J. J. Marsh. 322, holding contract a mortgage where slave is delivered as collateral security for loan of money; *Newton v. Fay*, 10 Allen, 505, holding shares of stock redeemable, upon parol proof of transfer made as collateral security for debt; *Newton v. Taylor*, 32 Ohio St. 399, holding that husband, inducing purchase and receiving money for wife's benefit, buying for himself, creates trust.

Cited in reference notes in 42 A. S. R. 273, on construction of doubtful instrument as mortgage; 25 A. D. 735; 28 A. D. 188; 31 A. D. 626; 36 A. D. 43,—as to when absolute deed considered as mortgage; 23 A. D. 727, on absolute deed and agreement to reconvey as a mortgage; 42 A. D. 246; 42 A. S. R. 272,—on deed absolute, with defeasance as mortgage; 36 A. D. 102, on effect of absolute deed with agreement to reconvey; 79 A. D. 373, on deed absolute on face as mortgage when intended to secure existing debt; 46 A. S. R. 297, on what constitutes a conditional sale; 90 A. D. 351, on agreement to resell as conditional sale; 34 A. D. 737, as to whether transaction is a conditional sale or mortgage; 90 A. D. 351, on intention to secure indebtedness by conveyance or bill of sale as criterion of mortgage.

Cited in notes in 94 A. S. R. 235, 237, on distinction between conditional sale and mortgage; 1 L.R.A. 240, as to when absolute sale cannot be construed as mortgage; 18 E. R. C. 13, 14, as to test whether transaction is mortgage or conditional sale; 17 A. D. 300, on intention of parties as determining whether absolute deed and agreement to convey constitutes a mortgage; 50 A. D. 196, on considering transaction as mortgage instead of condition sale in case of doubt.

Parol evidence as to writing.

Cited in *McElroy v. Swope*, 47 Fed. 380, holding parol evidence admissible to show whether transaction was conditional sale or partnership purchase.

Cited in reference notes in 28 A. D. 126, on parol evidence to establish fraud in written agreement; 35 A. D. 140, on parol evidence to show illegal consideration; 94 A. D. 670, on parol evidence to show illegality of consideration of contract; 23 A. D. 526, on parol evidence to show want of consideration; 24 A. S. R. 240, on parol evidence to prove usury.

— That absolute deed was mortgage.

Cited in *Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co.* 37 Colo. 96, 86 Pac. 94, 11 A. & E. Ann. Cas. 323, holding extrinsic evidence admissible to show bill of sale was mortgage although fraud not alleged; *Russell v. Southard*, 12 How. 139, 13 L. ed. 927, holding parol evidence admissible to prove deed a mortgage where borrowing and lending apparent; *Babcock v. Wyman*, 19 How. 289, 15 L. ed. 644, holding parol evidence admissible to show that absolute deed was mortgage; *Klein v. McNamara*, 54 Miss. 90, holding that deed given as security for loan was mortgage and transaction explanatory by parol; *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, holding intention as to whether deed was mortgage, ascertainable by written memorials of transaction and circumstances; *Hughes v. Sheaff*, 19 Iowa, 335, holding evidence of circumstances, and intention admissible in deciding whether transaction was conditional sale or mortgage; *Carveth v. Winegar*, 133 Mich. 34, 94 N. W. 381, holding circumstances, conversations, and value of land admissible to declare deed a mortgage.

Cited in note in 15 A. D. 47, on parol evidence that absolute deed or bill of sale was intended as a mortgage.

Burden of proof as to conditional sale.

Cited in *Honore v. Hutchings*, 8 Bush, 687, holding that burden of proof rests upon party insisting that contract is conditional sale.

Wife's refusal to unite with husband in conveyance.

Cited in reference note in 32 A. D. 750, on doctrine that equity will not attempt to coerce wife by acting upon husband.

Cited in note in 24 L.R.A. 765, on specific performance against husband where wife refuses to unite in conveyance.

20 AM. DEC. 153, FOWLER v. CRAVENS, 3 J. J. MARSH. 428.**Eviction of tenant.**

Cited in reference note in 50 A. D. 791, on eviction of tenant by title paramount.

Cited in note in 15 E. R. C. 306, on tenant's right to show eviction by paramount title.

Attornment by tenant.

Cited in notes in 23 A. S. R. 377; 86 A. D. 62; 89 A. S. R. 104,—on validity of attornment to stranger.

Right to controvert title of landlord or vendor.

Cited in *Chambers v. Pleak*, 6 Dana, 426, 32 A. D. 78, holding that tenant may purchase or take shelter under adverse title after judgment against landlord's title; *Bush v. Adams*, 22 Fla. 177, holding that vendee of land who buys an outstanding encumbrance can only recover amount expended.

Cited in reference notes in 20 A. D. 251; 27 A. D. 466,—on estoppel of tenant to deny landlord's title; 33 A. D. 143, on right of vendee in possession to dis-

pute vendor's title; 115 A. S. R. 452, on estoppel by vendee entering into possession of lands under executory contract of sale to deny vendor's title or to acquire hostile title; 52 A. D. 294, on estoppel of vendee entering on land under contract of purchase to deny vendor's title; 57 A. D. 212, on vendor's right to immunity from prejudicial acts by purchaser in possession; 53 A. D. 106, on right of vendor and vendee to buy adverse titles and encumbrances.

Cited in note in 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title.

Effect of vendee's possession.

Cited in note in 12 L.R.A. 243, on effect of possession of vendee.

20 AM. DEC. 156, NEWSON v. LYCAN, 3 J. J. MARSH. 440.

Judgment record of suit as evidence.

Cited in reference notes in 43 A. D. 180, on record of former suit as evidence against one not a party; 41 A. D. 682, on admissibility and effect of former judgment as plea in bar, or as evidence under general issue in subsequent action.

Rights of bona fide purchaser of chattel as against third persons.

Cited in note in 25 A. D. 615, on rights of bona fide purchaser from vendor in possession.

Distinguished in *Andrews v. Cox*, 42 Ark. 473, 48 A. R. 68, holding reservation of unborn foal in sale of dam binding upon subsequent purchasers without notice.

Grounds for new trial.

Cited in *Hall v. Page*, 4 Ga. 428, 48 A. D. 235, upholding right to new trial where verdict is clearly against evidence; *Fulton v. Lancaster County*, 10 Lanc. L. Rev. 81, holding that verdict will not be set aside as contrary to evidence, unless contrary preponderance be clear and decisive; *Lotz v. Reading Iron Co.* 10 Pa. Co. Ct. 497, holding that where an equitable defense is set up, the court may disregard the verdict if it is not based upon a fair and conscionable conclusion from the testimony.

Cited in reference notes in 24 A. D. 319, as to when new trial may be granted; 39 A. D. 592; 79 A. D. 523,—as to when new trial will be granted because verdict is against evidence; 76 A. D. 65; 38 A. S. R. 186,—on granting new trial when verdict against weight of evidence.

20 AM. DEC. 158, BREWER v. BOWMAN, 3 J. J. MARSH. 492.

Nature of bill of review.

Cited in reference notes in 62 A. D. 396; 62 A. S. R. 141,—on bills of review; 84 A. D. 385, on nature of bills of review; 21 A. D. 585; 50 A. D. 510; 60 A. D. 107; 36 A. S. R. 432; 54 A. S. R. 218,—on nature and scope of bills of review.

When bill of review lies.

Cited in reference note in 76 A. D. 124, as to when bill of review may be prosecuted.

Prerequisites to bill of review.

Cited in reference note in 25 A. S. R. 373, on necessity for performance of decree prior to bill of review.

Grounds for bills of review or new trial.

Cited in *Price v. Lathrop*, 68 Ga. 545, holding that bill of review will not lie for errors apparent on the face of the record after the judgment has been affirmed by the supreme court; *Safe Deposit & T. Co. v. Gittings*, 102 Md. 456,

4 L.R.A.(N.S.) 865, 62 Atl. 1030, 5 A. & E. Ann. Cas. 941, holding that trial court may grant bill to review decree entered by it on direction of appellate court; *State ex rel. Reynolds v. White*, 40 Fla. 297, 24 So. 160, holding that circuit courts have no jurisdiction of bills to review decrees entered by them in obedience to mandate of an appellate court; *McGregor v. Gardner*, 16 Iowa, 538, holding bill of review based on new matter so far in nature of original proceeding that supreme court cannot originally entertain it; *Beazley v. Mer-shon*, 6 Bush, 424, denying right of court of appeals to entertain bills of review of its own decisions; *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052, holding that bill of review cannot be maintained to review decree upon ground that the successful party had bribed a principal witness; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638, holding that inquiry cannot be made to errors of law apparent on the record not involving jurisdiction of the original suit brought by plaintiff when an infant; *Crews v. Richards*, 14 Or. 442, 13 Pac. 67, holding a decree will not be set aside on ground that plaintiffs were misled by the allegations of adverse party in former suit; *Creswell v. Jones*, 68 Ala. 420, as to whether erroneous ruling on demurrer is such error as would authorize resort to bill of review, and citing annotation also on this point.

Annotation cited in *Bloxham v. Florida*, C. & P. R. Co. 39 Fla. 243, 22 So. 697, holding that supreme court may direct decree to be entered with leave to apply to lower court to file bill of review.

Cited in reference note in 47 A. D. 115, on bill of review for errors apparent upon record, or *dehors* record.

— Newly discovered evidence; laches.

Cited in *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052, holding that bill of review will not lie in case evidence discovered after decree below, where a decision has been taken on appeal, unless right is reserved in decree, or permission given by appellate court; *Mitchell v. Berry*, 1 Met. (Ky.) 602, holding questions overlooked while writ of error was pending afterwards available as ground for bill of review; *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512, holding discovery of new evidence, impeaching witnesses upon original hearing, and for purpose of showing perjury of such witnesses not sufficient ground for allowing bill of review where credibility of witnesses had been put in issue.

Annotation cited in *Blair v. Ritchie*, 73 Vt. 109, 50 Atl. 807, holding that decree remanded by the appellate court will not be set aside for new trial on petition setting up newly discovered evidence; *Bartlett v. Gregory*, 60 Ark. 453, 30 S. W. 1043, holding that a bill of review should be denied, where there was laches in not discovering the evidence before the decree.

Cited in reference note in 62 A. S. R. 140, on bills of review for newly discovered matter.

Cited in notes in 4 L.R.A.(N.S.) 866, on bill of review, because of newly discovered evidence, after affirmance or reversal by appellate court; 54 A. S. R. 220, on proceedings or judgments subject to equitable relief.

— Cumulative evidence.

Cited in *Fox v. Reynolds*, 24 Ind. 46, holding a new trial will not be granted for newly discovered cumulative evidence; *Tilman v. Tilman*, 4 J. J. Marsh. 117; *Hines v. Driver*, 100 Ind. 315; *Pulliam v. Pulliam*, 13 Fed. 53; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271,—holding that bill of review will not lie
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for newly discovered evidence which is merely cumulative; *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32, holding that decree will not be set aside on cumulative parol evidence to point in issue in original suit, and referring with special approval to annotation on this point.

What reviewable on bill of review.

Cited in reference note in 43 A. S. R. 49, on what reviewed on bill of review.

20 AM. DEC. 175, SNEED v. WHITE, 3 J. J. MARSH. 525.

Release of surety.

Cited in *Carpenter v. Devon*, 6 Ala. 718, holding that surety may insist upon his discharge although debt is reduced to judgment; *Mayes v. Lane*, 116 Ky. 566, 76 S. W. 399, holding settlement by owner, of lien claims before completion, will not release sureties on contractor's bond.

Cited in reference notes in 24 A. D. 334; 29 A. D. 225, 226; 74 A. D. 545,—on acts of creditor releasing surety; 37 A. D. 595, on discharge of surety by creditors' interference; 59 A. D. 104, on duty of creditor to do nothing to impair rights and remedy of surety.

—By indulgence to principal.

Cited in *Ross v. Clore*, 3 Dana, 189, holding that mere passive indulgence by the creditor will not release surety; *Hawkins v. Mims*, 36 Ark. 145, 38 A. R. 30, holding mere delay on part of creditor to compel debtor to pay no defense to surety; *Bangs v. Strong*, 10 Paige, 11, holding that creditor may stipulate with debtor to extend time if surety assents; *Winne v. Colorado Springs Co.* 3 Colo. 155, holding plea by surety of offer by debtor to pay while solvent bad as plea of tender.

Cited in reference notes in 33 A. D. 521, on acts of indulgence to principal discharging surety; 42 A. D. 529; 31 A. S. R. 737,—on release of surety by indulgence to principal; 47 A. D. 743, on discharge of surety by forbearance, delay, negligence, or indulgence; 95 A. D. 313, on surety's liability not being affected by creditor's passiveness; 60 A. D. 332, on discharge of surety by binding extension of time given to principal.

Cited in notes in 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal; 51 A. D. 124, on effect on surety's rights of creditor's forbearance to enforce execution against principal.

Distinguished in *Wright v. Watt*, 52 Miss. 634, holding that forbearance by the creditor will not release surety.

—By forbearance, without valid consideration.

Cited in *Brinagar v. Phillips*, 1 B. Mon. 283, 36 A. D. 575, holding surety not released by verbal assent to indulgence to debtor for a specified time, there being no consideration; *Tudor v. Goodloe*, 1 B. Mon. 322, holding that agreement for future payment of usury for forbearance will not release surety; *Preston v. Henning*, 6 Bush, 556, holding that receiving interest in advance for period beyond maturity of note releases nonassenting surety; *Porter v. Hodenpuy*, 9 Mich. 11 (dissenting opinion), on right of creditor to sue surety where forbearance is granted debtor, without consideration.

—By staying execution.

Referred to as leading case in *Davis v. Mikell*, Freem. Ch. (Miss.) 548, holding that release by creditor of levy upon property of debtor, whereby lien is lost, will release nonassenting surety.

Cited in *Watson v. Read*, 1 Tenn. Ch. 196, holding that release by creditor

of levy upon debtor's property, whereby lien is lost, will release nonassenting surety; *Sherraden v. Parker*, 24 Iowa, 28, holding that abandonment of levy upon debtor's property held by surety for his indemnity, will release nonassenting surety; *Knight v. Charter*, 22 W. Va. 422, holding that countermand of execution in hands of sheriff, before levy made, does not release surety; *Maquoketa v. Willey*, 35 Iowa, 323, holding voluntary relinquishment of a part of debtor's property will discharge surety to corresponding extent.

— By novation.

Cited in *People's Ins. Co. v. McDonnell*, 41 Ohio St. 650, holding that novation will discharge surety who has no knowledge of the transaction.

Cited in reference notes in 26 A. D. 746, on novation; 28 A. D. 354, on discharge of surety by novation between principal and creditor.

— By creditor's neglect to protect security for benefit of surety.

Cited in *Warner v. Helm*, 6 Ill. 220, holding creditor's neglect to protect security for benefit of surety may release him; *Struss v. Masonic Sav. Bank*, 89 Ky. 61, 11 S. W. 769, holding that laches of creditor after notice of fraud and release of other security will release the surety.

Distinguished in *Evans v. Kister*, 35 C. C. A. 28, 92 Fed. 828, holding creditor's neglect to protect lien for benefit of surety will release latter to extent he has suffered loss.

Cosureties as parties.

Cited in *Sparks v. Hall*, 4 J. J. Marsh. 35, holding cosureties and principal debtor should be parties to bill by surety to be released by reason of act of creditor entitling principal to indulgence after debt has matured.

20 AM. DEC. 179, WILLIAMS v. PRESTON, 3 J. J. MARSH. 600.

Jurisdiction over property within state.

Cited in reference note in 48 A. D. 320, on jurisdiction of court over property within state.

Foreign judgments generally.

Cited in reference note in 48 A. D. 589, on judgments of sister states.

Cited in note in 94 A. S. R. 551, on foreign judgments *in rem*.

Actions on foreign judgments.

Cited in *Iglehart v. Moore*, 16 Ark. 46; *Harris v. John*, 6 J. J. Marsh. 257,—holding that debt will not lie on foreign judgment rendered against a non-resident who had no actual notice of the suit.

Cited in note in 11 A. D. 724, on actions upon decrees.

Pleading in action on foreign judgments.

Referred to as a leading case in *Crigler v. Quarles*, 10 Mo. 324, holding *nil debet* not a good plea to an action of debt on a sheriff's bond.

Cited in *Rogers v. Odell*, 39 N. H. 452, holding that plea of foreign judgment need not allege jurisdiction in the court pronouncing judgment; *Bank of United States v. Merchants' Bank*, 7 Gill, 415, holding plea of judgment of sister state need not aver that the court pronouncing judgment had jurisdiction; *Biesenthal v. Williams*, 1 Duv. 329, 85 A. D. 629, holding that foreign law authorizing a personal judgment will be upheld as between citizens of that state.

Cited in reference notes in 36 A. S. R. 730, on sufficiency of complaint in action on judgment of sister state; 40 A. D. 618, on pleas to actions on foreign judgments; 54 A. D. 460, on right to plead *nil debet* to debt on foreign judgment.

Limitation of action on foreign judgment.

Cited in reference note in 25 A. S. R. 102, on limitation of action on foreign judgments.

Conclusiveness of foreign judgments.

Cited in *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609, holding judgment entitled to no more force elsewhere than it is in state where rendered; *First Nat. Bank v. Cunningham*, 48 Fed. 510, holding that judgment that may be collaterally attacked for want of jurisdiction in the court rendering it, may be so attacked in any other state; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding judgments rendered in foreign countries, by the laws of which our judgments are reviewable on the merits, *prima facie* evidence only; *Hilton v. Guyot*, 42 Fed. 249, holding foreign judgment, *in personam*, rendered by court having jurisdiction of person and subject-matter, impeachable when sued on here; *Coleman v. Waters*, 13 W. Va. 278, holding judgment confessed in pursuance of law in state where it is valid conclusive in sister state; *Brand v. Brand*, 116 Ky. 785, 63 L.R.A. 206, 76 S. W. 868, holding judgment holding note barred by limitations not bar to suit upon it in another state; *MacDonald v. Grand Trunk R. Co.* 71 N. H. 448, 93 A. S. R. 550, 59 L.R.A. 448, 52 Atl. 982, holding foreign judgment upon the merits bar to subsequent suit between same parties upon same cause; *Cobb v. Haynes*, 8 B. Mon. 137, holding record of foreign judgment *prima facie* evidence of extent of liability of the principal debtor and of a cosurety who appeared and defended; *Fletcher v. Ferrel*, 9 Dana, 372, 35 A. D. 143, holding no defense can be set up against decree of sister state, which would not prevail in state in which decree was rendered; *Glenn v. Williams*, 60 Md. 93, holding a decree making an assessment upon unpaid subscriptions to capital stock binding upon nonresident stockholders.

Cited in reference notes in 42 A. D. 201, on effect of judgments of sister states; 65 A. D. 704, on judgment of court of general jurisdiction as *prima facie* evidence of jurisdiction; 54 A. S. R. 303, on collateral attack on judgments.

Cited in notes in 82 A. D. 414, on effect of foreign judgment; 94 A. S. R. 543, on difference between foreign judgments as causes of action and as *res judicata*.

Distinguished in *Calloway v. Glenn*, 105 Ky. 648, 49 S. W. 440, holding nonresident stockholders bound by decree against corporation making calls for unpaid stock.

Validity of judgment.

Cited in reference note in 50 A. S. R. 737, on necessity for service or appearance to give jurisdiction.

Cited in notes in 5 E. R. C. 746, on validity of foreign judgment; 11 A. S. R. 821, on validity of judgments rendered without jurisdiction; 48 A. D. 270, on necessity of notice in judicial proceedings; 16 L.R.A. 231, on validity of personal judgments rendered upon constructive service of process against nonresidents in other states than those wherein rendered.

20 AM. DEC. 189, HUNDLEY v. WEBB, 3 J. J. MARSH. 643.**Validity of mortgage or sale of chattels.**

Cited in *Re Hussman*, 2 Nat. Bankr. Reg. 437, Fed. Cas. No. 6,951, holding possession of stock of merchandise by vendor fraudulent in law as to creditors of vendor.

Cited in reference notes in 74 A. S. R. 172, on presumption of intent in fraudulent conveyance; 53 A. D. 125, as to what evidence will furnish presumption of fraud.

— **Change of possession.**

Cited in *Beall v. Williamson*, 14 Ala. 55, holding that intent on part of mortgagor and mortgagee to defeat creditors of former will render mortgage fraudulent as against a purchaser from mortgagor; *Foster v. Grigsby*, 1 Bush, 86; *Laughlin v. Ferguson*, 6 Dana, 111,—holding possession of chattels by vendor after absolute sale, fraudulent as to creditors of vendor; *Brummel v. Stockton*, 3 Dana, 134, holding absolute sale of chattel void as to bona fide creditor of vendor, where vendor retains possession under covenant to deliver it at a future day; *Jordan v. Lendrum*, 55 Iowa, 478, 8 N. W. 311, holding sale of stock scales situated on homestead of vendor, without change of possession or recording any evidence of sale, invalid as against creditors of vendor; *Bindley v. Martin Bros.* 28 W. Va. 773, holding retaining possession of chattels by vendor after an absolute sale prima facie fraudulent in fact; but presumption rebuttable by proof; *Short v. Tinsley*, 1 Met. (Ky.) 397, 71 A. D. 482, holding that possession of chattel by vendor will not avoid sale in equity as to pre-existing creditor; *Hempstead v. Johnston*, 18 Ark. 123, 65 A. D. 458, holding that grantor may by terms of trust deed retain possession of property until day of sale; *Vernon v. Morton*, 8 Dana, 247, holding possession of chattels by one of grantors to deed of assignment for benefit of creditors, who was retained by trustees to aid in executing trust, no evidence of fraud.

Cited in reference notes in 29 A. D. 363, on retention of possession of personal property by vendor; 33 A. D. 165, on effect of retention of possession by vendor; 30 A. S. R. 484, on retention of possession of chattels by seller as evidence of fraud; 65 A. D. 473, on retention of possession of real property after absolute sale, as badge of fraud; 73 A. S. R. 833, on necessity of change of possession to prevent conveyance from being fraudulent; 72 A. D. 635, on special cases where delivery of possession after absolute sale is not required.

Parties to foreclosure suit.

Cited in reference note in 34 A. D. 366, on parties to foreclosure suit.

Decree for current interest.

Cited in *Hughes v. Standeford*, 3 Dana, 285, holding it error to decrees current interest where a judgment at law would be for a sum in gross.

20 AM. DEC. 199, PEARL v. McDOWELL, 3 J. J. MARSH. 658.

Validity of transactions with persons under disability—Person under duress.

Cited in *Arnold v. Grimes*, 2 Iowa, 1, holding that effect of decree canceling deed obtained by duress is to render deed void from its date, and not from date of decree.

— **Insane persons generally.**

Cited in *Fitzhugh v. Wilcox*, 12 Barb. 235, holding contract for sale of realty executed by lunatic after office found unenforceable by committee; *Lincoln v. Buckmaster*, 32 Vt. 652, holding that one who contracts with a lunatic, will not be protected, where circumstances were such as to convince a prudent man of his insanity; *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 66 A. S. R. 167, 40 L.R.A. 250, 29 S. E. 182, holding bank not protected in paying check without knowledge of maker's insanity though adjudication was made in another state; *Elaton v. Jasper*, 45 Tex. 409, holding that burden of proving restoration to reason and termination of guardianship of one insane, is upon him who seeks to enforce contract against him who pleads insanity; *Allen v. Berryhill*, 27

Iowa, 534, 1 A. R. 309 (dissenting opinion), on capacity of lunatic to make binding contract; *Rannells v. Gerner*, 80 Mo. 474 (reversing 9 Mo. App. 506), holding wife's dower in insane husband's realty, sold by his guardian, not released by joining with husband in deed thereto.

Cited in reference notes in 55 A. D. 431; 41 A. S. R. 345,—on liability of insane person on contract; 28 A. D. 647, on invalidity of contracts of lunatics after office found.

Cited in notes in 71 A. S. R. 426, on contracts of insane persons; 21 A. R. 33, on validity of contract of lunatic; 16 E. R. C. 739, on avoidance of contract of alleged insane person; 15 A. D. 368, on contracts made after inquisition as to lunacy; 22 A. D. 659, on invalidity of contracts of lunatics after office found; 42 A. S. R. 753, on liability of incompetent persons; 34 L.R.A. 226 on husband's insanity as affecting his property rights.

— Power of committee to bind lunatic by contract.

Cited in *Agricultural Ins. Co. v. Barnard*, 26 Hun, 302, denying right of committee of lunatic to bind his ward by contract.

Cited in notes in 8 L.R.A.(N.S.) 437, on power of guardian or committee to bind incompetent person or his estate by contract; 7 L.R.A. 656, on trustee's power to create lien upon trust estate.

— Liability for necessities furnished lunatic or his family.

Cited in *Waldron v. Davis*, 70 N. J. L. 788, 66 L.R.A. 591, 58 Atl. 293, holding nursing and ministering to health and comfort of lunatic necessities which are recoverable against his estate; *Coleman v. Frazer*, 3 Bush, 300, holding estate of insane person chargeable for necessities and money advanced to pay off encumbrances; *Fruitt v. Anderson*, 12 Ill. App. 421, holding implied contract for necessities binding on an insane person; *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344, holding estate of insane widowed mother liable for necessities furnished her child during its minority; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460 (dissenting opinion), on power of lunatic to contract for necessities.

20 AM. DEC. 203, CLARK v. PATTON, 4 J. J. MARSH. 33.

Release of surety — By one joint creditor.

Cited in *Bangs v. Strong*, 10 Paige, 11, holding that agreement by one of several joint creditors to extend time of payment will release nonassenting surety.

— Defense available in equity.

Cited in *Kennedy v. Evans*, 31 Ill. 258, holding release of surety available in equity as a defense, though fact of suretyship does not appear on face of instrument.

Counterclaim in action on joint contract.

Cited in *Booth Bros. v. Baird*, 83 App. Div. 495, 82 N. Y. Supp. 432, holding that any counterclaim established against plaintiff in action to enforce liability on joint contract, will inure to benefit of all defendants.

20 AM. DEC. 205, STEVENS v. SMITH, 4 J. J. MARSH. 64.

To what dower attaches.

Cited in *Re Pulling*, 97 Mich. 375, 56 N. W. 765, holding widow entitled to dower in interest of husband represented by amounts due on contracts for sale of lands; *Rain v. Roper*, 15 Fla. 121, holding unconditional bond for conveyance of title to land, executed by one who afterwards marries and dies before

executing deed, entitles purchaser to a conveyance free of dower; *Gully v. Ray*, 18 B. Mon. 107, holding that dower does not attach where husband parts with equitable title and possession before he obtains legal title, which he subsequently acquires and conveys to his vendee; *Owen v. Robbins*, 19 Ill. 545, holding dower not assignable in estate embraced in a contract of purchase, assigned by husband in his lifetime.

Cited in reference notes in 28 A. D. 116, on dower in exchanged lands; 116 A. S. R. 900, on right to dower in equitable estate of husband; 60 A. D. 127, on existence of dower where husband is seised in law; 97 A. D. 432, on priority of vendor's lien over dower.

Cited in notes in 34 L. ed. U. S. 826, on right to dower; 87 A. D. 326, on widow's dower right in husband's equitable estate.

When right of curtesy exists.

Cited in reference notes in 90 A. D. 322, as to when tenancy by curtesy may exist; 67 A. D. 302, on necessity for actual seisin in wife to constitute husband tenant by curtesy.

Cited in note in 112 A. S. R. 580, on necessity and character of seisin to give right to curtesy.

Equity jurisdiction for assignment of dower.

Cited in *Badgley v. Bruce*, 4 Paige, 98, holding that court of chancery has concurrent jurisdiction with courts of law in suits for assignment of dower.

Nature of estate created by land certificates.

Cited in *Mowry v. Wood*, 12 Wis. 460, holding that deposit of school-land certificates as collateral security, amounted to mortgage upon equitable estate of debtor in lands.

20 AM. DEC. 209, BURKS v. ALBERT, 4 J. J. MARSH. 97.

Application of payments.

Cited in reference notes in 29 A. D. 691; 37 A. D. 625; 23 A. S. R. 48,—on application of payments; 39 A. D. 599, on how application of payments is made.

Cited in note in 3 E. R. C. 355, on appropriation of payments.

—By creditor.

Cited in *Bell v. Bell*, 20 S. C. 34; *Lowery v. Dickson*, 1 Tex. App. Civ. Cas. (White & W.) 245; *Bell v. Radcliff*, 32 Ark. 645,—holding that right of appropriation is in creditor, where debtor fails to declare on which account he pays; *Brice v. Hamilton*, 12 S. C. 32, holding failure of debtor to direct application at time of payment entitles creditor or his administrator to make application at any time before judgment or verdict.

—By debtor.

Cited in *Thomas v. Kelsey*, 30 Barb. 268, holding directions to apply moneys to debt for moneys loaned in preference to liability created by indorsements in accord with rules of equity.

—By court.

Cited in *Goetz v. Piel*, 26 Mo. App. 634; *Jones v. Kilgore*, 2 Rich. Eq. 63; *McDaniel v. Barnes*, 5 Bush, 183; *Bell & C. Co. v. Kentucky Glass Works Co.* 106 Ky. 7, 50 S. W. 1092,—holding that equity will apply payments to debt which is unsecured, where neither debtor nor creditor apply the payment.

Cited in note in 96 A. S. R. 56, on application of payment by court as between unsecured debts and debts secured by lien or mortgage.

20 AM. DEC. 211, BUTLER v. SCOFIELD, 4 J. J. MARSH. 139.**Validity of promise to make gift.**

Cited in *Hogue v. Bierne*, 4 W. Va. 658, holding promise to make gift in future of no legal validity.

Cited in reference notes in 32 A. D. 266, on delivery as essential to gift; 26 A. D. 325, on necessity of delivery to validity of gift.

Cited in notes in 21 L.R.A. 693, on undelivered transfer of property as a gift by unsealed instrument; 21 L.R.A. 694, on undelivered transfer of property as a gift by sealed instrument.

20 AM. DEC. 213, POTTS v. COM. 4 J. J. MARSH. 202.**Power of sheriff to release goods after levy.**

Cited in *Wadsworth v. Walliker*, 45 Iowa, 394, 24 A. R. 788, holding officer may at his peril release property after levy on claim of third party.

Cited in reference note in 36 A. D. 572, on refusal to sell where property discovered to be exempt after levy.

Liability of sheriff and sureties on official bond.

Cited in *State use of Hannibal & St. J. R. Co. v. Schacklett*, 37 Mo. 280, holding securities on sheriff's bond liable for his seizure of property for tax illegally assessed; *Taylor v. Johnson*, 17 Ga. 521, holding sheriff may show facts mitigating damages in action on his bond.

Cited in reference note in 50 A. D. 242, on right to show lien on property sufficient to absorb it in action against sheriff for not selling.

Measure of damages for officer's failure to sell.

Cited in reference note in 25 A. D. 52, on measure of damages for sheriff's neglect to sell under execution.

20 AM. DEC. 216, STEPHENS v. VAUGHAN, 4 J. J. MARSH. 206.**Excuse for nonperformance of contract.**

Cited in reference notes in 31 A. D. 707, on what will excuse performance of express covenant; 71 A. D. 156, as to whether act of God excuses performance of contract; 68 A. D. 375, on act of God as excuse for nonperformance of contract.

Delivery of property to rightful owner by bailee.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co.* 13 Ind. App. 225, 41 N. E. 480, holding bailee may show that he has in good faith or by legal process yielded possession to the rightful owner; *Poole v. Adkisson*, 1 Dana, 110 (dissenting opinion), on estoppel of bailee from denying bailor's title.

Estoppel of bailee.

Cited in reference notes in 99 A. D. 514; 37 A. D. 430,—on bailee's right to deny bailor's title; 118 A. S. R. 145, on estoppel of bailee to deny his bailor's right.

20 AM. DEC. 218, FORSYTHE v. ELLIS, 4 J. J. MARSH. 298.**Liability for unauthorized acts of sheriff.**

Cited in reference notes in 61 A. D. 565, on liability of sheriff for his own acts; 24 A. S. R. 747, on officer making wrongful levy as trespasser; 13 A. S. R. 289, as to whether sheriff's bond increases his liability.

Cited in note in 39 A. D. 512, on sheriff's liability for levying on stranger's goods.

— **Liability for act of deputy.**

Cited in reference notes in 36 A. D. 721; 61 A. D. 565; 99 A. D. 561,—on officer's liability for acts of deputy; 41 A. D. 683, on sheriff's liability for deputy's acts and defaults; 33 A. D. 224, on sheriff's liability for his deputy's torts; 41 A. D. 296, on liability of sheriff for misconduct of deputy.

— **Liability of sureties.**

Cited in State use of *Hannibal & St. J. R. Co. v. Schacklett*, 37 Mo. 280, holding sheriff's bondsmen liable for his seizure of property to enforce payment of tax on property not subject to taxation; *State ex rel. Brennan v. Dierker*, 101 Mo. App. 630, 74 S. W. 153, holding sheriff's bondsmen not liable for unlawful arrest by him without warrant; *Chandler v. Rutherford*, 43 C. C. A. 218, 101 Fed. 774, holding sureties not liable for acts of officer done under color of office without authority; *Walsh v. People*, 6 Ill. App. 204; *Hill v. Ragland*, 114 Ky. 209, 70 S. W. 634; *State use of Gates v. Fitzpatrick*, 64 Mo. 185; *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 173; *State use of Story v. Jennings*, 4 Ohio St. 418; *Holliman v. Carroll*, 27 Tex. 23, 84 A. D. 606; *Sangster v. Com.* 17 Gratt. 124; *Bishop v. McGillis*, 80 Wis. 575, 27 A. S. R. 63, 50 N. W. 779; *Van Pelt v. Littler*, 14 Cal. 194,—holding officer liable on official bond for seizing property of one person under writ against another; *Harrison v. Shanks*, 13 Bush, 620, holding sheriff liable to real owner of property taken on execution against another without bond of indemnity.

Cited in reference note in 32 A. S. R. 262, on liability of sureties for unlawful levy by sheriff.

Denied in *State, Allen, Prosecutor, v. Conover*, 28 N. J. L. 224, 78 A. D. 54, holding sheriff's bondsmen not liable for his seizure of property of one under execution against another.

Implied warranty on sale of chattel.

Cited in notes in 54 A. D. 506; 23 E. R. C. 207,—on implied warranty of title on sale of chattel.

Caveat emptor applied to judicial sales.

Cited in *Worthy v. Johnson*, 8 Ga. 236, 52 A. D. 399, holding that the rule of *caveat emptor* applies to judicial sales; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134, holding sale by trustee does not imply warranty of title in absence of fraud or gross negligence; *Griffin v. Pickett*, 6 J. J. Marsh. 388, on grounds for enforcing amount of sale bond.

Compensation for property taken.

Cited in reference notes in 36 A. D. 385, on compensation for exercise of right of eminent domain; 74 A. D. 555, on legislative power to take private property for public use without compensation; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use.

Cited in note in 22 A. D. 756, on eminent domain.

20 AM. DEC. 223, MONTGOMERY v. HOUSTON, 4 J. J. MARSH. 488.

Recovery of damages for void injunction.

See *Mark v. Hyatt*, 135 N. Y. 306, 18 L.R.A. 275, 31 N. E. 1099, holding damages from obedience of injunction which is utterly void, and under which no action had been taken by plaintiff, not recoverable.

20 AM. DEC. 226, MARTIN v. BLIGHT, 4 J. J. MARSH. 491.**Rights of vendor under judicial sale.**

Cited in *Langhorne v. Payne*, 14 B. Mon. 624, holding mortgagor agreeing that representative of mortgagee purchase on foreclosure and resell to pay debt entitled to decree for lands remaining after payment.

Cited in reference notes in 34 A. D. 204, as to when sheriff's sales will be set aside; 83 A. D. 227, on effect of fraud in execution sale; 53 A. D. 573, on validity of execution sale without bidders or bystanders.

— Effect of preventing competition.

Cited in *Stuart v. Brown*, 135 Ind. 232, 34 N. E. 976, holding fraud by purchaser at judicial sale tending to prevent competition ground for setting it aside; *Arnold v. Cord*, 16 Ind. 177, holding that purchaser at sheriff's sale preventing attendance of other bidders by fraud, not entitled to hold land purchased.

Cited in reference notes in 29 A. D. 136, on effect of fraudulent prevention of competition at execution sale; 49 A. D. 392, on effect of acts discouraging or preventing competition at execution sale.

Cited in note in 20 L.R.A. 549, on effect of preventing or checking bids on validity of sale at auction.

20 AM. DEC. 229, CLARKSON v. WHITE, 4 J. J. MARSH. 529.**Nature of act of issuing execution.**

Cited in reference notes in 37 A. D. 707, on issuance of writ of execution as ministerial act; 65 A. D. 94, on execution following judgment as matter of course.

Ratification of execution.

Cited in *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322, holding receipt of money by judgment creditor ratification of execution issued without his authority.

Cited in reference note in 79 A. D. 463, on creditor's ratification of clerk's unauthorized issuance of execution as making it valid.

Injunction against execution sale.

Cited in note in 30 L.R.A. 136, on irregularities as to conditions precedent to execution as ground for injunction against sale thereunder.

20 AM. DEC. 230, HUGHES v. EASTEN, 4 J. J. MARSH. 572.**Delivery of deeds.**

Cited in *Miller v. Physick*, 24 Ark. 244, holding deed executed by several and found among papers of one obligor after his death and delivered to obligee by stranger, not binding; *Hulick v. Scovill*, 9 Ill. 159, holding procuring of deed from auditor by third party without authority of grantee not sufficient delivery; *Stokes v. Anderson*, 118 Ind. 533, 4 L.R.A. 313, 21 N. E. 331, holding signing deed and leaving it on table from which it was taken by grantee not sufficient delivery; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, holding delivery of deed may be shown by acts or words or both combined; *Hibberd v. Smith*, 67 Cal. 547, 56 A. R. 726, 4 Pac. 473, holding delivery and acceptance of a deed essential to its validity.

Cited in reference notes in 22 A. D. 563, on what constitutes delivery of deed; 39 A. S. R. 73, on necessity for delivery of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed; 56 A. D. 442, on acts, etc., from which delivery

of deed may be inferred; 52 A. D. 563, on inference of delivery from acts without words, or from words without acts, or from both combined.

Cited in notes in 53 A. S. R. 532, on delivery of deed; 55 A. D. 412, on invalidity of deed for want of delivery.

Parol evidence as to writing.

Cited in reference notes in 57 A. D. 300, on secondary evidence of writing; 44 A. D. 83, on parol evidence of contents of written instruments; 22 A. D. 179, on parol evidence of contents of lost writing; 56 A. D. 107, on secondary evidence of contents of lost instruments.

20 AM. DEC. 232, SHAIN v. MARKHAM, 4 J. J. MARSH. 578.

Justifiable assault.

Cited in *Brubaker v. Paul*, 7 Dana, 428, 32 A. D. 111, holding wounding justifiable in repelling an assault by one obstructing a navigable stream.

Cited in reference notes in 26 A. D. 191, as to when assault and battery is justifiable; 56 A. D. 206, as to when assault to prevent trespass is justifiable; 61 A. D. 414, on what will sustain plea of justification in action for assault and battery; 38 A. D. 720, on resistance by plaintiff to abatement of nuisance as justification for assault by defendant; 24 A. D. 649, on right to commit assault and battery in defending one's possession.

Cited in note in 82 A. D. 674, on degree of force which is justifiable to defend one's property.

20 AM. DEC. 237, BOSTICK v. KEIZER, 4 J. J. MARSH. 597.

What property subject to debts.

Cited in *Ketcham v. State*, 12 Ind. 620, holding land dedicated to city as market not subject to sale on execution against the city; *Houghton v. Davenport*, 74 Me. 590, holding trust property not liable for debt of trustee though held and recorded in his name; *Bowen v. Lansing*, 129 Mich. 117, 95 A. S. R. 427, 57 L.R.A. 643, 88 N. W. 384, holding intestate's interest in realty sold on contract not subject to debt of heir.

Cited in reference notes in 24 A. D. 436; 26 A. D. 231,—on property subject to execution; 62 A. S. R. 886, on issue of execution against judgment debtor in another capacity; 71 A. S. R. 588, on liability of trust property to execution; 40 A. D. 622, on trust property as subject to execution against trustee.

Change of possession on transfer of property.

Cited in reference notes in 47 A. S. 387, on delivery to pass title to chattel; 49 A. D. 65, on possession by vendor after sale as evidence of fraud.

Presence of property at judicial sale.

Cited in *Hannah v. Carrington*, 18 Ark. 85, holding objection that property was not present at trust sale not available to stranger; *Jones v. Portsmouth & C. R. Co.* 32 N. H. 544, holding sale of shares of stock by officer on execution without knowing quantity invalid.

Power of trustee to bind trust estate.

Cited in *Owen v. Reed*, 27 Ark. 122, holding trustee unable to bind estate beyond authority given by instrument creating the trust.

20 AM. DEC. 241, CAMPBELL v. WHITTINGHAM, 5 J. J. MARSH. 96.

Rights of vendee generally.

Cited in note in 12 L.R.A. 246, on rights and remedies of vendee in contract of sale of land.

Defect in title as ground for rescission.

Cited in *English v. Thomasson*, 82 Ky. 280; *Campbell v. Medbury*, 5 Biss. 33, Fed. Cas. No. 2,365,—holding defect in title of grantor no defense by grantee in undisturbed possession to suit for purchase price in absence of fraud.

Misrepresentation as ground for rescission or damages.

Cited in *Cullum v. Branch Bank*, 4 Ala. 21, 37 A. D. 725, holding purchaser entitled to rescission upon eviction under encumbrance unknown to him at time of purchase; *Yeates v. Pryor*, 11 Ark. 58, holding vendee may rescind whole contract for vendor's inability to convey a considerable portion of the land; *Upshaw v. Debow*, 7 Bush, 442, holding fraudulent misrepresentation of quantity of land sold ground for rescission by vendee; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14, holding grossly negligent misrepresentation by vendor of amount of encumbrance on land ground for rescission by vendee; *Harvey v. Smith*, 17 Ind. 272, holding fraudulent representations on sale of newspapers as to number of subscribers ground for damages.

Cited in reference notes in 84 A. S. R. 814, on fraudulent representations as to title to land; 35 A. D. 408, on fraudulent representation as to title to land rendering person making it responsible; 68 A. D. 120, on vendee's right to equitable relief from vendor's concealment or misrepresentation as to title to land; 27 A. D. 550, on suppression of the truth or expression of untruth as ground for rescission.

Cited in note in 37 L.R.A. 604, on what diligence is required as to searching title and records by one to whom fraudulent representations are made to effect contract.

20 AM. DEC. 248, LUNSFORD v. TURNER, 5 J. J. MARSH. 104.**Estoppel of tenant.**

Cited in reference notes in 22 A. D. 563; 27 A. D. 466,—on estoppel of tenant to deny landlord's title; 39 A. D. 334, on tenant's right to dispute landlord's title during tenancy; 50 A. D. 791, on eviction of tenant by title paramount.

Cited in notes in 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title; 69 A. D. 511, as to when tenant can dispute landlord's title; 89 A. S. R. 99, on effect of eviction by paramount title to remove estoppel of tenant to deny landlord's title.

Acquisition of title by tenant.

Cited in *Hodges v. Shields*, 18 B. Mon. 828, holding that tenant may acquire title on entire failure of title in landlord; *Stout v. Merrill*, 35 Iowa, 47, holding tenant of one holding under tax deeds cannot acquire interest of heir having right to redeem.

Cited in note in 120 A. S. R. 58, on acquisition of adverse title as defense in action for unlawful detainer.

Right of tenant to attorn to another.

Cited in *Roe v. Doe*, 48 Ga. 165, 15 A. R. 656, holding tenant under land contract may attorn to purchaser under execution sale against landlord; *George v. Putney*, 4 Cush. 351, 50 A. D. 788, holding tenant may attorn to judgment creditor of landlord who threatens to oust him under title acquired by execution; *Merryman v. Bourne*, 9 Wall. 592, 19 L. ed. 683, holding that tenant may attorn to one threatening suit upon a paramount title; *Stridde v. Saroni*, 21 Wis. 174, holding upon judgment in ejectment against tenant he may attorn to plaintiff though he failed to notify his lessor.

Cited in note in 89 A. S. R. 105, on validity of attornment to stranger.

Effect on landlord of ejectment against tenant.

Cited in *Lowe v. Emerson*, 48 Ill. 160, holding judgment in ejectment against tenant not conclusive against landlord who was not notified.

Parties to scire facias proceeding.

Cited in notes in 94 A. D. 233, on parties defendant to scire facias to revive judgment; 122 A. S. R. 57, on joinder of new parties in scire facias; 122 A. S. R. 89, on new parties against whom proceedings by scire facias must be prosecuted.

20 AM. DEC. 251, MCGEE v. SODUSKY, 5 J. J. MARSH. 185.**Evidence of character in action for slander.**

Cited in reference note in 24 A. D. 105, on evidence of plaintiff's character, rank, and condition.

Cited in note in 5 A. R. 360, on the admissibility of evidence of plaintiff's good character in libel.

Evidence admissible under general issue in slander.

Cited in *Harper v. Harper*, 10 Bush, 447, holding evidence of truth of charge inadmissible under general issue in action for slander.

Cited in reference note in 24 A. D. 104, on evidence in mitigation under general issue.

20 AM. DEC. 255, DANA v. GILL, 5 J. J. MARSH. 242.**Nonsuits.**

Cited in reference note in 34 A. D. 98, on ground of compulsory nonsuit.

Effect of order for new trial on payment of costs.

Cited in *Heffner v. Scranton*, 27 Ohio St. 579, holding order for new trial on payment of costs is not conditioned on such payment.

Actions between partners.

Cited in reference notes in 35 A. D. 136, on right to sue partner at law; 69 A. S. R. 968, on right of action on covenant in partnership articles.

Cited in note in 40 A. S. R. 574, on remedy which one partner has by suit or action against another after dissolution.

20 AM. DEC. 260, TOURNE v. LEE, 8 MART. N. S. 548.**Authority of another as defense to trespass or replevin.**

Cited in *Coco v. Hardie*, 25 La. Ann. 230, holding that there is no ground for a call in warranty in trespass; *Hood v. Stewart*, 2 La. Ann. 219, holding that agent cannot call in warranty his employer in defense to trespass.

Cited in reference notes in 88 A. D. 675, on right to plead property in stranger in replevin; 51 A. D. 646, on title in stranger being no defense in trespass *quare clausum fregit*.

Police power.

Cited in *Haigh v. Bell*, 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666, holding act preventing hogs from running at large valid exercise of police power.

Cited in reference note in 90 A. D. 283, as to valid exercise of police power by municipal corporations.

Municipal power over nuisances.

Cited in reference notes in 26 A. D. 102, on remedies for public nuisances; 4 A. S. R. 256, on right of municipality to declare what is a nuisance; 22 A. D.

425; 28 A. D. 191,—on power of municipal corporation to declare certain business or thing a nuisance.

Cited in notes in 40 A. D. 344, on power of municipal corporations to prohibit and prevent nuisances; 27 A. D. 98, on power of municipal corporations to remove nuisances and to determine what is a nuisance; 39 L.R.A. 683, on municipal power over water and water courses as nuisances; 39 L.R.A. 660, on municipal power over nuisances consisting of obstructions of and encroachments on street.

20 AM. DEC. 262, MORGAN v. HIS CREDITORS, 8 MART. N. S. 599.

Rights of individual and partnership creditors.

Cited in *Gueringer v. His Creditors*, 33 La. Ann. 1279, holding that wife as individual creditor of husband cannot compete with partnership creditors though other copartner had retired; *Hagan v. Scott*, 10 La. 345; *Arnold v. Hamer*, Freem. Ch. (Miss.) 509; *Wilder v. Keeler*, 3 Paige, 167, 23 A. D. 781,—holding that individual creditors have preference in individual assets over partnership creditors; *Fowler v. Their Creditors*, 3 La. Ann. 189, holding partnership creditors participate equally by statute with individual creditors in individual assets; *Bernard v. Dufour*, 17 La. 596, holding undivided share of partner in realty liable to claims of all his creditors without distinction; *Claiborne v. Creditors*, 18 La. 501, holding insurance on partnership boat a fund liable first to partnership creditors; *Thomson v. Mylne*, 11 Rob. (La.) 349, holding balance due from one member of particular partnership to copartner for price of his share in property not a partnership debt.

Cited in reference notes in 25 A. D. 745, on liability of partnership property; 23 A. D. 789, on relative rights of partnership and individual creditors; 47 A. D. 694, on priority between partnership creditors and separate creditors of partners as to partnership property; 51 A. D. 601, on partnership property being first liable for partnership debts; 33 A. D. 617, as to when partnership assets will be applied to debt of individual partner; 85 A. D. 642, on right of separate creditor of partnership to attach and sell joint property; 77 A. D. 115, 116, on rights of creditor of partnership against estate of deceased partner.

20 AM. DEC. 266, BOATNER v. VENTRESS, 8 MART. N. S. 644.

Conclusiveness of decisions of register and receiver of United States Land Office.

Cited in *Newport v. Cooper*, 10 La. 155; *Boatner v. Scott*, 1 Rob. (La.) 546,—denying power of register and receiver of United States Land Office to revoke or modify their decisions regarding conflicting claims.

Cited in reference notes in 99 A. S. R. 820, on conclusiveness of decisions of Land Department; 23 A. D. 492; 36 A. D. 536; 43 A. D. 547; 49 A. D. 111; 52 A. S. R. 219,—on conclusiveness of actions of land officers; 50 A. S. R. 684, on conclusiveness of decision of general land office as to public lands; 43 A. S. R. 186, on collateral attack on patent to public land; 62 A. D. 702, on conclusiveness of decision of register and receiver of land office; 36 A. D. 681, on how far decisions of register and receiver of United States Land Office are final.

Government or state land patent as evidence.

Cited in *Thomas v. Turnley*, 3 Rob. (La.) 206, holding that in controversies between original grantee of land and one whose title has been confirmed by the Commissioners of the United States the certificate of the latter is not evidence; *Grant v. Smith*, 26 Mich. 201, holding patent of state to swamp lands admissible to prove title of patentee in action of trover for cutting timber.

Rights acquired by donee of land from the United States.

Cited in *Higgins v. McMicken*, 1 La. 53, holding that donee of land from the United States takes it subject to all conditions affixed by the donor.

Effect and conclusiveness of patent to land.

Cited in reference notes in 39 A. D. 516, on effect of patent and how impeachable; 61 A. D. 597, on right to collaterally impeach patent regular on its face; 22 A. D. 764, on notice by recitals in patents and other instruments.

Right to recover for improvements.

Cited in reference notes in 21 A. D. 410, on right to recover for improvements on eviction; 9 A. S. R. 805, on allowance for improvements in action for *meane profits* against bona fide possessor.

Cited in note in 81 A. S. R. 171, on what are betterments and when allowance should be made therefor.

20 AM. DEC. 277, BRADEN v. LOUISIANA STATE INS. CO. 1 LA. 220.**Mortgagee's equitable lien on insurance money.**

Cited in *Wheeler v. Factors & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055, holding if mortgagor is bound to insure for security of mortgagee the latter has an equitable lien on money due under policy; *Howard v. Delgado*, 57 C. C. A. 270, 121 Fed. 26, on equitable liens.

Power of agent to make insurance payable to self.

Cited in *Pritchett v. Mechanics' & T. Ins. Co.* 27 La. Ann. 525, holding one taking out insurance as agent for another cannot direct payment to himself.

Cited in reference note in 29 A. D. 567, on insurance effected by agent for insured.

Action by agent.

Cited in reference note in 26 A. D. 215, on action by agent in his own name.

Set-off.

Cited in reference note in 27 A. D. 131, as to when set-off is allowable.

20 AM. DEC. 279, MALPICA v. McKOWN, 1 LA. 248.**What law governs contracts.**

Cited in *Curtis v. Leavitt*, 15 N. Y. 9, holding in absence of special provision agreements are governed by law where made; *Arayo v. Currell*, 1 La. 528, 20 A. D. 286, holding law of place where contract is to be performed governs it; *Keene v. Lizardi*, 6 La. 315, 26 A. D. 478, on what law governs liability on contracts.

Cited in reference notes in 31 A. D. 270, on law governing contract; 30 A. S. R. 828, as to when contract is governed by law of place of performance; 36 A. D. 356, on *lex loci* as determining right under contract; 37 A. D. 420, on what law governs validity of contract; 27 A. D. 141, on law governing construction of contract; 10 A. S. R. 698, as to what law governs the construction and enforcement of contracts; 26 A. D. 491, on law governing interpretation, construction, and validity of contracts; 61 A. D. 172, on rights and liabilities of parties to contract governed by law of place of contract.

Cited in notes in 20 A. D. 293, on law governing contract; 5 E. R. C. 888, on what law governs contract of affreightment; 99 A. D. 670, as to where contract made by agent is deemed to have been made.

Denied in *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274, holding liability of shipowners governed by law where they reside.

Existence of common law.

Cited in *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342, holding English common law in force in Colorado only as adopted by statute.

Presumption as to foreign law.

Cited in reference note in 33 A. S. R. 54, on presumption as to foreign laws.

Cited in note in 113 A. S. R. 879, on presumption as to existence of common law in sister state or foreign country which was populated or derived from a mother country in which common law did not obtain.

Judicial notice of foreign law.

Cited in *Mexican C. R. Co. v. Marshall*, 34 C. C. A. 133, 91 Fed. 933, holding courts of Texas will take judicial notice of laws of Mexico existing before their separation.

Cited in note in 67 L.R.A. 36, on judicial cognizance of law of other state.

Proof of foreign laws.

Cited in *Bonneau v. Poydras*, 2 Rob. (La.) 1; *Pecquet v. Pecquet*, 17 La. Ann. 204,—holding laws of France must be proved in Louisiana; *Mexican C. R. Co. v. Glover*, 46 C. C. A. 334, 107 Fed. 356; *Berluchaux v. Berluchaux*, 7 La. 545,—on recognition of Spanish law in Louisiana.

Cited in note in 113 A. S. R. 869, on foreign laws as provable facts.

Liability of owner or master of vessel.

Cited in *The Leonidas*, Olcott, 12, Fed. Cas. No. 8,262, holding that holder of bill of lading has remedy in admiralty against master or personally against owners or *in rem* against vessel for nondelivery of goods.

Cited in reference notes in 35 A. D. 244, on liability of owners for acts of master; 25 A. D. 199; 26 A. D. 481,—on liability of owner for tortious acts of master.

Distinguished in *Walker v. Goslee*, 11 La. Ann. 389, holding delivery of effects of deceased passenger to agent of administrator appointed in Massachusetts before curator appointed in Louisiana will discharge master.

20 AM. DEC. 284, MACDONOUGH v. ELAM, 1 LA. 489.**Judicial sales.**

Cited in *Dupre v. Thompson*, 25 La. Ann. 503 (dissenting opinion), on presumption of validity of tax sale; *Lannes v. Workingmen's Bank*, 29 La. Ann. 112, holding purchaser at tax sale holds *prima facie* title which can only be attacked directly; *M'Donough v. Gravier*, 9 La. 531, on necessity for exact description of land sold under execution; *Nelson v. Kinney*, 93 Tenn. 428, 25 S. W. 100, on conveyance fraudulent as to subsequent debt; *Sampson v. Williamson*, 6 Tex. 102, 55 A. D. 762, on what constitutes a forced sale.

Cited in reference notes in 58 A. S. R. 231, on tax sales *en masse*; 42 A. D. 484, on necessity of strict compliance with statute as to tax sale.

20 AM. DEC. 285, MORGAN v. THEIR CREDITORS, 1 LA. 527.**Novation of negotiable instruments.**

Cited in *Exchange & Bkg. Co. v. Walden*, 15 La. 431, holding renewal of note secured by mortgage without surrender of old no novation.

Cited in reference notes in 26 A. D. 746, on novation; 25 A. D. 181, on what constitutes a novation; 28 A. D. 354, on discharge of surety by novation between principal and creditor.

Distinguished in *Turner v. Lewis*, 6 La. Ann. 774, holding payments between

parties dealing together will be imputed to mercantile account, not to mortgage note held by creditor.

Denied in *Nightingale v. Chafee*, 11 R. I. 609, 23 A. R. 531, holding note given for antecedent debt not discharge unless given and received as absolute payment.

20 AM. DEC. 286, ARAYO v. CURRELL, 1 LA. 528.

What law governs contracts.

Cited in *Keene v. Lizardi*, 6 La. 315, 26 A. D. 478, on what law governs liability on contracts; *The Brantford City*, 29 Fed. 373, holding stipulations against carrier's negligence made here invalid though valid by law of ship's flag; *Rothschild v. Rochester & P. R. Co.* 1 Pa. Co. Ct. 620, 8 Sadler (Pa.) 83, 4 Atl. 385, holding corporation consolidated from two corporations of different states controlled by law where acting.

Cited in reference notes in 31 A. D. 270, on law governing contract; 11 A. S. R. 889, on conflict of laws as to contract; 20 A. D. 303; 27 A. D. 141,—on law governing construction of contract; 30 A. S. R. 828, as to when contract is governed by law of place of performance; 39 A. D. 406, on what law governs carrier's contract; 32 A. D. 310, on nonenforcement of contract made elsewhere for goods; 20 A. D. 284, on law governing agent's authority to bind principal.

Cited in note in 63 A. D. 643, on what law governs contracts of shipmaster.

Denied in *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274, holding liability of shipowners governed by law where they reside.

Liability of principal for acts of agent.

Cited in *Block v. Bannerman*, 10 La. Ann. 1, holding owners of vessel liable for torts of master committed within scope of his authority; *The Leonidas*, Olcott, 12, Fed. Cas. No. 8,262, holding that holder of bill of lading has remedy in admiralty against the master or personally against owners or *in rem* against vessel for nondelivery of goods; *Farrar v. Duncan*, 29 La. Ann. 126, holding principal bound by contract made by agent necessary to carry out objects of agency; *Fellows v. High*, 7 La. Ann. 451 (dissenting opinion), on liability of vessel owners for misconduct of master to passenger.

Cited in reference notes in 35 A. D. 244, on liability of owners for acts of master; 25 A. D. 199, on owner's liability for tortious acts of master.

Proof of foreign laws.

Cited in *Routh v. Agricultural Bank*, 12 Smedes & M. 161, holding one desiring to take advantage of law of another state must prove it; *Norris v. Harris*, 15 Cal. 226, holding laws of other states are to be proved same as other facts; *Bradley v. Mutual Ben. L. Ins. Co.* 3 Lans. 341, holding law of another state presumed same as law of forum unless contrary shown; *Graham v. Williams*, 21 La. Ann. 594, holding after recognizing law of another state it will be presumed to exist until contrary is proved; *Herr v. Johnson*, 11 Colo. 393, 18 Pac. 342, holding English common law in force in Colorado only as adopted by statute; *Stokes v. Mackin*, 62 Barb. 145, holding common law presumed to prevail in England until contrary shown; *Pecquet v. Pecquet*, 17 La. Ann. 204, holding laws of France must be proved in Louisiana; *Berluclaux v. Berluclaux*, 7 La. 545, on recognition of Spanish law in Louisiana.

Cited in reference note in 37 A. D. 84, on what falls within judicial notice.

Cited in note in 89 A. D. 675, on judicial notice of laws of mother state or country.

20 AM. DEC. 294, POLICE JURY v. HAW, 2 LA. 41.**Officers de facto.**

Cited in reference notes in 42 A. D. 148; 44 A. D. 321,—on officers *de facto*; 90 A. D. 497, as to who are officers *de facto*; 38 A. D. 106, on extent of validity of acts of officer *de facto*.

Cited in note in 25 L. ed. U. S. 314, on validity of acts of officer *de facto*.

Liability of official sureties.

Cited in *Parker v. Bradley*, 2 Hill, 584, on liability of sureties.

Cited in notes in 23 A. D. 521, on effect of sureties signing sheriff's bond; 45 L.R.A. 338, on conditional execution of collector's bonds under parol agreement not to take effect until signed by others.

—Effect of irregularities.

Cited in *State v. Winfree*, 12 La. Ann. 643, holding parties signing bond impliedly waive defects in its form; *Blanchard v. Gloyd*, 7 Rob. (La.) 542, holding error in filling in date of judgment no defense for surety on appeal bond; *McGuire v. Bry*, 3 Rob. (La.) 196, holding sureties on sheriff's bond for collection of taxes cannot contest legality of assessment in suit for default in taxes collected.

—Official incapacity of principal.

Cited in *State v. Hayes*, 7 La. Ann. 118, holding sureties of one acting as tax collector, though ineligible, liable for his default; *State v. Dunn*, 11 La. Ann. 549, holding sureties cannot plead ignorance of sheriff's defalcation at time they sign bond; *Lafayette Parish v. Judice*, 39 La. Ann. 896, 2 So. 792, holding sureties on officer's bond estopped from denying his official capacity; *Lyon Bros. & Co. v. Stern, Kenney & Boze*, 110 La. 473, 34 So. 641, holding surety on bond of corporation cannot deny its power to perform acts bond provides for.

Release of sureties.

Cited in reference notes in 29 A. D. 225, on what acts of creditor discharge surety; 31 A. S. R. 738, on release of surety by indulgence to principal; 22 A. D. 191, on release of surety by failure to sue principal.

Cited in note in 23 A. D. 197, on discharge of surety by forbearance, laches, or indulgence as to principal.

Statute creating mortgage on estates of officers.

Cited in *Cain v. Bouligny*, 7 Rob. (La.) 159, holding statute creating mortgage on estates of sheriff not applicable to marshals.

Contradiction of judicial record by parol.

Cited in *Henderson v. Walmsly*, 23 La. Ann. 582, holding parol evidence inadmissible to contradict judicial record except for fraud.

20 AM. DEC. 297, HUDSON v. DANGERFIELD, 2 LA. 63.**Issuance of two executions at same time.**

Cited in *State v. Probate Judge*, 3 Rob. (La.) 355, holding second *fi. fa.* cannot be issued on judgment till first is returned.

Cited in reference note in 22 A. D. 729, on right to issue two executions at the same time on the same judgment.

Irregularities as ground for injunction.

Cited in *Hatch v. City Bank*, 1 Rob. (La.) 470, denying injunction for irregularity without showing injury or apprehension of injury; *Calderwood v.*

Prevost, 9 Rob. (La.) 182, denying injunction to execution debtor because sheriff advertised property without first taking possession; Williams v. Douglass, 47 La. Ann. 1277, 17 So. 805, holding alleged premature issuance of writ of seizure and sale not ground for injunction; Dupre v. Hayes, 23 La. Ann. 550, denying injunction against sale of property under execution for misdescriptions which could not have deceived debtor; Reboul v. Behrens, 5 La. 79, on dissolution of injunction for insufficiency of affidavit.

Distinguished in Spreyer v. Miller, 108 La. 204, 61 L.R.A. 781, 32 So. 524, holding omission of amount from injunction bond ground for dissolution.

20 AM. DEC. 299, TOWN v. MORGAN, 2 LA. 112.

Law governing conditional obligations.

Cited in United States ex rel. Gaines v. New Orleans, 17 Fed. 483, holding conditional obligations governed by law when contracted, not when condition happens.

Rights of partnership creditors to individual assets.

Cited in Flower v. His Creditors, 3 La. Ann. 189; Gueringer v. His Creditors, 33 La. Ann. 1279,—on right of partnership creditors to share in individual assets.

20 AM. DEC. 300, CLAGUE v. CREDITORS, 2 LA. 114.

Usury.

Cited in Rosenda v. Zabriskie, 4 Rob. (La.) 493; Baker v. Garlick, 9 Rob. (La.) 125; Missouri, K. & T. Trust Co. v. Krumseig, 23 C. C. A. 1, 40 U. S. App. 620, 77 Fed. 32,—holding courts will not permit a device adopted to avoid usury law; State ex rel. Ornstine v. Cary, 126 Wis. 135, 11 L.R.A. (N.S.) 174, 105 N. W. 792, holding statute making usury a misdemeanor valid exercise of police power.

Cited in reference notes in 66 A. D. 77, on loss imposed on borrower in addition to amount lent and lawful interest as usury; 78 A. D. 466, on effect of contract causing loss to borrower in addition to lawful interest as usurious.

Cited in notes in 55 A. D. 394, on usury in exchange of choses in action; 53 L.R.A. 464, on validity of life insurance to secure usurious debt to insurer.

Conflict of laws.

Cited in reference note in 70 A. D. 85, on *lex loci contractus* governing construction of contracts.

— As to usury.

Cited in reference note in 30 A. S. R. 598, on law governing usurious contracts.

Cited in notes in 46 A. S. R. 201, on conflict of laws as to usury; 55 A. D. 391, as to what law governs usurious contracts; 62 L.R.A. 42, on effect of penal or remedial character of foreign statute as to usury.

20 AM. DEC. 304, BULLARD v. HINKLEY, 6 ME. 289.

Effect of fraudulent mortgage.

Cited in reference note in 22 A. S. R. 781, on effect of fraudulent mortgage as against creditors of mortgagor.

Sale of equity in real estate.

Cited in Freeland v. Freeland, 102 Mass. 475, holding an assignee in insolvency may treat conveyance by debtor as void and sell his interest without first suing to set it aside; Bartlett v. Stearns, 73 Me. 17, holding sale on execution for gross

sum of equity of redemption under two mortgages on same property not void as joint sale of two equities; *Brown v. Snell*, 46 Me. 490, holding sale of equitable right to redeem, if mortgage paid before sale, passes nothing; *Russell v. Dudley*, 3 Met. 147, holding purchaser on execution of equity of redemption cannot prove mortgage fraudulent and hold in fee; *Crane v. Guthrie*, 47 Iowa, 542, holding that nothing passes by sale under order of equitable interest in realty when interest was absolute.

20 AM. DEC. 309, CLARK v. FOXCROFT, 6 ME. 296.

Liability of officer in execution of process.

Cited in *Willard v. Whitney*, 49 Me. 235, holding officer cannot impeach judgment to lessen his liability for not keeping property attached; *Dyer v. Tilton*, 71 Me. 413, holding that deputy acted under direction of plaintiff is defense by sheriff for not arresting defendant; *People use of Whipple v. Dumpley*, 2 Mich. N. P. 197, holding in action against sheriff and sureties for nonreturn of execution irregularities in judgment less than jurisdictional defect no defense; *Forrist v. Leavitt*, 52 N. H. 481, holding officer justified in making arrest under verbal warrant of justice though latter acted in bad faith.

Cited in note in 21 A. D. 208, on waiver by officer of benefit of process regular on its face.

Fraudulent conveyance as defense to levying officer.

Cited in note in 95 A. S. R. 124, on fraudulent conveyance as defense to sheriffs, constables, and marshals seizing property of third person.

Necessity for return of legal process.

Cited in *Fletcher v. Wrighton*, 184 Mass. 547, 69 N. E. 313, holding officer can justify conversion by execution if return made before execution offered in evidence; *True v. Emery*, 67 Me. 28, holding return of execution upon which equity was sold not necessary to validity of sale against subsequent purchaser; *Womack v. Bird*, 63 Ala. 500, holding defendant in trespass justifying under meane process after return day must show return or excuse for failure.

Effect of irregularities in judicial sales.

Cited in *May v. Thomas*, 48 Me. 397, holding sale of stock of goods in gross under execution passes title to bona fide purchaser though statute contemplates sale by articles; *Tuttle v. Gates*, 24 Me. 395, holding sale of goods by officer on execution, a legal transfer though statute not conformed to; *Hunter v. Perry*, 33 Me. 159, holding sale of logs by corporation authorized to sell for tolls passes title though corporate proceedings for sale irregular.

Necessity of pleading fraud.

Cited in reference note in 24 A. D. 753, on necessity of pleading fraud.

20 AM. DEC. 316, PLUMMER v. DENNETT, 6 ME. 421.

Action for wrongful use of process.

Cited in *Carle v. Delesdernier*, 13 Me. 363, 29 A. D. 508, holding sheriff not liable in trespass for arresting, in obedience to precept, a person privileged from arrest; *Bassett v. Bratton*, 86 Ill. 152; *Blalock v. Randall*, 76 Ill. 224,—holding case, not trespass, proper action for act done under regular legal process; *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993, on form of action for malicious use of process.

Cited in reference notes in 22 A. D. 337, on action for malicious prosecution;

24 A. D. 683; 30 A. D. 621,—on case as proper remedy for malicious prosecution or arrest; 86 A. D. 215, on actions for prosecution of civil suit or process; 28 A. D. 258, on necessity of both malice and want of probable cause to maintain action for malicious prosecution; 66 A. D. 462, on party at whose instance magistrate has acted, as trespasser with respect to all acts done in execution of process issued by such magistrate in excess of authority.

Cited in note in 13 L.R.A. 60, on action for malicious prosecution in case of arrest.

Distinguished in *Breck v. Blanchard*, 20 N. H. 323, holding trespass proper action against party causing execution to be levied after payment.

20 AM. DEC. 320, *GODDARD v. BOLSTER*, 6 ME. 427.

Death of party between verdict and judgment.

Cited in *Brown v. Wheeler*, 18 Conn. 199, holding that on death of plaintiff after verdict, judgment will be entered as of date of verdict though action not one which would survive; *Blaisdell v. Harris*, 52 N. H. 191, entering judgment as of term verdict rendered, on overruling defendant's motion to set it aside, when plaintiff died while motion pending; *Webber v. Stanton*, 1 Mich. N. P. 97, holding that on death of plaintiff after trial, judgment entered as of date of rendition, is valid; *Hilker v. Kelley*, 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304, holding court may enter judgment in tort though plaintiff died after verdict; *Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136, holding though plaintiff in tort action died after verdict her attorney could enter judgment; *Holford v. Alexander*, 12 Ala. 280, 40 A. D. 253, holding judgment against corporation may be completed after it ceases to exist; *Lewis v. Soper*, 44 Me. 72, holding on death of either party after verdict, judgment may be entered as of term verdict was rendered.

Cited in note in 52 A. D. 108, on validity of judgment rendered against decedent.

Fixtures.

Cited in *Wilmarth v. Bancroft*, 10 Allen, 348, holding that mortgagor has no right to sell parts of building saved from fire without mortgagee's consent; *Thayer v. Wright*, 4 Denio, 180, on right of owner of realty to convert fixtures wrongfully placed thereon by another.

— What are.

Cited in *Lathrop v. Blake*, 23 N. H. 46, holding machinery in paper mill part of realty though removable without injury; *Patton v. Moore*, 16 W. Va. 428, 37 A. R. 789, holding machinery hauled into mill yard to be placed in mill, realty; *Patton v. Moore*, 16 W. Va. 428, 37 A. R. 789, holding that machinery washed out of mill by flood retains its character as realty; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170, holding that when fence is built as permanent structure on another's land without agreement it becomes realty; *Cross v. Marston*, 17 Vt. 533, 44 A. D. 353, holding personal property nailed to building but removable without injury to either, personalty; *State use of Kidney v. Marshall*, 4 Mo. App. 29, holding that intent of tenant in attaching property to realty cannot determine its status as between two creditors; *State v. Elliot*, 11 N. H. 540, holding tenant placing windows in house and leaving them on vacating cannot subsequently enter to remove them.

Cited in reference notes in 30 A. D. 367, on what are fixtures; 59 A. D. 658, on machinery as fixture.

20 AM. DEC. 322, OSGOOD v. HOWARD, 6 ME. 452.**When trover maintainable.**

Cited in reference note in 90 A. D. 287, on trover or replevin for fixtures converted or removed.

Cited in notes in 24 A. S. R. 818, on what personalty may be subject of conversion; 26 A. D. 539, on trover for building erected on another's land with his consent.

Fixtures.

Cited in *Pope v. Skinkle*, 45 N. J. L. 39, holding intention of parties governs nature of building as realty or personalty when erected on land of another; *Haven v. Emery*, 33 N. H. 66, holding vendor of rails furnished under agreement for retaining title till paid for may hold them against mortgagee of railroad company; *Hingley & E. Iron Co. v. Black*, 70 Me. 473, 35 A. R. 346; *Kingsley v. McFarland*, 82 Me. 231, 17 A. S. R. 473, 19 Atl. 442,—holding buildings erected by vendee under land contract become realty in absence of agreement to contrary; *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 A. R. 175, holding replevin maintainable for house wrongfully removed and placed on land of another.

Cited in reference note in 90 A. D. 286, as to when building or fixture is not part of realty.

Cited in notes in 19 L.R.A. 442, on effect of agreement to prevent fixtures from becoming part of realty; 84 A. S. R. 882, on agreement between parties that fixtures shall retain character of personalty; 84 A. S. R. 879, as to when no agreement may be made that fixtures shall retain character of personalty.

—Erected by tenant.

Cited in *Andrews v. Auditor*, 28 Gratt. 115, holding buildings erected on land by lessee with agreement for removal not taxable to owner of land; *Kuhlmann v. Meier*, 7 Mo. App. 260, holding buildings attached to soil by tenant under stipulation for removal at end of term remain personalty; *Gordon v. Miller*, 28 Ind. App. 612, 63 N. E. 774, holding mill and machinery placed on premises by lessee and subject to removal without injury to premises, personalty; *Korbe v. Barbour*, 130 Mass. 255, holding vendee of bakehouse and oven erected by tenant may maintain conversion against landlord on refusal to permit their removal.

—Erected by life tenant.

Cited in *Doak v. Wiswell*, 38 Me. 569, holding buildings erected on land by tenant by curtesy become part of realty; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 A. R. 622, holding structures placed on land under license by life tenant do not become property of owner in fee.

—Erected by licensee.

Cited in *Stout v. Stoppel*, 30 Minn. 56, 14 N. W. 268, holding shelving and drawers placed in building under license of owner remain personalty though attached; *Russell v. Richards*, 10 Me. 429, 25 A. D. 254, holding mill erected on land with permission of owner for trade purposes remains personalty; *Dame v. Dame*, 38 N. H. 429, 75 A. D. 195; *Brearley v. Cox*, 24 N. J. L. 287; *Howard v. Fessenden*, 14 Allen, 124,—holding buildings erected on land may remain personalty by agreement; *Wickersham v. Orr*, 9 Iowa, 253, 74 A. D. 348, holding parol evidence admissible to show grantee had notice of parol license in third party for use of wall; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, on rights of one erecting building on land of another under license subsequently withdrawn.

Cited in reference notes in 23 A. D. 703; 28 A. D. 176,—on ownership of build-

ings erected on another's land with his consent; 27 A. D. 681, on ownership of building erected on other's land under license.

Cited in notes in 26 A. D. 539, on ownership of building erected on another's land with his consent; 14 L.R.A.(N.S.) 440, on character of building placed by consent on another's land as real or personal property, in absence of agreement as to its character.

Revocability of license.

Cited in note in 10 A. D. 43, as to when license is not revocable.

20 AM. DEC. 324, STATE v. SMITH, 6 ME. 462.

Care and custody of infants.

Cited in reference notes in 14 A. S. R. 731, on custody of children; 56 A. S. R. 169, on right to custody of infant; 98 A. S. R. 416, on determination of right to custody of infant; 27 A. D. 392, on determination of custody of child on habeas corpus; 35 A. D. 668, on custody of child on habeas corpus; 77 A. D. 539; 29 A. S. R. 849,—on habeas corpus to obtain custody of child; 67 A. D. 395, on determining custody of children on habeas corpus; 81 A. D. 208, on placing custody of legitimate child on habeas corpus; 82 A. D. 228, on habeas corpus as remedy to determine custody of child; 55 A. S. R. 437, on conclusiveness of adjudication on habeas corpus as to right to custody of child; 5 A. S. R. 855, on order awarding custody of child on habeas corpus as *res judicata*.

Cited in note in 5 L.R.A. 781, on common-law rule as to custody of child.

— Rights and liabilities of parent generally.

Cited in reference notes in 6 A. S. R. 688, on parent's right to custody of child; 38 A. S. R. 66, on right of parent to reclaim minor child by habeas corpus.

Cited in note in 2 A. S. R. 186, on proper methods for enforcement of parent's right to custody of child.

— Rights and liabilities of father.

Cited in *Hall v. Hall*, 44 N. H. 293, on right of father to custody and control of child; *Clark v. Bayer*, 32 Ohio St. 299, 30 A. R. 593, holding father's right to custody of child not absolute; *McShan v. McShan*, 56 Miss. 413, denying custody of children to father who deserted his family; *Brooke v. Logan*, 112 Ind. 183, 2 A. S. R. 177, 13 N. E. 669, holding father, if suitable person, has right to custody of child as against statutory guardian; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216, holding trustee under indenture of separation may enforce agreement by husband to contribute to support of wife and infant; *Gilley v. Gilley*, 79 Me. 292, 1 A. S. R. 307, 9 Atl. 623, holding after divorce mother may recover from father necessary support of minor children.

Cited in reference notes in 44 A. D. 714, on father's right to custody of minor child; 81 A. D. 208, on father's rights to management and custody of children.

Limited in *Ahrenfeldt v. Ahrenfeldt*, Hoffm. Ch. 497, holding father has *prima facie* right to custody of child.

— Power of courts in awarding custody.

Cited in *Re Barry*, 42 Fed. 113, 136 U. S. 597, note, 34 L. ed. 503, note, holding by common law habeas corpus will issue to determine right between parents to custody of infant; *State ex rel. Paine v. Paine*, 4 Humph. 523, holding on habeas corpus proceeding court has discretion as to awarding custody of child to father; *McGill v. McGill*, 19 Fla. 341, holding chancery courts have discretion in awarding custody of children on granting divorce; *Hewitt v. Long*, 76 Ill. 399 (dissenting opinion), on discretion of court in awarding custody of child.

Cited in reference note in 37 A. S. R. 125, on discretion of court in awarding custody of child.

Cited in note in 89 A. S. R. 277, 278, on control by court of guardian's custody of ward.

— **Interests of children controlling.**

Cited in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, holding best interests of child to control its custody as between natural and adopted parents; *People ex rel. Wilcox v. Wilcox*, 22 Barb. 178, holding welfare of child controls in determining its custody as between mother and grandparents; *Hope's Petition*, 19 R. I. 486, 34 Atl. 994; *Re Moorehead*, 13 Pittsb. L. J. N. S. 130; *Marshall v. Reams*, 32 Fla. 499, 37 A. S. R. 118, 14 So. 95,—holding the welfare of the child is guide of court in awarding custody to parent or third person.

Cited in reference notes in 111 A. S. R. 147, on consideration of child's welfare in determining who shall be given custody of it; 81 A. D. 208, on child's welfare as controlling element in placing its custody; 37 A. S. R. 125, on preferences of child as factor in awarding custody.

— **Relinquishment of control by parents.**

Cited in *Com. ex rel. Terry v. Dougherty*, 2 Legal Gaz. 179, 1 Legal Gaz. Rep. 63, holding that acts of parent may show relinquishment of right to custody of child; *Fletcher v. Hickman*, 50 W. Va. 244, 88 A. S. R. 862, 55 L.R.A. 896, 40 S. E. 371, holding that father committing custody of infant to another can reclaim it only by showing its welfare will be promoted thereby; *Merritt v. Swimley*, 82 Va. 433, 3 A. S. R. 115; *Com. ex rel. Gilkeson v. Cilkeson*, 5 Clark (Pa.) 30, 1 Phila. 194, 8 Phila. Leg. Int. 86,—holding father who surrendered custody of child to another not entitled to reassert right against child's wishes; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 199, 47 A. R. 810, 16 N. W. 91, denying to mother recovery of custody of child she gave to her parents to raise; *Dumain v. Gwynne*, 10 Allen, 270, holding contract of parent giving children to charitable institution binding, but court will investigate their welfare; *Sargent v. Sargent*, 106 Cal. 541, 39 Pac. 931, sustaining right of parents to contract with each other as to custody and control of children; *Allen v. Affleck*, 64 How. Pr. 380, 10 Daly, 509, on validity of agreement between husband and wife for separation and custody of children.

Cited in notes in 27 L.R.A. 59, on validity of contract for transfer of parental responsibility or authority; 88 A. S. R. 874, on right under statute to contract for transfer of parental control and responsibility.

20 AM. DEC. 337, STEVENS v. MORSE, 7 ME. 36.

Effect of payment of judgment by third party.

Cited in *Whittier v. Heminway*, 22 Me. 238, 38 A. D. 309, holding officer paying amount of execution cannot sue on judgment in name of creditor; *Slaton v. Alcorn*, 51 Miss. 72, holding administrator paying judgment against intestate with own funds not substituted to rights of creditor; *Page v. Claggett*, 71 N. H. 85, 51 Atl. 686, holding agreement by tax collector to pay unpaid taxes and continue warrants till tax collected, void; *Lombard v. Fiske*, 24 Me. 56 (dissenting opinion), on assignment of judgment.

Cited in reference note in 44 A. D. 738, on what constitutes satisfaction of judgment.

Cited in notes in 68 L.R.A. 570, on keeping alive judgments against principals paid by sureties; 68 L.R.A. 515, on extinction of judgments against principals by payments by joint debtors.

20 AM. DEC. 341, MILLER, v. MARINER'S CHURCH, 7 ME. 51.**Secondary evidence of instrument affecting interest of witness.**

Cited in *Fifield v. Smith*, 21 Me. 383; *Snow v. Thomaston Bank*, 19 Me. 269; *Marwick v. Georgia Lumber Co.* 18 Me. 49,—holding witness may be examined concerning written instruments not produced affecting his interest; *Robertson v. Allen*, 16 Ala. 106, holding secondary evidence admissible to prove execution of instrument affecting competency of interested witness.

Competency of witnesses.

Cited in *Ministerial & School Fund v. Reed*, 39 Me. 41, holding trustees of ministerial and school fund competent witnesses in action in name of the corporation.

Cited in reference notes in 31 A. D. 52, on competency of members of corporation as witnesses for it; 49 A. D. 233, on admissibility of witness's own testimony on question of his competency to testify.

Duty of injured party to decrease damage.

Cited in *Gooden v. Moses Bros.* 99 Ala. 230, 13 So. 765; *Judice v. Southern P. Co.* 47 La. Ann. 255, 16 So. 816; *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117,—holding measure of damage for breach of contract is that which plaintiff could not reasonably have avoided; *Hamilton v. McPherson*, 28 N. Y. 72, 84 A. D. 330, holding damages, which plaintiff could have prevented, for injury to grain while awaiting transportation not recoverable; *Jones v. George*, 61 Tex. 345, 48 A. R. 280; *Eureka Marble Co. v. Windsor Mfg. Co.* 51 Vt. 170; *Bradley v. Denton*, 3 Wis. 557; *Fitzpatrick v. Boston & M. R. Co.* 84 Me. 33, 24 Atl. 432,—holding injured party bound to take reasonable measures to render damage as light as possible; *Strauss v. Meertief*, 64 Ala. 299, 38 A. R. 8, holding one wrongfully discharged should accept offer of similar employment in same place to mitigate damage; *Grindle v. Eastern Exp. Co.* 67 Me. 317, 24 A. R. 31, holding one whose life insurance lapsed because of defendant's negligent transmission of premium should seek reinstatement to lessen damages; *McGinn v. French*, 107 Wis. 54, 82 N. W. 724, holding tenant knowing defect but continuing in premises without repairing it cannot recover for injuries therefrom; *Lawrence v. Porter*, 26 L.R.A. 167, 11 C. C. A. 27, 22 U. S. App. 483, 63 Fed. 62, holding buyer should minimize loss from breach of contract to sell on credit by accepting, if able, reduced cash price; *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, 57 N. E. 863 (affirming on this point 85 Ill. App. 627), holding that plaintiff should take reasonable steps to lessen damage from building operations on adjoining premises; *The Morton, Brown, Adm.* 137, Fed. Cas. No. 9,864, holding vessel in tow bound to prevent collision if possible or to lessen the damage as much as possible; *Ward v. Paducah & M. R. Co.* 4 Fed. 862, holding owner of crops bound to use reasonable care to prevent damage by stray cattle passing over defective cattle guard; *Fox v. Everson*, 27 Hun, 355, holding one purchasing clover seed bound to examine it for foreign seed before sowing; *Purcell v. English*, 86 Ind. 34, 44 A. R. 255, on duty of tenant to lessen damage by making repairs; *Cook v. Soule*, 56 N. Y. 420, on duty of tenant to make repairs, if slight, to avoid damage; *The Baltimore (The Baltimore v. Rowland)*, 8 Wall. 377, 19 L. ed. 463, on duty of injured party to lessen damages.

Cited in reference notes in 48 A. D. 392, on duty of injured person to protect himself from damages; 33 A. S. R. 792, on right of party to proceed to execute contract after adversary declines to perform.

Cited in note in 1 L.R.A. 76, on obligations of person injured by another's fault.

Distinguished in *Haas v. Dudley*, 30 Or. 355, 48 Pac. 168, on breach by grantee of part of tract of agreement to pay mortgage on whole, grantor not bound to prevent sale of whole.

Measure of damages.

Cited in note in 40 A. D. 327, on measure of damages in recoupment.

— For breach of contract generally.

Cited in *Dodd v. Jones*, 137 Mass. 322, holding measure of damage for breach of agreement to assign insurance policy is cost of other insurance; *Marshall v. Franklin F. Ins. Co.* 13 Lanc. L. Rev. 169, holding measure of damage for refusing to transfer perpetual insurance is sum whose interest would buy similar annual policies; *Hitchcock v. Hunt*, 28 Conn. 343, holding measure of damage for loss of pork because of leaky barrels is cost of new barrels and repacking; *Taylor v. Read*, 4 Paige, 561, holding nominal damages only recoverable for breach of contract causing no actual loss; *Raleigh v. Clark*, 114 Ky. 732, 71 S. W. 857, holding measure of damage for failure to maintain ditch is cost of putting ditch in proper condition; *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522, holding measure of damage for breach of covenant to fence is value of crop when destroyed; *Shannon v. Comstock*, 21 Wend. 457, 34 A. D. 262, holding measure of damages for failure to furnish freight is actual loss after reasonable effort to obtain other freight; *Tenny v. Mulvaney*, 9 Or. 405, on recovery of damages for breach of verbal agreement.

Cited in reference note in 27 A. D. 627, on measure of damages for breach of contract.

Cited in note in 3 L.R.A. 588, on loss of profits as element of damages for breach of contract.

— For failure to furnish article.

Cited in *Furlong v. Polleys*, 30 Me. 491, 50 A. D. 635; *Yellow Poplar Lumber Co. v. Chapman*, 20 C. C. A. 503, 42 U. S. App. 21, 74 Fed. 444,—holding measure of damage for failure to deliver an article, cost of obtaining it from nearest market; *Freeman v. Clute*, 3 Barb. 424, holding measure of damage for failure to furnish machinery is expense actually incurred in consequence; *Ramsey v. Tully*, 12 Ill. App. 463, holding measure of damage for failure to deliver article for special purpose not obtainable on market, is probable damage resulting.

— For furnishing article not up to contract.

Cited in *Pullman's Palace Car Co. v. Metropolitan Street R. Co.* 157 U. S. 94, 39 L. ed. 632, 15 Sup. Ct. Rep. 503, holding measure of damages for defective brakes on cars is cost of installing proper ones; *Thems v. Dingley*, 70 Me. 100, holding on sale, under warranty of defective carriage springs, cost of removing and replacing them proper damages; *Blanchard v. Ely*, 21 Wend. 342, 34 A. D. 250, holding measure of damage for defect in construction under contract is cost of making defect good; *Crane Co. v. Columbus Constr. Co.* 20 C. C. A. 233, 46 U. S. App. 52, 73 Fed. 984, holding that when article furnished is sufficient for purpose expense in making it conform to contract is not proper damages.

— For failure to deliver telegram.

Cited in *Western U. Teleg. Co. v. Graham*, 1 Colo. 230, 9 A. R. 136, holding estimated profits not proper damages for failure to deliver telegram ordering merchandise; *Merrill v. Western U. Teleg. Co.* 78 Me. 97, 2 Atl. 847, holding nominal damages only recoverable for failure to deliver telegram informing plaintiff of employment under defeasible contract; *True v. International Teleg. Co.* 60

Me. 9, 11 A. R. 156, holding measure of damages for failure to deliver telegram accepting contract for corn is difference between contract cost and cost of obtaining it later.

— For wrongful discharge from employment.

Cited in *Huntington v. Ogdensburgh & L. C. R. Co.* 33 How. Pr. 416; *Walworth v. Pool*, 9 Ark. 394,—holding defendant may show other employment secured by plaintiff in mitigation of damages for wrongful discharge; *Sutherland v. Wyer*, 67 Me. 64, holding measure of damage for wrongful discharge is contract salary less amounts plaintiff could have earned with reasonable diligence; *Friedlander v. Pugh*, 43 Miss. 111, 5 A. R. 478, holding measure of damage for breach of contract for services is pay for services rendered and actual loss from nonperformance of balance.

Cited in note in 43 A. D. 212, on measure of damages for wrongful discharge of servant before expiration of contract.

— In tort.

Cited in *Cavanagh v. Durgin*, 156 Mass. 466, 31 N. E. 643, holding measure of damage for trespass is cost of restoring premises and loss of use; *Davis v. Poland*, 102 Me. 192, 120 A. S. R. 480, 10 L.R.A.(N.S.) 212, 66 Atl. 380, holding damages not recoverable for suffering from removal of doors and windows by trespasser beyond time they could reasonably have been replaced; *Brown v. Chadbourne*, 31 Me. 9, 50 A. D. 641, holding plaintiff could recover amount necessarily expended in getting logs by a dam erected by defendant; *Wright v. Keith*, 24 Me. 158, holding one arrested on body execution because citation was erroneous could recover only expense of ascertaining the error.

20 AM. DEC. 346, *ESMOND v. TARBOX*, 7 ME. 61.

What determines boundary in case of conflicting descriptions.

Cited in *Williams v. Spaulding*, 29 Me. 112, holding a plan intended to represent survey actually marked out controlled thereby; *Bean v. Bachelder*, 78 Me. 184, 3 Atl. 279, holding that where land is described by its number "according to the plan," actual survey controls; *Machias v. Whitney*, 16 Me. 343, holding that where legislature granted land, requiring survey to be made the actual location determined extent of grant; *Doe ex dem. Miller v. Cullum*, 4 Ala. 576, to point that monuments control plan of survey referred to in deed; *Bethel v. Albany*, 65 Me. 200, to point that lines described in deed or charter are controlled by monuments established in original survey; *Hall v. Davis*, 36 N. H. 569, holding lines described in charter and plan controlled by lines and monuments made on original survey; *Richardson v. Chickering*, 41 N. H. 380, 77 A. D. 769, holding description in original laying out controlled by lines and monuments actually marked on ground; *Griffin v. Bixby*, 12 N. H. 454, 37 A. D. 225, holding that monuments control courses and distances; *Long v. Merrill*, 24 Pick. 157, to same point.

Cited in notes in 22 A. D. 642, on boundaries; 31 A. D. 154, on superiority of monuments over courses and distances.

Distinguished in *Prescott v. Hawkins*, 12 N. H. 19, holding such rule inapplicable where evidence fails to show a practical location; *Miller v. Lavelle*, 130 Wis. 500, 110 N. W. 421, upon question of monuments operating to control courses and distances marked on plat; *Thomas v. Patten*, 13 Me. 329, holding that plan referred to in deed controls monuments subsequently established.

20 AM. DEC. 347, HODSDON v. WILKINS, 7 ME. 113.**Negligence in serving process.**

Cited in note in 95 A. D. 432, as to what constitutes negligence in service of process.

Liability for neglect in serving process.

Cited in reference note in 49 A. D. 56, on liability of sheriff for neglect in levying execution.

Validity of contracts generally.

Cited in note in 4 L.R.A. 682, on enforceability of contracts growing out of illegal or immoral acts.

Validity of agreement to neglect duty.

Cited in note in 40 A. D. 426, as to when agreement for indemnity is void because act indemnified against is illegal.

— Of officer.

Cited in *Hardesty v. Price*, 3 Colo. 556, holding bond given tax collector in consideration of his neglecting to perform his statutory duty void; *Harrington v. Crawford*, 136 Mo. 467, 58 A. S. R. 653, 35 L.R.A. 477, 38 S. W. 80 (affirming 61 Mo. App. 221), holding bond indemnifying sheriff against liability for failure to execute final protest void; *Packard v. Tisdale*, 50 Me. 376, refusing relief to collector neglecting to enforce payment of taxes and paying same himself; *Ray v. McDevitt*, 126 Mich. 417, 86 A. S. R. 548, 85 N. W. 1086, holding bond given sheriff, he not to make levy valid where doubt existed as to levy's legality.

Cited in note in 86 A. S. R. 557, on invalidity of indemnity to sheriffs.

Validity of trust in favor of executor.

Cited in *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, refusing to enforce a trust in favor of executor made by him at expense of the estate.

Measure of damages for negligence as to process.

Cited in reference notes in 33 A. D. 224; 48 A. D. 48,—on damages against sheriff for not serving execution; 25 A. D. 52, on measure of damages for sheriff's neglect to sell under execution; 49 A. D. 513, on measure of damages for failure to return executions.

Cited in note in 95 A. D. 437, on measure of damages for negligence in serving process.

20 AM. DEC. 349, CAMPBELL v. PETTENGILL, 7 ME. 126.**Rights and liabilities of parties to bills.**

Cited in *Commercial Bank v. Barksdale*, 36 Mo. 563, holding drawer of bill having reason to believe same will be accepted entitled to notice of protest; *Ransom v. Wheeler*, 12 Abb. Pr. 139, holding that to charge drawer bill must be presented at bank when due unless drawer without funds.

— Bills specially accepted.

Cited in *Phillips v. Frost*, 29 Me. 77, to point that holder of bill may take special acceptance; *Taylor v. Newman*, 77 Mo. 257, to point that holder of bill must show in action against drawer that acceptor violated terms of his acceptance; *Wintermute v. Post*, 24 N. J. L. 420, holding that term "when in funds" in acceptance means cash, wages excluded, in hand belonging to drawer.

Cited in reference note in 35 A. D. 223, on conditional acceptance of bill of exchange.

Notice of nonacceptance of bill.

Cited in note in 2 A. D. 619, on necessity of notice of nonacceptance of bill.

20 AM. DEC. 352, CHASE v. DWINAL, 7 ME. 134.**Recovery of money wrongfully paid.**

Cited in *McMillan v. Richards*, 9 Cal. 417, 70 A. D. 655, assuming but not deciding that excess paid sheriff, over amount necessary to redeem real estate after foreclosure, may be recovered; *La Salle County v. Simmons*, 10 Ill. 513, holding recoverable, payment of illegal bonus demanded by county as condition of granting ferry license; *Norris v. Blethen*, 19 Me. 348, holding not recoverable, money paid attaching creditor by sheriff, under supposed liability; *Dwinel v. Barnard*, 28 Me. 573 (dissenting opinion), as to recoverability of money paid on illegal claim, to prevent impending loss of property; *Livermore v. Peru*, 55 Me. 469, holding that money voluntarily paid by one town to another in settlement of claim for aid furnished family and supposed to be in nature of pauper supplies, not recoverable; *Baltimore v. Lefferman*, 4 Gill, 425, 45 A. D. 145, denying recovery of money paid under requirement of unconstitutional law for building of wall; *Buckley v. New York*, 30 App. Div. 463, 52 N. Y. Supp. 452, holding recoverable, money paid for illegal building permit under threat of arrest and stopping construction of building.

Cited in reference note in 24 A. S. R. 173, on right to recover back money paid under duress.

Cited in notes in 94 A. S. R. 411, on recoverability of voluntary payments; 45 A. D. 170, on right to recover money involuntarily paid; 45 A. D. 153, as to what constitutes compulsory payment so as to enable payor to recover the money paid.

— To regain possession of property.

Cited in *Beckwith v. Frisbie*, 32 Vt. 559; *Tutt v. Ide*, 3 Blatchf. 249, Fed. Cas. No. 14,275b,—holding recoverable, illegal freight paid carrier at destination to secure possession of goods; *Cobb v. Charter*, 32 Conn. 358, 87 A. D. 178, holding recoverable, money paid by mechanic in groundless claim, in order to get possession of chest of tools; *Spaids v. Barrett*, 57 Ill. 289, 11 A. R. 10, holding recoverable, money wrongfully demanded and paid to regain possession of perishable goods detained by fraudulent attachment; *Chamberlain v. Reed*, 13 Me. 357, 29 A. D. 506, holding recoverable, money paid by shipper to liberate goods detained by master of vessel to enforce payment of illegal claim; *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942, holding recoverable, money paid to release cargo from illegal demurrage charges; *First Nat. Bank v. Sargeant*, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595, holding recoverable, money wrongfully demanded and paid to regain control of real estate for purpose of selling same; *White v. Heylman*, 34 Pa. 142, holding recoverable, money paid to obtain possession of property wrongfully held.

Distinguished in *Kenneth v. South Carolina R. Co.* 15 Rich. L. 284, 98 A. D. 382, denying recovery of illegal freight voluntarily paid after delivery of goods.

— Illegal taxes or license fees.

Cited in *Brumagim v. Tillinghast*, 18 Cal. 265, 79 A. D. 176, denying right to recover money voluntarily paid for stamps under unconstitutional stamp act; *Bradford v. Chicago*, 25 Ill. 422, holding recoverable, payment of illegal assessment made under misapprehension of facts; *Boston & S. Glass Co. v. Boston*, 4 Met. 181, holding recoverable, illegal taxes paid to collector with tax bill and

warrant in legal form; *Ligonier v. Ackerman*, 46 Ind. 552, 15 A. R. 323 (dissenting opinion), on recoverability of liquor license fee paid without objection under void ordinance.

Distinguished in *Cahaba v. Burnett*, 34 Ala. 400, holding license fee paid town under ordinance afterward declared void, not recoverable.

Duress avoiding contracts.

Cited in *Mariposa Co. v. Bowman*, Deady, 228, Fed. Cas. No. 9,089, holding money paid to remove cloud on title of real estate not paid under duress; *Reese v. United States*, 2 Ct. Cl. 1, to point that compromise procured by withholding claimant's vouchers is not binding; *Adams v. Schiffer*, 11 Colo. 15, 7 A. S. R. 202, 17 Pac. 21, holding that settlement of account forced through defendant's control of bank containing funds of plaintiff, was made by duress of property; *Lightfoot v. Wallis*, 12 Bush, 501, holding mortgage obtained by fraudulently withholding possession of debtor's horse, void for duress; *Carew v. Rutherford*, 106 Mass. 1, 8 A. R. 287, holding money extorted by illegal conspiracy recoverable by action in tort; *Hackley v. Headley*, 45 Mich. 589, 8 N. W. 511, holding that compelling creditor to give receipt in full on partial payment of claim is not duress merely because creditor financially embarrassed; *First Nat. Bank v. Sargeant*, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595, holding one who to sell his property submitted to exactions of his creditor entitled to recover excess paid him; *Harmony v. Bingham*, 1 Duer, 209 (affirmed in 12 N. Y. 99, 62 A. D. 142), holding duress established where excessive freight demanded as condition to delivery of goods; *Earle v. Berry*, 27 R. I. 221, 1 L.R.A.(N.S.) 867, 61 Atl. 671, 8 A. & E. Ann. Cas. 875, holding refusal to pay money admittedly due unless peculiar receipt given insufficient to avoid receipt.

Cited in note in 94 A. S. R. 419, on duress of goods.

Right to collect tolls.

Cited in *St. Louis R. D. Improv. Co. v. C. N. Nelson Lumber Co.* 51 Minn. 10, 52 N. W. 976, denying right of river improvement company to collect tolls where dams constructed by it had been swept away by freshet.

20 AM. DEC. 356, DENNETT v. SHORT, 7 ME. 150.

Sufficiency of performance of contract.

See *Fredenburg v. Turner*, 37 Mich. 402, holding that where parties to note payable in sawing and lumber cannot agree on the proportion of each, the law will apportion it equally; *Buck v. Burk*, 18 N. Y. 337, holding that when dealer agrees to pay \$2,000 in merchandise from his store, it suffices if he keeps stock up to value of \$2,000 though inferior in variety and quality.

20 AM. DEC. 357, TYLER v. CARLTON, 7 ME. 175.

Parol evidence as to consideration of deed or bill of sale.

Cited in *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. 506, holding parol evidence admissible to prove true consideration of deed; *Eckles v. Carter*, 26 Ala. 563, holding same to show that true consideration for sealed bill of sale was slave and not money; *McGehee v. Rump*, 37 Ala. 651, holding same to show transaction was an exchange of slaves and not a sale; *Leach v. Shelby*, 58 Miss. 681, holding it competent to prove that consideration of deed attacked for fraud was a marriage settlement and not money; *Brown v. Lunt*, 37 Me. 423, holding additional considerations, consistent with those expressed, provable; *Emmons v. Littlefield*, 13 Me. 233, to same effect; *Abbott v. Marshall*, 48 Me. 44, holding mortgagee

entitled to prove additional agreement not disclosed by mortgage; *Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635, to point that evidence is admissible to vary amount of a money consideration; *Harwell v. Fitts*, 20 Ga. 723, holding party executing bill of sale not bound by clause acknowledging receipt of consideration; *Hall v. Hall*, 8 N. H. 129, enforcing vendee's oral promise to pay vendor contingent sum upon a resale; *Nickerson v. Saunders*, 36 Me. 413, enforcing grantee's oral promise to let grantor have money realized from change of road; *Dearborn v. Morse*, 59 Me. 210, holding that grantor may prove grantee orally assumed payment of taxes.

Cited in notes in 23 A. D. 526, on parol evidence to show want of consideration; 30 A. D. 117, on admissibility of parol evidence as to consideration clause of deed; 20 L.R.A. 104, on parol evidence of further consideration than that named in deed to support grantor; 14 E. R. C. 751, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed.

20 AM. DEC. 360, CAMPBELL'S CASE, 2 BLAND, CH. 209.

Necessity for producing lunatic upon the inquisition of lunacy.

Cited in Supreme Council R. A. v. Nicholson, 104 Md. 472, 65 Atl. 320, 10 A. & E. Ann. Cas. 213, holding that upon an inquisition of lunacy, the alleged lunatic must, if practicable, be produced.

Expenditure of lunatic's income.

Cited in reference note in 70 A. S. R. 649, on expenditure of income of lunatic's estate.

Statutory construction.

Cited in *Kelly v. McGuire*, 15 Ark. 555, to point that different provisions of statutes of descents are to be so construed as to avoid inconsistencies; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255, holding that apparently incongruous enactments are to be construed so as to effectuate legislature's intention.

Cited in reference note in 61 A. D. 409, on statutory construction.

Invalidity of statutes.

Cited in *Storek v. Baltimore*, 101 Md. 476, 61 Atl. 330, holding void, a clause of a statute in which meaningless words occurred.

Cited in reference notes in 27 A. D. 707, on relief against private statute obtained by fraud; 41 A. D. 642, on relief in court of law or equity against private act obtained by fraud.

Distinguished in *State v. Tag*, 100 Md. 588, 60 Atl. 465, to point that statutes which are inexplicable, contradictory, and wholly absurd are void.

Functions of the respective governmental departments.

Cited in *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *State ex rel. Yancey v. Hyde*, 121 Ind. 20, 22 N. E. 644,—holding that the appointing power is not lodged in the legislature and cannot be exercised by it; *Ex parte Anderson*, 46 Tex. Crim. Rep. 372, 81 S. W. 973, holding statute authorizing governor to appoint commissioners to control municipal affairs void; *Hepburn's Case*, 3 Bland, Ch. 95, to point that legislature cannot assume to anyone's prejudice any fact not admitted by him; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L.R.A. 794, 37 Atl. 1080, holding that a superior court judge cannot exercise powers not judicial; *Williamson v. Williamson*, 3 Smedes & M. 715, 41 A. D. 636, holding titles acquired under sale of decedent's estate, authorized by private act, valid if conditions thereof complied with; *Williams's Case*, 3 Bland,

Ch. 186, to point that a statute suspending execution of a judgment at common law is void; *Williams's Case*, 3 Bland, Ch. 186, as to validity and practicability of statutes authorizing sales of infant's realty.

Cited in reference note in 79 A. D. 139, on definition of rights of sovereignty, and in whom they are vested.

Cited in note in 13 A. S. R. 138, on appointment of officers as executive function.

Liability for debts of ancestor.

Cited in reference note in 40 A. D. 193, on liability of property in hand of heirs, devisees, or alienees to payment of decedent's debts.

Cited in note in 21 L.R.A. 89, on liability of heirs for obligations of ancestor.

Doctrine of *lis pendens*.

Cited in reference note in 40 A. S. R. 189, as to when *lis pendens* commences.

Cited in notes in 56 A. S. R. 860, on the law of *lis pendens*; 23 A. D. 186, as to when *lis pendens* begins.

Consolidating cases.

Cited in *Gilbert v. Washington Beneficial Endowment Asso.* 10 App. D. C. 316, holding that in equity cases may be consolidated at any time where subject-matter is same though parties and defenses are different; *Grant v. Davis*, 5 Ind. App. 116, 31 N. E. 587, as to consolidating claims against a decedent's estate; *Hartman v. Spiers*, 87 N. C. 28, holding separate suits instituted by different creditors to subject the same debtor's estate may be consolidated.

Cited in reference note in 46 A. S. R. 619, on consolidation of actions.

Procedure under private acts authorizing property transfers.

Cited in *Hepburn's Case*, 3 Bland, Ch. 95, as to course of procedure under private acts facilitating transfers of property.

Discretion in conduct of trial.

Cited in reference note in 50 A. D. 803, on discretion of court as to conduct of trial.

20 AM. DEC. 381, MURDOCK'S CASE, 2 BLAND, CH. 461.

When injunction will lie.

Cited in *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 A. R. 195, 23 Phila. Leg. Int. 12, 3 Legal Gaz. 1, holding that object of preliminary injunctions is to preserve things in condition in which it finds them; *Cape Sable Co.'s Case*, 3 Bland, Ch. 606; *Gray v. Kock*, 2 Mich. N. P. 119,—to same point; *Cole Silver Min. Co. v. Virginia & G. H. Water Co.* 1 Sawy. 470, Fed. Cas. No. 2,989, granting a preliminary injunction restraining the diversion of water; *Washington University v. Green*, 1 Md. Ch. 97, holding interlocutory injunction proper to restrain interference with occupation of buildings; *Thebaut v. Canova*, 11 Fla. 143, refusing to enjoin erection of steam mill within limits of town; *Smith v. McDowell*, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141, enjoining construction and maintenance of an obstruction in village street, and citing annotation also on this point.

Cited in reference note in 39 A. S. R. 901, on injunctions against obstructions in highways.

Cited in notes in 7 L.R.A.(N.S.) 70, on extent or form of relief by way of injunction on ground of trespass to compel or prevent erection, maintenance, or removal of fences or gates; 21 A. D. 51, on injunction as preventive remedy; 23 A. D. 772, on injunction against trespass.

—Against waste.

Cited in *Moses Bros. v. Johnson*, 88 Ala. 517, 16 A. S. R. 58, 7 So. 146, holding that vendor retaining legal title may enjoin commission of waste; *Nelson v. Pinegar*, 30 Ill. 473, holding that mortgagee may enjoin commission of waste; *Williams v. Chicago Exhibition Co.* 188 Ill. 19, 58 N. E. 611, holding that injunction will lie to prevent removal of fixtures from mortgaged premises; *Salmon v. Claggett*, 3 Bland, Ch. 125, perpetuating injunction to protect mortgaged property granted before debt due.

—Mandatory injunctions.

Cited in *Norton v. Elwert*, 29 Or. 583, 41 Pac. 926, granting mandatory injunction requiring removal of wall extending over on plaintiff's land; *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128, holding interlocutory injunction improper to compel removal of an obstruction; *Southern P. R. Co. v. Oakland*, 58 Fed. 50, holding that preliminary injunction cannot direct the restoration of property; *Gardner v. Stroeve*, 81 Cal. 148, 6 L.R.A. 90, 22 Pac. 483, refusing mandatory preliminary injunction where bill alleged plaintiff would be damaged by building already erected and citing annotation also on this point.

Annotation cited in *Wees v. Coal & I. R. Co.* 54 W. Va. 421, 46 S. E. 166, in refusing to enjoin obstruction of road, to point that mandatory injunctions will issue only where damage is serious.

Cited in reference notes in 2 A. S. R. 409, on mandatory injunctions; 61 A. S. R. 300; 84 A. S. R. 849,—as to when mandatory injunction will issue; 49 A. S. R. 378, on jurisdiction to grant mandatory injunctions.

Cited in notes in 26 A. S. R. 167, as to when mandatory injunction will issue; 20 A. D. 394, 396, on power to issue mandatory injunction on interlocutory application; 20 L.R.A. 162, on power of equity to grant mandatory injunctions as to use of property.

Object of injunction before answer.

Cited in *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278, 44 Atl. 1024; holding that restraining orders should merely suspend action by defendant until he is given chance to answer.

Surplusage.

Cited in reference note in 65 A. D. 73, as to when prayer for relief will be regarded as surplusage.

Right of mortgagee or trustee to purchase at his own sale.

Cited in *Imboden v. Hunter*, 23 Ark. 622, 79 A. D. 116, to point that mortgagee without power of sale may purchase the same as he could at execution sale.

Cited in reference notes in 22 A. D. 302; 24 A. D. 279; 30 A. D. 530,—on trustee's right to purchase at his own sale; 39 A. D. 187, on validity of trustee's purchase at sale of trust property; 25 A. D. 399, on invalidity of purchase by trustee at his own sale.

Application of proceeds of foreclosure sale.

Cited in *Williams's Case*, 3 Bland, Ch. 186, to point that proceeds of sale of mortgaged property should be applied first to costs, commissions, etc.

Effect of bidding at judicial sale.

Cited in *Knox v. Spratt*, 19 Fla. 817, to point that an enforceable contract does not arise from the mere bidding at administrator's sale.

Cited in notes in 96 A. D. 265, on auctions; 69 A. D. 369, 370, on modes of enforcement of liability of bidder at equity sale.

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Violation of order of court.

Cited in reference note in 55 A. D. 722, on personal responsibility of defendants served with injunction for violation of order of court.

Practice in contempt proceedings.

Cited in *State ex rel. Thatcher v. Horner*, 16 Mo. App. 191, to point that affidavit or return of officer setting forth facts is necessary in proceeding to punish contempt; *Crook v. People*, 16 Ill. 534, holding that in proceedings for contempt for breach of injunction proofs may be taken to contradict answers to the interrogatories.

Disapproved in *State v. Matthews*, 37 N. H. 450, holding that in determining whether one is guilty of contempt proofs upon both sides are taken and considered.

Right to discharge in contempt proceedings.

Cited in *State v. Vincent*, 46 Kan. 618, 26 Pac. 939, holding that defendant should be dismissed where his answer showed he was not connected with paper in which article constituting the contempt appeared.

Amending pleadings.

Cited in *Cook v. Bee*, 2 Tenn. Ch. 343, refusing to allow an amendment setting up statute of frauds where contract originally denied.

20 AM. DEC. 402, HELMS v. FRANCISCUS, 2 BLAND, OH. 544.**Lapsing of legacies.**

Cited in *Cox v. Harris*, 17 Md. 23, holding that slaves included in void bequest fall to residuary legatee; *Vandewalker v. Rollins*, 63 N. H. 460, 3 Atl. 625, holding that the general residuary bequest carries lapsed legacies and anything undisposed of; *Williams v. Whittle*, 50 Ga. 523, holding that void devise passes to heir and not to residuary legatee.

Cited in reference note in 10 A. S. R. 463, on right to property devised or bequeathed to person dead when will was made or dying before testator.

Quoted in notes in 39 A. D. 582; 60 A. D. 478,—on lapsed legacies.

What passes by residuary bequest.

Cited in note in 9 L.R.A. 202, as to what passes in residuary bequest.

—Lapsed legacies.

Cited in reference notes in 48 A. D. 716, on residuary legatee taking legacy void for uncertainty; 28 A. D. 590, as to when residuary legatee takes lapsed and void legacies.

Contracts between husband and wife.

Cited in note in 58 A. S. R. 492, on agreements between husband and wife to compensate each other's services, or to relinquish claims on each other's earnings or profits.

Wife's power over separate property.

Cited in reference notes in 31 A. D. 26, on protection of property of married woman; 57 A. S. R. 406, on power of married woman to contract with respect to her separate property.

Separation agreements.

Cited in *Barclay v. Barclay*, 98 Md. 366, 56 Atl. 804, to point that courts will not enforce deeds of separation.

Cited in reference notes in 35 A. D. 668, on contracts of voluntary separation of husband and wife; 26 A. S. R. 268, on validity of agreements of husband and

wife to separate; 40 A. D. 783, on enforceability of husband's stipulation to allow a separate maintenance to wife.

Cited in notes in 83 A. S. R. 871, on construction of separation agreements; 83 A. S. R. 871; 6 E. R. C. 375,—on validity of agreements for separation between husband and wife; 12 L.R.A.(N.S.) 851, on validity of agreement between husband and wife renouncing marital rights; 83 A. S. R. 860, on validity and effect of agreements between husband and wife for living apart; 83 A. S. R. 882, on actions on separation agreements.

Distinguished in *Foote v. Nickerson*, 70 N. H. 496, 54 L.R.A. 554, 48 Atl. 1088, holding that while contracts for separate maintenance are valid contracts for separation are not.

Power of courts over parental relation.

Cited in *Faulk v. Faulk*, 23 Tex. 653, holding that courts will interfere to protect children against their parent.

Father's rights as guardian.

Cited in reference note in 25 A. D. 523, on father's right as guardian of his infant children.

Allowing alimony.

Cited in *Wright v. Wright*, 2 Md. 429, 56 A. D. 723, to point that formerly power to grant divorces was legislative and power to grant alimony was judicial.

Cited in reference notes in 74 A. D. 381, as to when alimony may be allowed; 42 A. S. R. 398, on authority to grant alimony.

Cited in note in 12 A. D. 257, on equity jurisdiction in case of alimony.

— Where divorce not granted.

Cited in *Stewart v. Stewart*, 27 W. Va. 167, enforcing decree of foreign court allowing alimony without divorce; *Garland v. Garland*, 50 Miss. 694, holding that equity will compel husband to support wife without regard to question of divorce; *Dunnock v. Dunnock*, 3 Md. Ch. 140, to point that wife may under circumstances be decreed a separate maintenance to be paid out of husband's estate; *Jamison v. Jamison*, 4 Md. Ch. 289, holding that alimony may be allowed though wife not entitled to limited divorce under English law; *Tolman v. Tolman*, 1 App. D. C. 299, to same effect; *Wagoner v. Wagoner*, 77 Md. 189, 26 Atl. 284, to point that separate maintenance will not be granted unless cause for limited divorce made out; *Galland v. Galland*, 38 Cal. 265 (dissenting opinion), on wife's right to have separate maintenance without regard to question of divorce.

Cited in reference note in 33 A. S. R. 576, on separate suit by wife, suing for divorce, for maintenance.

Cited in notes in 60 A. D. 666, on allowance of alimony without divorce; 77 A. S. R. 231, on right to maintain separate suit for maintenance independent of suit for divorce; 77 A. S. R. 235, 237, 238, on causes for which separate suit for maintenance independent of suit for divorce may be brought.

Cruelty as ground for divorce or separate maintenance.

Cited in reference notes in 33 A. D. 530; 58 A. D. 83,—on cruelty as ground for divorce or alimony; 28 A. D. 55, as to when cruel treatment is ground for granting alimony.

"Wife's equity."

Cited in reference note in 39 A. D. 639, on wife's equitable right to maintenance where husband is compelled to come into equity to get property belonging to her.

Cited in note in 23 A. D. 565, on wife's equity.

Distinguished in *Mercier v. West Kansas City Land Co.* 72 Mo. 473, as to whether settlement upon wife to exclusion of husband includes children.

Inheritance by illegitimates.

Cited in reference notes in 11 A. S. R. 173, on right of bastards to inherit; 40 A. D. 495, on right of bastard to inherit at common law; 85 A. D. 654, as to when illegitimate children may inherit.

Cited in note in 23 L.R.A. 754, on inheritance by illegitimate from his mother.

20 AM. DEC. 424, ALLEGRE v. MARYLAND INS. CO. 2 GILL & J. 136.

Liability on marine policy.

Cited in reference note in 30 A. D. 714, on liability on marine policy.

Construction of insurance policy.

Cited in note in 14 E. R. C. 44, on construction of general terms describing the adventure insured in contract of insurance.

Increase of risk.

Cited in note in 13 E. R. C. 500, on increase of risk by vessel sailing at different time than stated in application.

Effect of intent of parties to insurance contract.

Cited in reference note in 48 A. D. 469, on controlling effect of intent of parties to contract of insurance.

Statements binding on assured.

Cited in *Augusta Ins. & Bkg. Co. v. Abbott*, 12 Md. 348, holding assured not bound by statement as to time of sailing; *Kimball v. Aetna Ins. Co.* 9 Allen, 540, 85 A. D. 786, holding fire insurance policy binding though applicant failed to conform to his oral promise to occupy house; *Alston v. Mechanics' Mut. Ins. Co.* 4 Hill, 329, holding statement as to intention or expectation not representation which assured is bound to see performed to render his policy valid.

Cited in note in 13 E. R. C. 536, on avoidance of policy by breach of statement as to time vessel is to sail.

— As to disclosures required.

Cited in *Allegre v. Maryland Ins. Co.* 8 Gill & J. 190, 29 A. D. 536, holding that assured must show that insurer knew the cargo was to consist of live stock; *Turnbull v. Home F. Ins. Co.* 83 Md. 312, 34 Atl. 875, holding it assured's duty to declare his intention to use gasoline notwithstanding the rate paid indicated such intention.

Parol evidence to vary writing.

Cited in note in 6 A. R. 679, on parol evidence to explain and contradict written contract.

— As to custom or usage.

Cited in *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. ed. 505, holding proof of usage as to rate of premium inadmissible where policy itself is clear and definite; *Price v. White*, 9 Ala. 563, to point that evidence of usages are resorted to only when law is doubtful or unsettled; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 A. R. 186, 7 Atl. 802, holding evidence that among merchants of particular place word "settlement" had peculiar meaning inadmissible; *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739, holding evidence of custom of booming trade admissible.

Cited in reference note in 54 A. D. 321, on admissibility of evidence of usage to explain or control express contract.

Cited in notes in 25 A. D. 372, on admissibility of evidence of usage; 14 E. R. C. 671, on parol evidence to interpret written contracts and to show usage of trade; 11 A. S. R. 632, on admissibility of evidence of custom or usage to explain technical expressions in contract or to disclose intention of parties; 14 E. R. C. 48, on rule as to admission of evidence of custom or understanding of merchants to explain expressions in policy of insurance which are inadequate to explain themselves.

Existence, nature, and effect of usages and customs.

Cited in *Power v. Kane*, 5 Wis. 265, holding, in treating of brokers' commissions, that usages to be binding must be clear, uniform, and well established.

Cited in reference notes in 45 A. D. 352, on usage and custom with regard to marine insurance; 30 A. D. 584, on nature and validity of usages; 70 A. D. 523, on essentials to binding force of usages and customs; 45 A. D. 773, on duty of insurer to inform himself on a general custom of trade.

Cited in notes in 23 A. D. 622, on what is necessary to constitute usage; 18 A. R. 207, on custom or usage as affecting contractual relations; 10 L.R.A. 785, on effect of usage on obligations of contracts.

Question for jury as to custom or usage.

Cited in *Leach v. Perkins*, 17 Me. 462, 35 A. D. 268, to point that question whether usage is proved is for jury.

Cited in reference notes in 45 A. D. 773; 70 A. D. 523,—on existence of custom being for jury.

20 AM. DEC. 434, McCAULEY v. GRIMES, 2 GILL & J. 318.

Instantaneous seisin.

Cited in *Heuisler v. Nickum*, 38 Md. 270, holding land purchased and mortgaged three days later does not present case of instantaneous seisin.

Transitory seisin.

Cited in *Banning v. Edes*, 6 Minn. 402, Gil. 270, holding lien of prior judgment subordinate to lien of purchase money mortgage, dated after deed but delivered therewith; *Wallace v. Silsby*, 42 N. J. L. 1, holding that seisin held by person merely for purpose of reconveyance does not inure to such person's grantee; *Farmers Loan & T. Co. v. People*, 1 Sandf. Ch. 139, holding title acquired by state in escheated lands of alien, subject to lien of purchase money mortgage.

— In respect to dower.

Cited in *Mayburry v. Brien*, 15 Pet. 21, 10 L. ed. 646; *Eslava v. Lepretre*, 21 Ala. 504, 56 A. D. 266; *Glenn v. Clark*, 53 Md. 580; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76,—holding that dower does not attach as against purchase money mortgage; *McMahon v. Russell*, 17 Fla. 698, to same point; *Libby v. Tidden*, 192 Mass. 175, 78 N. E. 313, 7 A. & E. Ann. Cas. 617, to point that dower does not attach where husband's seisin is instantaneous; *Roush v. Miller*, 39 W. Va. 638, 20 S. E. 663, holding widow's right of dower subject to lien retained for unpaid purchase money; *Rawlings v. Lowndes*, 34 Md. 639, holding that dower attached as against purchase money mortgage not acknowledged until some time after its execution.

Cited in reference notes in 24 A. D. 707, on dower in case of transitory seisin; 37 A. D. 659, on dower as affected by purchase money mortgage or trust.

Cited in note in 4 L.R.A. 607, as to whether mortgage given to vendor for purchase money is superior to dower.

20 AM. DEC. 438, STOCKETT v. WATKINS, 2 GILL & J. 326.**When action for use and occupation sustainable.**

Cited in *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723, holding that action for use and occupation will lie upon a contract implied by law; *Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 598, holding that one who enters and holds as trespasser is not liable in such action; *Smith v. Houston*, 16 Ala. 111, holding such action not sustainable on proof of title in plaintiff and that defendant did not hold adversely; *Bates v. Ridgeway*, 48 Ala. 611, to point that such action is not sustainable where defendant's possession is tortious; *Ackerman v. Lyman*, 20 Wis. 455, holding instruction that law will imply promise to pay rent where one entering as trespasser holds with owner's assent erroneous.

Cited in reference notes in 23 A. D. 407, on assumpsit for use and occupation; 46 A. D. 289, on action for use and occupation.

Implied contracts.

Cited in reference notes in 23 A. D. 662; 26 A. D. 556,—on exclusion of implied contract by express contract; 60 A. D. 629, on nonimplication of promise where express contract exists.

When action of assumpsit sustainable.

Cited in *Franklin v. Waters*, 8 Gill, 322, holding slave not entitled to recover for services rendered after manumission, the parties not so intending; *Kiddall v. Trimble*, 1 Md. Ch. 143, to point that plaintiff who brings assumpsit where trespass is the proper action misconceives his remedy and cannot recover.

Cited in note in 89 A. D. 428, on assumpsit not being proper action to try title.
—As to matters sounding in tort.

Cited in *Janet v. Buzzard*, Hempst. 240, Fed. Cas. No. 7,206a; *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 A. D. 394,—holding that owner may waive wrongful conversion and bring assumpsit; *Strickland v. Burns*, 14 Ala. 511, sustaining action of assumpsit against one who wrongfully disposed of notes for property; *Upchurch v. Norsworthy*, 15 Ala. 705, sustaining action of assumpsit by administrator against one tortiously disposing of property of the estate; *Isaacs v. Hermann*, 49 Miss. 449, sustaining action of assumpsit where defendant procured the goods by fraud; *Linton v. Walker*, 8 Fla. 144, 71 A. D. 105 (dissenting opinion), on right to maintain assumpsit against one wrongfully using slaves of another; *Gordon v. Bruner*, 49 Mo. 570; *Starr Cash Car Co. v. Reinhart*, 2 Misc. 116, 20 N. Y. Supp. 872; *Norden v. Jones*, 33 Wis. 600, 14 A. R. 782,—holding that claim growing out of tort may be set off in action upon contract; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50; *Hutton v. Wetherald*, 5 Harr. (Del.) 381; *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133; *McDonald v. Peacemaker*, 5 W. Va. 439,—to point that injured party may waive tort and bring assumpsit.

Cited in reference notes in 26 A. D. 481; 49 A. D. 281; 18 A. S. R. 810,—on waiver of tort to sue in assumpsit.

Cited in notes in 17 A. D. 245, 246, on waiving tort; 8 L.R.A. 217, on election of remedy for conversion.

Distinguished in *Mann v. United States*, 32 Ct. Cl. 580, holding such rule cannot be made use of to give court jurisdiction in claims against the government.

Admissibility of declarations by privies in estate.

Cited in *Burt v. McKinstry*, 4 Minn. 204, Gil. 146, 77 A. D. 507, holding declarations of assignor offered to impeach assignment previously made inad-

missible; *Vrooman v. King*, 36 N. Y. 477, holding it necessary in order to bind grantee by declarations of grantor to show that same were made prior to sale.

Cited in notes in 40 A. D. 240; 42 A. D. 80,—on admissibility of declarations of former owner of chattel or chose in action against party claiming under him. **Power of court to determine sufficiency of evidence.**

Cited in *Cole v. Hebb*, 7 Gill & J. 20, holding it for the court to determine the legal sufficiency of the evidence adduced.

20 AM. DEC. 448, HAMILTON v. WARFIELD, 2 GILL & J. 482.

When freight *pro rata itineris* demandable.

Cited in *Towle v. Kettell*, 5 Cush. 18, denying right to any freight where vessel was lost while homeward bound, the charter party being for an entire voyage out and home.

Cited in reference note in 30 A. D. 718, on right to freight *pro rata itineris* where owner voluntarily receives goods at intermediate port.

20 AM. DEC. 452, GLENN v. SMITH, 2 GILL & J. 493.

Powers, duties, and liabilities of executors and administrators.

Cited in note in 2 E. R. C. 152, on right of executor or administrator to retain his claim against estate.

—Extraterritorial powers and duties.

Cited in *Reynolds v. McMullen*, 55 Mich. 568, 54 A. R. 386, 22 N. W. 41, holding foreign administrator not entitled to sell mortgage on land situate within state of forum after grant of local administration; *Davis v. Smith*, 5 Ga. 274, 48 A. D. 279, holding administrator not liable as for devastavit for failing to defend suit in foreign state; *Wright v. Gilbert*, 51 Md. 146, holding that in absence of statute courts are not open to foreign executors; *South-Western R. Co. v. Paulk*, 24 Ga. 356, holding same as to foreign administrators; *Corrie's Case*, 2 Bland, Ch. 488, to point that a foreign administration is not recognized.

Cited in reference notes in 41 A. S. R. 545, on foreign executors and administrators; 28 A. D. 141; 32 A. D. 633,—on powers and duties of foreign administrator or curator; 23 A. D. 572, on powers and liabilities of foreign administrators; 32 A. D. 107, on rights, powers, liabilities, and duties of foreign administrators and executors; 58 A. D. 268, on authority of administrator, executor, or curator over assets in another jurisdiction; 25 A. D. 317, on appointment, powers, and duties of foreign administrators.

Cited in notes in 5 L.R.A. 541, on incapacities of foreign administrator; 45 A. S. R. 671, 672, on extraterritorial powers and liabilities of executors and administrators; 45 A. S. R. 664, on power and duty of administrator and executor as to property outside of state; 35 A. D. 485, on necessity for appointment of ancillary administrator.

Distinguished in *Pedan v. Robb*, 8 Ohio, 227; *Smith v. Henning*, 10 W. Va. 596,—upon point that courts are not open to foreign executors and administrators; *Holcomb v. Phelps*, 16 Conn. 127, holding property brought by foreign administrator into state of forum not subject to seizure at suit of administrator there appointed; *Lucas v. Byrne*, 35 Md. 485, holding foreign administrator entitled to sue, as assignee upon claim assigned by him to himself individually; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521, holding debt discharged where resident debtor paid foreign administrator before local administration granted.

Payment by bills and notes.

Cited in *Poole v. Rice*, 9 W. Va. 73, holding that in absence of express agreement note will not be considered absolute payment; *Warfield v. Booth*, 33 Md. 63, to same point; *Berry v. Griffin*, 10 Md. 27, 69 A. D. 123, holding liability on account not extinguished where note received in payment thereof; *Peter v. Beverly*, 10 Pet. 532, 9 L. ed. 522, holding arrangement whereby for decedent's notes other notes were substituted no payment; *Merchants Nat. Bank v. Good*, 21 W. Va. 455, holding substituting new note for matured one not an extinguishment thereof unless so agreed; *First Nat. Bank v. Handley*, 48 W. Va. 690, 37 S. E. 536, to same effect; *Hopkins v. Boyd*, 11 Md. 107, holding note in effect a renewal of note surrendered not a payment thereof; *Councilman v. Towson Nat. Bank*, 103 Md. 469, 64 Atl. 358, holding suit sustainable on original indebtedness where renewal note signed by but one joint debtor; *Reppert v. Robinson*, Taney, 492, Fed. Cas. No. 11,703, holding suit upon original cause of action under libel filed in admiralty sustainable notwithstanding duebill taken; *Lewis v. Brehme*, 33 Md. 412, 3 A. R. 190, holding agent liable as debtor not discharged upon sending principal a draft; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 23 L.R.A. 173, 28 Atl. 563, to point that check is not a payment unless so agreed or creditor guilty of laches; *Hoopes v. Strasburger*, 37 Md. 390, 11 A. R. 538, holding that one induced by fraud to accept note as absolute payment need not in suit on original contract produce note until trial; *Sentman v. Gamble*, 69 Md. 293, 14 Atl. 673 (dissenting opinion), as to vendee's note operating as part payment within statute of frauds; *Haines v. Pearce*, 41 Md. 221, holding that agreement to take bill as payment need not be expressed in so many words; *Hoopes v. Strasburger*, 37 Md. 390, 11 A. R. 538, holding note, a payment when accepted by creditor at his risk; *Bantz v. Basnett*, 12 W. Va. 772, holding note extinguished where before same due new note taken, and old one surrendered; *Meek v. Parker*, 63 Ark. 367, 58 A. S. R. 119, 38 S. W. 900, holding mechanics' lien not waived by accepting note in settlement and transferring it if taken up at maturity.

Cited in reference notes in 43 A. D. 635; 44 A. D. 144,—as to when giving of note operates as payment of pre-existing debt; 43 A. D. 540, as to when giving note operates as payment, and its effect on pre-existing debt; 42 A. D. 383, on effect of accepting note for pre-existing debt; 51 A. D. 73, on payee's right to recover on original consideration when note is unavailing; 27 A. D. 641, on presumption of payment arising from taking of note; 42 A. D. 383, on presumption as to agreement that note was received as payment; 72 A. D. 620, on rebutting presumption that old debt was discharged by acceptance of negotiable note.

Cited in note in 37 A. D. 48, on extinguishment of debt by note or order.

Distinguished in *Blake v. Pitcher*, 46 Md. 453, holding principles regulating effect of note as payment inapplicable to mechanics' lien law; *Neff v. Clute*, 12 Barb. 466, to point that action not maintainable on note after same delivered back to maker for a new note.

—Of third person.

Cited in *Kephart v. Butcher*, 17 Iowa, 240, holding note surrendered upon receipt of third party's note not thereby paid; *Guion v. Doherty*, 43 Miss. 538, holding wife's liability on open account not discharged where husband's note accepted; *Haines v. Pearce*, 41 Md. 221, holding one entitled to credit for drafts given as collateral where holder guilty of laches in giving notice of dishonor;

Cocks v. Chaney, 14 Ala. 65, holding that one transferring note given him as collateral security adopts same as payment.

Cited in reference notes in 35 A. S. R. 817, on acceptance of note of third person as payment; 23 A. D. 777, as to when payment by note of third person discharges debt; 24 A. D. 640; 27 A. D. 192,—as to when note given by debtor or third person operates as payment.

Cited in notes in 10 L.R.A.(N.S.) 539, on effect of giving receipt by one accepting without indorsement transfer of worthless check or note of third person; 10 L.R.A.(N.S.) 512, 513, 518, on effect of transfer, without indorsement, of worthless check or note of third person on account of antecedent debts; 10 L.R.A.(N.S.) 540, on effect of negotiating worthless paper of third person, accepting without indorsement; 10 L.R.A.(N.S.) 541, on effect of laches of one accepting, without indorsement, transfer of worthless check or note of third person.

— **Of one member of debtor firm.**

Cited in **Hoeflinger v. Wells**, 47 Wis. 628, 3 N. W. 589, holding one lending money to partnership not paid by taking note of member thereof; **Folk v. Wilson**, 21 Md. 538, 83 A. D. 599, holding partnership not discharged from liability for goods sold firm where note of member accepted; **First Nat. Bank v. Newton**, 10 Colo. 161, 14 Pac. 428, holding firm note surrendered after a change in partnership, unknown to creditor, for another note not thereby paid.

— **Effect of producing note at trial.**

Cited in **Matthews v. Dare**, 20 Md. 248, holding suit on original indebtedness sustainable if note given therefor is actually produced at trial; **Morrison v. Welty**, 18 Md. 169, holding same as to an altered note; **Owen v. Hall**, 70 Md. 97, 16 Atl. 376, holding that if renewal note be produced at trial recovery can be had on original note.

— **When receipted for.**

Cited as leading case in **Re Hurst**, 1 Flipp. 462, Fed. Cas. No. 6,925, holding it a question of fact whether notes taken in full satisfaction and discharge operate as payment.

Cited in **Hurley v. Hollyday**, 35 Md. 469, holding absolute payment of purchase money not established where notes received and receipted for; **McMurry v. Taylor**, 30 Mo. 263, 77 A. D. 611, holding statement in receipt that note is in settlement of an account insufficient to prove absolute payment; **Combination Steel & I. Co. v. St. Paul City R. Co.** 47 Minn. 207, 49 N. W. 744, holding note receipted for as payment not operative as absolute payment; **Comptoir D'Escompte De Paris v. Dresbach**, 78 Cal. 15, 20 Pac. 28, to same point; **Harness v. Chesapeake & O. Canal Co.** 1 Md. Ch. 248, holding debt not extinguished where creditor receipted in full for acceptances of debtor; **H. F. Cady Lumber Co. v. Greater America Exposition**, 4 Neb. (Unof.) 268, 93 N. W. 961, holding absolute payment not established where note receipted for as payment on account and credited on books; **Feamster v. Withrow**, 12 W. Va. 611, holding bank receipting for surety's indorsed note given in payment of judgment recovered against, principal not thereby absolutely paid; **Maryland & N. Y. Coal & I. Co. v. Wingert**, 8 Gill, 170, holding lien of mortgage not extinguished by receipting for checks and notes given in payment thereof; **Eastman v. Porter**, 14 Wis. 39, holding liability on mortgage debt not discharged where plaintiff accepted usurious note and entered mortgage released.

— **Effect of, to suspend payment.**

Cited in **Herman v. Williams**, 36 Fla. 136, 18 So. 351, holding that acceptance

of note for antecedent debt extends time of payment until note's maturity; *Metzerott v. Ward*, 10 App. D. C. 514; *Mudd v. Harper*, 1 Md. 110, 54 A. D. 644,—to point remedy on original debt suspended until maturity of note given in payment thereof; *Yates v. Donaldson*, 5 Md. 389, 61 A. D. 283; *Vanderford v. Farmers' & M. Nat. Bank*, 105 Md. 164, 10 L.R.A. (N.S.) 129, 66 Atl. 47,—to point that payment is merely suspended where a security is substituted for another of equal degree; *Hunter v. Van Bomhorst*, 1 Md. 504, holding that receiving from drawer bills accepted by him for amount due on previous note suspends action thereon; *American Iron & Steel Mfg. Co. v. Beall*, 101 Md. 423, 61 Atl. 629, 4 A. & E. Ann. Cas. 883, holding that accepting note payable at future time suspends suit on original contract and discharges guarantor.

Cited in reference note in 30 A. D. 258, on effect of taking note to suspend remedy on debt.

Cited in note in 12 L.R.A. 224, on effect of taking security as influenced by kind taken and time of taking.

Who liable as executor de son tort.

Cited in reference notes in 22 A. D. 719; 23 A. D. 376,—on who liable as executor *de son tort*; 45 A. D. 778, as to how executor *de son tort* is constituted; 65 A. D. 140, as to when intermeddling with goods will convert one into executor *de son tort*.

Cited in notes in 85 A. D. 424; 98 A. S. R. 194,—on what constitutes one an executor *de son tort*; 85 A. D. 424, on what acts will not constitute person executor *de son tort*.

Rights and liabilities of executors de son tort.

Cited in *Winn v. Slaughter*, 5 Heisk. 191, holding executor *de son tort* paying debts to twice the amount of assets received exonerated from liability; *Hill v. Henderson*, 13 Smedes & M. 688, holding by statute executor *de son tort* liable only to extent of assets received though *plene administravit* not pleaded; *Baumgartner v. Haas*, 68 Md. 32, 11 Atl. 588; holding that rule that such executor cannot retain for his own debt applies in equity; *Bellows v. Goodall*, 32 N. H. 97, to point that extent of such executor's common-law liability is value of assets received; *Jenks v. Terrell*, 73 Ala. 238, holding widow entitled to reimbursement for just debts paid by her before administration granted.

Cited in notes in 98 A. S. R. 201, on rights of executor *de son tort*; 45 A. D. 778; 57 A. D. 154,—on liability of executor *de son tort*; 85 A. D. 426, 827, on liability of executor *de son tort*.

In what actions recoupment or set-off allowed.

Cited in *Lee v. Rutledge*, 51 Md. 311, holding to point that recoupment is allowed in actions both *ex contractu* and *ex delicto* to avoid circuity of action.

—Availability to executor de son tort.

Cited in *Tobey v. Miller*, 54 Me. 480, holding such executor entitled to recoup just debts paid by him; *Roggenkamp v. Roggenkamp*, 15 C. C. A. 600, 32 U. S. App. 453, 68 Fed. 605, holding such executor chargeable only to extent of assets received against which debts paid may be set off.

When title vests.

Cited in note in 12 L.R.A. 702, as to when vendee's title vests on conditional sale.

20 AM. DEC. 463, FRIDGE v. STATE, 3 GILL & J. 103.**Powers of probate court.**

Cited in *Lefever v. Lefever*, 6 Md. 472, holding that court may appoint guardian where mother neglected for three months to qualify as such.

Distinguished in *De Kraft v. Barney*, 2 Hayw. & H. 405, Fed. Cas. No. 18,288, holding probate court precluded from inquiring into father's fitness to have personal custody of his children.

Presumption of performance of duty.

Cited in *Pennington v. Yell*, 11 Ark. 212, 52 A. D. 262, holding that in action against attorney for negligence there is strong presumption that he performed his duty; *State use of Baltimore County v. Horner*, 34 Md. 569, holding it unnecessary in action on tax collector's bond, to aver when he was appointed and when levies were made.

— By probate court.

Cited in *State use of Dittman v. Robinson*, 57 Md. 486, holding orphans' court having accepted bond it will be presumed to have demanded it in accordance with statute; *Sitzman v. Pacquette*, 13 Wis. 291 (dissenting opinion), upon the presumptions arising in favor of validity of acts of probate court.

Conclusiveness of judgment.

Cited in reference notes in 30 A. D. 168, on conclusiveness of judgment of court of competent jurisdiction; 52 A. D. 392, on collateral attack on judgment.

— Of probate court.

Cited in *Nugent v. Powell*, 4 Wyo. 173, 62 A. S. R. 17, 20 L.R.A. 199, 33 Pac. 23, holding adoption proceedings conclusive upon parties thereto and their privies.

Cited in reference note in 61 A. S. R. 667, on conclusiveness of judgment appointing or removing guardian.

Distinguished in *Redman v. Chance*, 32 Md. 42, holding that parent not notified of appointment of guardian may on petition in same court impeach the appointment.

Estoppel by recitals in bond.

Cited in *Thompson v. Rush*, 66 Neb. 758, 92 N. W. 1060, to point that sureties are estopped to deny facts recited in bond; *Hauenstein v. Gillespie*, 73 Miss. 742, 55 A. S. R. 569, 19 So. 673, holding in action on guardian's bond sureties estopped to deny validity of guardian's appointment; *Gray v. State*, 78 Ind. 68, 41 A. R. 545, holding sureties on guardian's bond given upon sale of ward's realty estopped to deny guardian's appointment; *Gunther v. State*, 31 Md. 21, to point that sureties of guardian are estopped to deny that he is guardian or that ward had property subject to guardianship; *Hoffman v. Fleming*, 66 Ohio St. 143, 64 N. E. 63, holding sureties on executor's bond estopped to deny that court had jurisdiction to make the appointment; *Milburn v. State*, 1 Md. 1, holding parties to bond reciting principal's appointment estopped to deny such fact; *State ex rel. Remo v. Golding*, 28 Ind. App. 233, 62 N. E. 502, holding that sureties on bond of licensee cannot attack validity of the license; *Lloyd v. Burgess*, 4 Gill, 187, holding administrator estopped to deny fact admitted in intestate's bond.

Cited in reference notes in 55 A. S. R. 573; 65 A. S. R. 123,—on estoppel by recitals in guardian's bond.

Cited in note in 11 E. R. C. 15, on estoppel by matter of record.

Sufficiency and effect of tender.

Cited in *Hiller v. Howell*, 74 Ga. 174, holding a partial and uncertain tender insufficient.

Cited in reference notes in 22 A. D. 225; 26 A. D. 265,—on sufficiency and necessity of tender; 38 A. S. R. 529, on necessity of tender being for full amount; 35 A. D. 495, on sufficiency of offer of part of amount as a tender.

Cited in notes in 77 A. D. 474, giving illustrations of insufficient tender; 77 A. D. 488, on effect of tender as payment and discharge.

Liability of guardians generally.

Cited in note in 75 A. D. 440, on personal liability of guardians.

Conclusiveness of settlement by guardian.

Cited in reference note in 46 A. D. 486, as to when guardian's settlement of ward not binding.

Release of guardian.

Cited in reference note in 29 A. D. 89, on setting aside release from ward to guardian made at or before time of settling accounts.

Jurisdiction over guardian.

Cited in reference note in 71 A. D. 119, on what facts are necessary to confer jurisdiction to bind guardian.

Validity of contracts of infants.

Cited in *Ridgeley v. Crandall*, 4 Md. 435, holding that presumably infant's deed is voidable and not void; *Levering v. Heighe*, 3 Md. Ch. 365, 2 Md. Ch. 81, holding female infant's contract binding her realty by a marriage settlement merely voidable; *Cronise v. Clark*, 4 Md. Ch. 403, holding mortgage by infant of reversionary interest in her property to secure debt of husband's firm void; *McClellan v. Kennedy*, 3 Md. Ch. 234; *Greenwood v. Greenwood*, 28 Md. 369,—to point that female infant is not entitled to execute valid release to guardian; *McKim v. Handy*, 4 Md. Ch. 228, to point that female is entitled to receive her property from guardian at age of eighteen; *Monumental Bldg. Asso. No. 2 v. Herman*, 33 Md. 128, sustaining exceptions by infant to sale under mortgage executed by him; *Anderson v. Smith*, 33 Md. 465, holding infant continuing to live in home where father placed her liable for necessities.

Cited in reference notes in 23 A. D. 529; 26 A. D. 254; 30 A. D. 82,—as to when contracts of infants are void, voidable, or binding; 36 A. D. 298, on infants' contracts for necessities; 26 A. D. 748, on liability of infants on contracts for necessities.

Cited in notes in 18 A. S. R. 576, on infants' contracts as void or voidable; 18 A. S. R. 580, on statutory regulations of infants' contracts; 18 A. S. R. 618, on infants' compromises and releases; 22 A. D. 654, on infant's liability for necessities.

Ratification or disaffirmance of infant's contracts.

Cited in *West v. Penny*, 16 Ala. 186, sustaining action on covenant of infant to pay over money received by him where he, upon his majority, ratified same; *Fant v. Cathcart*, 8 Ala. 725, holding that infant may ratify single bill on attaining his majority.

Cited in reference note in 7 A. D. 137, on right to disaffirm contract as privilege of infant only.

Who may sue on guardian's bond.

Distinguished in *Baldwin v. State*, 89 Md. 587, 43 Atl. 857, holding that tax authorities may sue on guardian's bond.

Right of infant to sue by next friend.

Cited in *Baltimore v. Norman*, 4 Md. 352, holding infant entitled to sue in trover by next friend though he have duly qualified guardian.

Where legal plaintiff is only a nominal party.

Cited in *Karrick v. Wetmore*, 22 App. D. C. 487, to point that nominal plaintiff is the substantial plaintiff in respect to institution and prosecution of suit; *State ex rel. Dunham v. Hood*, 3 Blackf. 351, to point that it is nothing to defendant, in action brought for use of another, who is entitled to equitable interest; *Le Strange v. State*, 58 Md. 26, holding that husband's name need not be used as next friend in suit in name of state to use of wife.

Distinguished in *Harvey v. Baltimore & O. R. Co.* 70 Md. 319, 17 Atl. 88, holding that suit in name of state for use of husband against one causing wife's death abates on husband's death.

When interest allowed.

Cited in *McShane v. Howard Bank*, 73 Md. 135, 10 L.R.A. 552, 20 Atl. 776, holding in action on cashier's bond interest recoverable from time money embezzled by him; *Gott v. State*, 44 Md. 319, holding plaintiff in action on trustee's bond given on sale of property entitled to his share of interest received by trustee from purchasers; *Carter v. Cross*, 7 Gill, 43, holding question of allowance of interest properly left to jury.

Cited in reference note in 53 A. D. 686, as to when interest is recoverable.

Cited in note in 51 A. D. 277, on allowance of interest.

20 AM. DEC. 471, MASON v. THOMPSON, 9 PICK. 280.

Liability of innkeepers.

Cited in *Norcross v. Norcross*, 53 Me. 163; *Dunbier v. Day*, 12 Neb. 596, 41 A. R. 772, 12 N. W. 109; *Hulett v. Swift*, 33 N. Y. 571, 88 A. D. 405 (affirming 42 Barb. 230),—holding innkeeper's liability that of an insurer; *McKee v. Owen*, 15 Mich. 115; *Ingalsbee v. Wood*, 36 Barb. 452; *Wallace v. Canady*, 4 Sneed, 364, 70 A. D. 250,—to same point; *Mateer v. Brown*, 1 Cal. 221, 52 A. D. 303, holding innkeeper liable as an insurer even against acts of burglars; *Pinkerton v. Woodward*, 33 Cal. 557, 91 A. D. 657, to same effect; *Burbank v. Chapin*, 140 Mass. 123, 2 N. E. 934, holding innkeeper liable as insurer though guest failed to comply with inn's regulations, where loss not due to such noncompliance; *Lanier v. Youngblood*, 73 Ala. 587, holding guest entitled to recover for money stolen though he used room knowing that lock on door thereof was broken; *Spring v. Hager*, 145 Mass. 186, 1 A. S. R. 451, 13 N. E. 479, holding guest locking but not bolting his door entitled to recover for property stolen; *Shaw v. Berry*, 31 Me. 478, 52 A. D. 628, holding innkeeper liable for injury suffered by guest's horse though due care used; *Piper v. Manny*, 21 Wend. 282, holding innkeeper liable for safety of property placed at direction of hostler in open yard near highway; *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 55 L.R.A. 208, 50 Atl. 358, denying innkeeper's liability for safety of team which guest, without directly notifying him, placed in carriage shed; *Wilkins v. Earle*, 3 Robt. 352, 19 Abb. Pr. 190 (dissenting opinion), upon liability of innkeeper where guest deposited with him \$22,000; *Johnson v. Richardson*, 17 Ill. 302, 63 A. D. 369, holding innkeeper prima facie liable for money stolen from guest though latter failed to use safe provided for valuables; *Curtis v. Murphy*, 63 Wis. 4, 53 A. R. 242, 22 N. W. 825, holding innkeeper not liable for money stolen by his clerk from neighbor who had taken room with prostitute.

Cited in reference notes in 24 A. D. 89; 29 A. D. 683; 35 A. D. 125; 52 A. D. 312,—on liability of innkeepers; 71 A. D. 326, on prima facie liability for negligence of innkeeper where guest's property is lost while in his charge; 64 A. S. R. 229, on rights of guests of inn as to goods stolen.

Cited in notes in 7 A. D. 454, on extent of innkeeper's liability; 13 E. R. C. 129, on liability of innkeeper for goods brought to inn; 18 A. R. 133, 135, on innkeeper's liability for loss of goods of guest; 25 L. ed. U. S. 103, on liability of innkeeper for goods and money of guest; 69 A. D. 221, 223, on kind of goods for which innkeeper is liable; 8 L.R.A. 97, on liability of innkeeper as insurer; 6 L.R.A. 485, on liability of innkeeper as insurer of property committed to his care; 99 A. S. R. 578, on liability of innkeepers as insurers for injury to or loss of property of guest.

Distinguished in *Merritt v. Claghorn*, 23 Vt. 177, holding innkeeper not liable for property destroyed by a fire not due to his negligence.

Disapproved in *Laird v. Eichold*, 10 Ind. 212, 71 A. D. 323, holding innkeeper not liable as an insurer.

To whom innkeeper is responsible for loss.

Cited in *Dickinson v. Winchester*, 4 Cush. 114, 50 A. D. 760, holding parent entitled to recover for property lost by minor son while a guest of defendant innkeeper; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, holding corporation entitled to recover for money belonging to it stolen from its agent while a guest.

Cited in note in 99 A. S. R. 583, on existence of relation of guest and innkeeper as essential to latter's liability.

When relation of innkeeper exists.

Cited in *Murray v. Clarke*, 2 Daly, 102, as to continuance of relation of innkeeper towards property left at inn by guest who intended to return; *Peet v. McGraw*, 25 Wend. 653, to point that relation of innkeeper may exist as to horses left at inn though owner put up elsewhere; *Lord v. Jones*, 24 Me. 439, 41 A. D. 391; *McDaniels v. Robinson*, 26 Vt. 316, 62 A. D. 574,—to same point.

Cited in reference notes in 67 A. D. 723, on who are guests; 67 A. D. 723, on one committing horse to innkeeper to be fed as guest.

Cited in notes in 7 A. D. 451, as to who are guests of innkeeper; 62 A. D. 586, 588, as to who are guests at inn and when they cease to be so; 105 A. S. R. 936, on leaving animal or property at inn as creating relation of guests.

Disapproved in *Grinnell v. Cook*, 3 Hill, 485, 38 A. D. 663, holding that relation of innkeeper does not exist as to horses left at inn by neighbor; *Healey v. Gray*, 68 Me. 489, 28 A. R. 80; *Ingalsbee v. Wood*, 36 Barb. 452,—holding same where owner of horse puts up at relative's house; *Thickstun v. Howard*, 8 Blackf. 535, denying recovery to a nontraveler for death of horse which he had left at stable of inn.

Sale of liquor to guest.

Cited in *Hall v. State*, 4 Harr. (Del.) 132, holding innkeeper may sell liquor to guest on Sunday.

Carrier's liability for passengers' effects.

Cited in *The John Brooks*, 1 Haskell, 439, Fed. Cas. No. 7,335, holding boat company not liable for money stolen from passenger who failed to both bolt and lock his stateroom door; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 A. S. R. 325, 6 L.R.A. 809, 44 N. W. 226, holding sleeping car company liable for safe-keeping of coat delivered to porter by passenger; *McKee v. Owen*, 15 Mich. 115, as to carrier's liability for property stolen from one assigned stateroom in conjunction with another.

20 AM. DEC. 475, MUNROE v. PERKINS, 9 PICK. 298.

Rescission and modification of contracts.

Cited in *Coyle v. Baum*, 3 Okla. 695, 41 Pac. 389, holding it for jury to deter-

mine whether liability on original contract is discharged where money was returned to vendee upon his returning the defective goods; *Jacksonville & A. R. Co. v. Woodworth*, 26 Fla. 368, 8 So. 177, holding burden of proof on party alleging that the contract has been subsequently altered; *Barelli v. O'Conner*, 6 Ala. 617; *Siebert v. Leonard*, 17 Minn. 433, Gil. 410; *Stees v. Leonard*, 20 Minn. 494, Gil. 448; *Allen v. Jaquish*, 21 Wend. 628,—to point that an unsealed contract if acted upon may rescind a specialty; *Fresh v. Gibson*, 16 Pet. 327, 10 L. ed. 982, to point that no action is maintainable on deed when by subsequent acts of parties contract contained therein is varied; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122, holding original contract discharged where buyer agreed to pay higher price to induce seller to continue sending goods; *Agel v. F. R. Patch Mfg. Co.* 77 Vt. 13, 58 Atl. 792, holding executed agreement to reduce price of goods made to induce vendee to accept same enforceable; *Paine v. Sherwood*, 21 Minn. 225, holding release from further performance of contract to supply lumber made upon contractor's agreeing to run his mill for a time exclusively for contractee binding.

Cited in reference note in 16 A. S. R. 799, on right to rescind executory contract by mutual agreement before breach.

Cited in note in 34 L.R.A. 40, on performance of existing contract obligation as consideration for new promise.

Criticized in *Michaud v. McGregor*, 61 Minn. 198, 63 N. W. 479, holding owner's agreement to pay one building on his land cost of removing rocks therefrom enforceable where latter contended his contract did not require him to remove same.

— Of written contract by parol agreement.

Cited in *Buford v. Funk*, 4 G. Greene, 493, to point that parol agreement substituted for prior special contract is enforceable; *Robison v. Hardy*, 22 Ill. App. 512, holding that a written contract may subsequently, if before breach, be verbally modified; *Bean v. Jay*, 23 Me. 117, holding that town may verbally waive performance of contract to support paupers; *American Fine Art Co. v. Simon*, 72 C. C. A. 45, 140 Fed. 529, holding written contract rescinded where parties subsequently entered into oral agreement inconsistent therewith; *Barnes v. Thomas*, 156 Mass. 581, 31 N. E. 683, holding subsequent oral warranty varying executory written contract provable; *Courtenay v. Fuller*, 65 Me. 156, holding oral agreement executed contemporaneously with written contract provable if subsequently adopted; *Emerson v. Slater*, 22 How. 28, 16 L. ed. 360; *Teal v. Bilby*, 123 U. S. 572, 31 L. ed. 263, 8 Sup. Ct. Rep. 239,—holding that written contracts not within statute of frauds may be subsequently modified and annulled by verbal agreements; *Cummings v. Arnold*, 3 Met. 486, 37 A. D. 155, holding oral agreement varying time of payment provided for in prior written contract which was within statute of frauds provable; *Long v. Hartwell*, 34 N. J. L. 116, holding that substituted performance agreed on by parol operates to discharge written contract within statute of frauds; *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165, holding contract within statute of frauds discharged if modified by an executed parol agreement; *Wilson v. People's Gas Co.* 75 Kan. 499, 89 Pac. 897, holding subsequent oral agreements modifying the manner of paying rentals provable; *Minor v. Edwards*, 10 Mo. 671, holding that obligors may orally waive condition of bond intended for their benefit; *Tuson v. Crosby*, 172 Mass. 478, 52 N. E. 744, holding that provisions of bail bond may be waived and annulled by subsequent oral agreements; *Sharp v. Wyckoff*, 39 N. J. Eq. 376, holding oral agreement varying provisions as to interest in mortgage past due provable; *Morril v. Chadwick*, 9 N. H. 84, to point that oral agreement modifying provisions as to delivery

in sealed contract may be proved; *Platte Land Co. v. Hubbard*, 12 Colo. App. 465, 56 Pac. 64, holding it competent to waive orally provisions in sealed contract as to time of payment; *Adams v. Macfarlane*, 65 Me. 143, to point that sealed contract may subsequently be orally waived; *Quincy v. Carpenter*, 135 Mass. 102, holding parol evidence admissible to show discharge of sealed contract; *Kirchner v. Laughlin*, 4 N. M. 386, 17 Pac. 132, holding sealed contract admissible in evidence as showing consideration for parol contract substituted therefor; *Ballou v. Billings*, 136 Mass. 307, to point that sealed contract may be verbally rescinded; *Hastings v. Lovejoy*, 140 Mass. 261, 54 A. R. 463, 2 N. E. 776, holding that lessee may prove that lessor orally agreed for valuable consideration to reduce the rent; *McKenzie v. Harrison*, 120 N. Y. 260, 17 A. S. R. 638, 8 L.R.A. 257, 24 N. E. 458, holding an executed parol agreement to reduce rent secured by sealed lease binding; *Wilgus v. Whitehead*, 89 Pa. 131, 6 W. N. C. 537, 36 Phila. Leg. Int. 265, enforcing landlord's parol agreement to waive requirement of sealed lease that rent be paid in advance.

Cited in reference notes in 21 A. D. 645; 17 A. S. R. 643,—on modification of sealed contract by executed parol agreement.

Cited in notes in 13 L.R.A. 633, on admissibility of parol evidence to show waiver; 56 A. S. R. 666, on subsequent parol agreements to vary written agreement as to employment and services; 56 A. S. R. 670, on variation of specialty by subsequent parol agreement.

Distinguished in *Goodrich v. Longley*, 4 Gray, 379, holding conversation had at time contract was executed inadmissible to vary same; *Thurston v. Ludwig*, 6 Ohio St. 1, 67 A. D. 328, holding vendee's verbal promise made immediately after execution of written contract to make an advancement not required thereby unenforceable.

— Oral promise of additional advantage to induce other party to complete contract.

Cited in *Doherty v. Doe*, 12 Colo. 456, 33 Pac. 165, holding lessor's verbal agreement to reduce rent of hotel if lessee continued to operate same enforceable; *Sargent v. Robertson*, 17 Ind. App. 411, 46 N. E. 925, holding same of agreement to reduce rent of mine; *Keeney v. Mason*, 49 Barb. 254, holding promise to pay increased price for lumber upon vendor's refusing to deliver same because of previous delay by vendee enforceable; *Peck v. Requa*, 13 Gray, 407, enforcing note given to induce plaintiff to resign an office though he had previously contracted to resign; *Holmes v. Doane*, 9 Cush. 135, holding it competent to show additional advantages subsequently promised to induce one to fulfil his contract; *Coyner v. Lynde*, 10 Ind. 282, holding additional promises made to induce one to resume work under a contract he had abandoned enforceable; *Mannetti v. Doege*, 48 App. Div. 567, 62 N. Y. Supp. 918, enforcing promise by owner of building to be responsible for wages of subcontractor's employee who threatened to quit; *Duell v. McCraw*, 86 Hun. 331, 33 N. Y. Supp. 528, holding promise to pay builder who had made mistake in his estimate, an additional sum to induce him to complete the building, enforceable; *Linz v. Schuck*, 106 Md. 220, 11 L.R.A. (N.S.) 789, 67 Atl. 286; *Meech v. Buffalo*, 29 N. Y. 198,—holding promise of additional compensation made to induce one to complete contract which he had abandoned because of unforeseen difficulties enforceable; *Gordon v. Phillips*, 13 Ala. 565, holding action sustainable on grantor's verbal promise to make good any deficiency in land previously conveyed if grantee would take possession; *Abbott v. Doane*, 163 Mass. 433, 47 A. S. R. 465, 34 L.R.A. 33, 40 N. E. 197, enforcing promise by an interested party made to induce another to perform his contract; *Moore v. Detroit*

Locomotive Works, 14 Mich. 266, holding delivery of property sufficient consideration for agreement to waive damages resulting from delay in delivery.

Distinguished in *Johnson v. Sellers*, 33 Ala. 265, holding promise by one made to induce another to perform a contract latter has with stranger unenforceable.

Disapproved in *King v. Duluth, M. & N. R. Co.* 61 Minn. 482, 63 N. W. 1105, holding promise to pay one additional compensation to induce him to complete building contract unenforceable; *Alaska Packers' Asso. v. Domenico*, 54 C. C. A. 485, 117 Fed. 99 (reversing 112 Fed. 554), holding contract to increase sailors' pay to induce them to continue their services unenforceable.

Recovery on quantum meruit or for extra work.

Cited in *Van Deusen v. Blum*, 18 Pick. 229, 29 A. D. 582, to point that recovery can be had on a *quantum meruit* where special contract not conformed to; *Zapel v. Ennis*, 104 Ill. App. 175, sustaining action of assumpsit for services rendered where defendant refused to carry out express contract; *Hilton v. Hanson*, 101 Me. 21, 62 Atl. 797, holding action for services rendered sustainable upon oral contract substituted for prior written contract; *Abbott v. Gatch*, 13 Md. 314, 71 A. D. 635, refusing allowance for extra work in absence of proof of express waiver of contract provision against extra charges unless agreed for in writing.

Liability of obligor for money received from co-obligor.

Cited in *Bacon v. Green*, 36 Fla. 325, 18 So. 870, holding recovery proper against one obligor for money received by another on joint account.

20 AM. DEC. 479, TUXWORTH v. MOORE, 9 PICK. 347.

Sufficiency of delivery to effect change of title to chattels.

Cited in *Ingalls v. Herrick*, 108 Mass. 351, 11 A. R. 360, holding question of sufficiency of delivery for jury where seller acting as agent agreed to keep the property in his storehouse for buyer who purchased to resell; *Gleason v. Drew*, 9 Me. 79, holding that title revested in vendor where vendee surrendered bill of sale and agreed to hold property as vendor's agent; *Thorndike v. Bath*, 114 Mass. 116, 19 A. R. 318, holding title passed where one was delivered bill of sale for unfinished piano which he left with seller to be finished; *Bradford v. Marbury*, 12 Ala. 520, 46 A. D. 264, holding that title passes on delivery to warehouseman indicated by vendee though liens upon the goods existed in favor of former.

Cited in reference notes in 31 A. D. 39, on sufficiency of delivery to pass title to chattels; 44 A. D. 538, on sufficiency of symbolical or constructive delivery; 26 A. D. 628, on sufficiency of constructive delivery to pass title to chattels.

Cited in notes in 49 A. D. 731, on necessity for delivery of a pledge; 5 E. R. C. 96, on want of change of possession of chattels sold as badge of fraud.

Distinguished in *Dempsey v. Gardner*, 127 Mass. 361, 34 A. R. 389, holding delivery of bill of sale in absence of any other delivery insufficient.

— Chattels in possession of third person.

Cited in *Audenreid v. Randall*, 3 Cliff. 99, Fed. Cas. No. 644; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424,—to point that order on bailee together with notice to him is a sufficient delivery; *Union Stock Yard & Transit Co. v. Mallory*, 54 Ill. App. 170, holding delivery made, where agent of vendee was given an order on bailee for the goods; *Strahorn-Hulton-Evans Commission Co. v. Quigg*, 38 C. C. A. 395, 97 Fed. 735, holding delivery insufficient unless notice be given the bailee having possession; *Corning v. Records*, 69 N. H. 390, 76 A. S. R. 178, 46 Atl. 462, holding sale valid without actual delivery where goods in possession of lessee even though no notice given him; *Carter v. Willard*, 19 Pick. 1, holding suf-

sufficient delivery established where lessee notified to hold the goods in his possession for vendee, though he failed to agree positively to so do; *Bullard v. Wait*, 16 Gray, 55, holding same where livery-stable keeper in possession of horse agreed to continue keeping same at vendee's expense; *Whitaker v. Sumner*, 20 Pick. 399, holding that title to goods in possession of pledgee passes to pledgeor's assignee upon pledgee being notified; *Boardman v. Spooner*, 13 Allen, 353, 90 A. D. 196, holding order on warehouseman given to buyer of goods, without notifying warehouseman, not such a delivery to and acceptance by buyer as satisfies statute of frauds; *Hunt v. Bode*, 66 Ohio St. 255, 64 N. E. 126, holding delivery sufficient where one took written assignment of warehouse receipts which were in pledge, the pledgee being notified to account to the assignee for the receipts after satisfying his own debt; *Russell v. O'Brien*, 127 Mass. 349, holding same where vendee's agent presented to carrier papers which entitled him to receive the goods; *Hatch v. Bayley*, 12 Cush. 27, holding same where carrier recognized order to hold for vendee though latter was not given bill of sale; *First Nat. Bank v. Dearborn*, 115 Mass. 219, 15 A. R. 92, holding same where a carrier's non-negotiable receipt for goods in its possession was delivered; *Gill v. Frank*, 12 Or. 507, 53 A. R. 378, 8 Pac. 764, holding delivery of non-negotiable receipt insufficient to effect change of title without assent of receptor; *National Newark Bkg. Co. v. Delaware, L. & W. R. Co.* 70 N. J. L. 774, 103 A. S. R. 825, 66 L.R.A. 595, 58 Atl. 311, holding that title to grain *in transitu* passed upon delivery of symbols of title; *Chase v. Willard*, 57 Me. 157, holding sale of fish stored in warehouse complete where vendee with general assent exercised acts of ownership; *Whipple v. Thayer*, 16 Pick. 25, 26 A. D. 626, holding delivery of instrument of assignment sufficient delivery where property is under attachment; *Appleton v. Bancroft*, 10 Met. 231, holding that where goods under attachment are mortgaged, title passes to mortgagee if attaching officer be notified; *First Ward Nat. Bank v. Thomas*, 125 Mass. 278, holding that if owner of property sold under attachment makes assignment of it and proceeds, title to proceeds vests in assignee.

Cited in reference notes in 37 A. D. 617, on sufficiency of delivery accompanying sale of property in stranger's possession; 22 A. D. 482, on sufficiency of delivery on sale of chattel in possession of third person.

Distinguished in *Doak v. Brubaker*, 1 Nev. 218, holding rule as to constructive delivery being sufficient inapplicable when property is in possession of grantor's servant; *Hallgarten v. Oldham*, 135 Mass. 1, 46 A. R. 433, holding bailor's assigning without notice to bailee, latter's non-negotiable receipt for the goods an insufficient delivery; *Geilfuss v. Corrigan*, 95 Wis. 651, 60 A. S. R. 143, 37 L.R.A. 166, 70 N. W. 306, holding delivery not established by indorsement of storage warrants for iron issued by furnace company retaining possession of and using the iron.

Measure of damages for breach of contract.

Cited in reference note in 27 A. D. 627, on measure of damages for breach of contract.

20 AM. DEC. 481, HAWES v. HUMPHREY, 9 PICK. 350.

Meaning of "credible witnesses" as used in statute of wills.

Cited in *Re Noble*, 124 Ill. 266, 15 N. E. 850; *Fuller v. Fuller*, 83 Ky. 345; *Haven v. Hilliard*, 23 Pick. 10; *Jones v. Larrabee*, 47 Me. 474,—holding that "credible witnesses" as used in statute of wills means competent witnesses; *Sparhawk v. Sparhawk*, 10 Allen, 155; *Nash v. Reed*, 46 Me. 168; *Warren v. Barter*, 48 Me. 193; *Smalley v. Smalley*, 70 Me. 545, 35 A. R. 353,—to same effect; *Bacon*

v. Bacon, 17 Pick. 134; Rucker v. Lambdin, 12 Smedes & M. 230; Lord v. Lord, 58 N. H. 7, 42 A. R. 565,—holding that word “credible” in statute of wills refers to witnesses competent at time will is executed.

Cited in note in 77 A. S. R. 460, on necessity that witness to will shall be “credible.”

As of what time competency of attesting witnesses determined.

Cited in Camp v. Stark, 10 Phila. 528, 30 Phila. Leg. Int. 21, holding that attesting witnesses must be competent at time will executed; Gillis v. Gillis, 96 Ga. 1, 51 A. S. R. 121, 30 L.R.A. 143, 23 S. E. 107; Stewart v. Harriman, 56 N. H. 25, 22 A. R. 408,—to same point; Vrooman v. Powers, 47 Ohio St. 191, 8 L.R.A. 39, 24 N. E. 267, holding that witness cannot remove his disqualification by renouncing favorable provisions of will when same offered for probate; Rice's Estate, 34 W. N. C. 167, 3 Pa. Dist. R. 262, 14 Pa. Co. Ct. 581 (affirmed in 173 Pa. 298, 33 Atl. 1100); Taylor v. Taylor, 1 Rich. L. 531,—to point that subsequent events cannot affect competency of attesting witness.

What constitutes being “interested.”

Cited in Northampton v. Smith, 11 Met. 390, holding probate judge not “interested” within meaning of statute regulating removals because an inhabitant of town whose poor were benefited by the will; Moses v. Julian, 45 N. H. 52, 84 A. D. 114, to point that one who as counsel wrote will is disqualified to sit as judge of probate thereon; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 28 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362 (dissenting opinion), as to what is legal meaning of word “interested.”

— Witnesses generally.

Cited in Manchester Bank v. White, 30 N. H. 456, holding an uncertain, remote, and contingent interest insufficient to disqualify witness; Re Marston, 79 Me. 25, 8 Atl. 87, to point that witnesses who may possibly be slightly benefited are not disqualified by reason of interest.

Cited in reference note in 30 A. S. R. 882, on competency of witnesses.

— Witnesses to will.

Cited in Hodgman v. Kittredge, 67 N. H. 254, 68 A. S. R. 661, holding husband incompetent as attesting witness where wife a legatee; Sullivan v. Sullivan, 106 Mass. 474, 8 A. R. 356, holding wife incompetent to attest will containing devise to husband; Lord v. Lord, 58 N. H. 7, 42 A. R. 565, holding heir of executrix who was a legatee under the will not disqualified by reason of interest; Warren v. Baxter, 48 Me. 193, holding attesting witness not “interested” because a member of church to which property devised; Piper v. Moulton, 72 Me. 155, holding inhabitant of town whose schools are benefited by will not disqualified as witness thereto; Hitchcock v. Shaw, 160 Mass. 140, 35 N. E. 671, holding taxpayer of town whose libraries were provided for by a will not incompetent to attest same, nor one who was entitled to use such library.

Cited in notes in 41 A. S. R. 366; 77 A. S. R. 459; 2 L.R.A. 668,—on competency of attesting witnesses to will; 77 A. S. R. 462, 465, on competency of witness to will as affected by interest.

Distinguished in Haven v. Hilliard, 23 Pick. 10, holding member of parish to which legacy bequeathed a competent witness to the will.

Proof of will by subscribing witnesses.

Cited in notes in 40 A. D. 232, on proof of will by subscribing witnesses; 77 A. S. R. 473, on weight and effect of testimony of subscribing witness on probate of will.

Proof of handwriting of incompetent witness.

Cited in *Harding v. Harding*, 18 Pa. 340, holding proof of handwriting of incompetent subscribing witness inadmissible to establish will.

Implied revocation or ademption of wills.

Cited in *Emery v. Union Soc.* 79 Me. 334, 9 Atl. 891, holding that testator by selling property devised revokes the devise *pro tanto*; *Marshall v. Marshall*, 11 Pa. 430; *Webster v. Webster*, 105 Mass. 538,—to same point; *Balliet's Appeal*, 14 Pa. 451, holding that though all the realty is conveyed away will is revoked only as to it; *Hoitt v. Hoitt*, 63 N. H. 475, 56 A. R. 530, 3 Atl. 604, holding will not revoked where testator conveyed away greater portion of his estate and acquired other properties; *Swails v. Swails*, 98 Ind. 511, as to whether a specific devise is revoked by testator's conveying part of his estate; *Sturtevant v. Bowker*, 11 Met. 290, sustaining probate of will though widow contrary to testator's expectation elected to take dower; *Warner v. Beach*, 4 Gray, 162, holding will not revoked by testator's wife's death, his insanity, births and deaths among children and change in property's value.

Cited in reference note in 34 A. D. 130, on what amounts to revocation of will.

Cited in notes in 2 E. R. C. 26, on ademption of specific legacies; 1 L.R.A. 204, on ademption by sale of property or change or annihilation of fund; 23 A. S. R. 356, on implied revocation of will by sale of property or change in testator's circumstances; 95 A. S. R. 354, on *pro tanto* ademption by advancement.

Function of court when will presented for probate.

Cited in *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97, holding that wills are not to be construed by probate court when presented for probate; *Re John*, 30 Or. 494, 36 L.R.A. 242, 47 Pac. 341, to same point; *Odell v. Odell*, 10 Allen, 1, to point that probate court cannot inquire whether will is void because creating perpetuities; *Worrill v. Gill*, 46 Ga. 482, to point that alienation merely operates as revocation and judgment of probate does not decide what passes under will; *Saltonstall v. Sanders*, 11 Allen, 446, to point that will unintelligible in parts is entitled to probate though "no intention or will can be collected by any rules of law from . . . it."

20 AM. DEC. 489, MELDRUM v. SNOW, 9 PICK. 441.**When title passes in conditional sales.**

Cited in *Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208, holding that title vests in vendee immediately where contract is for "sale or return."

Cited in notes in 94 A. S. R. 254, on contract of "sale or return;" 22 L.R.A. 850, on reservation in conditional sales of goods to be resold.

Distinguished in *Hotchkiss v. Higgins*, 52 Conn. 205, 52 A. R. 582, holding title passed where retailer was delivered liquors, he to return any not used; *Walter A. Wood Mining & Reaping Mach. Co. v. Brooke*, 2 Sawy. 576, Fed. Cas. No. 17,980, holding same where machines were shipped sales agent to be paid for if sold during year and if not sold carried over to next year; *Young v. Woodward*, 44 N. H. 250, to point that in declaring on contracts for sale or return there should be special count setting forth defendant's promise, consideration, breach and plaintiff's damage.

Authority of consignee to sell consignment.

Cited in *Romeo v. Martucci*, 72 Conn. 504, 77 A. S. R. 327, 47 L.R.A. 691, 45

Atl. 99 (dissenting opinion), on consignee's authority to sell consignment as part of his entire stock and business.

Liability for wrongful attachment.

Cited in note in 43 A. D. 264, on sheriff's liability for seizure of one person's goods under attachment against another.

20 AM. DEC. 491, COM. v. KNAPP, 9 PICK. 496.

Assigning counsel.

Cited in *Valle v. State*, 9 Tex. App. 57, 35 A. R. 719, granting new trial where one accused of horse stealing was forced to trial without counsel; *Edwards v. State*, 47 Miss. 581, holding that prosecuting attorney may with court's approval have other counsel associated with him; *Andersen v. Treat*, 172 U. S. 24, 43 L. ed. 351, 19 Sup. Ct. Rep. 67, holding fact that court intimated that it would refuse to assign counsel asked for, immaterial on petition for habeas corpus.

Accused's rights as to proceedings before grand jury.

Cited with special approval in *State v. Coates*, 130 N. C. 701, 41 S. E. 706, holding indictment valid though one of the witnesses before the grand jury was incompetent.

Cited in *Com. v. Woodward*, 157 Mass. 516, 34 A. S. R. 302, 32 N. E. 939, to point that court will not inquire whether incompetent evidence was heard by grand jury; *People v. Lauder*, 82 Mich. 109, 46 N. W. 956 (dissenting opinion), upon sufficiency of plea made by accused that he had been subpoenaed by grand jury and had unwittingly given testimony upon which indictment was founded.

— List of witnesses before grand jury.

Cited in *State v. Johnson*, 33 Ark. 174, holding that accused should be furnished list of grand jury witnesses but indictment not defective because same not indorsed thereon; *People v. Naughton*, 38 How. Pr. 430, 7 Abb. Pr. N. S. 421, allowing accused to have list of grand jury's witnesses but denying him, because no sufficient cause therefor shown, its minutes; *United States v. Southmayd*, 6 Biss. 321, Fed. Cas. No. 16,361, 7 Legal Gaz. 316, furnishing accused, there being no preliminary examination, list of grand jury witnesses but denying him minutes of its proceedings; *State v. Wilkinson*, 76 Me. 317, holding that statute regulating the supplying accused with list of grand jury witnesses need not be literally followed.

Challenging jury.

Cited in *Com. v. Walsh*, 124 Mass. 32, holding that court may try challenge to the array; *Com. v. McElhaney*, 111 Mass. 439, holding that by statute peremptory challenges must be made before questions as to interest, bias, etc. put.

Cited in reference notes in 24 A. D. 695, on challenge of juror; 41 A. D. 463, as to when peremptory challenge of juror is allowed.

Competency of jurors.

Cited in reference note in 53 A. D. 101, on competency of jurors.

Cited in note in 28 L.R.A. 321, on competency of witnesses before grand jury.

— Juror who has formed an opinion.

Cited in *State v. Boyle*, 104 N. C. 800, 10 S. E. 1023, to point that juror who has formed an opinion upon the case is incompetent; *State v. Potter*, 18 Conn. 166, upon same question; *Trimble v. State*, 2 G. Greene, 404, holding juror who had expressed an opinion, even though of a hypothetical nature, disqualified; *Curry v.*

State, 4 Neb. 545, holding juror incompetent if testimony required to overcome opinion founded upon rumor; *Rothschild v. State*, 7 Tex. App. 519, holding juror who had formed an opinion upon rumor to which he would adhere unless rumor was disproved incompetent.

Cited in reference note in 36 A. D. 516, on competency of juror having formed opinion.

Cited in notes in 36 A. D. 524, on nature of opinion disqualifying juror; 9 A. S. R. 745, on actual or presumed bias of juror.

Distinguished in *Hudgins v. State*, 2 Ga. 173, holding juror who had from rumor merely formed an opinion qualified; *State v. Walton*, 74 Mo. 270, holding juror competent though he had formed and expressed an opinion founded on rumor where it appeared such opinion would yield to evidence.

Right of court to separate or exclude witnesses.

Cited in *Loose v. State*, 120 Wis. 115, 97 N. W. 526, to point that exclusion and separation of witnesses while others are testifying is matter within discretion of court.

Cited in reference notes in 35 A. D. 449, on exclusion of witnesses from court room; 36 A. D. 569, on power to exclude witnesses from court room.

Admissibility of admissions or confessions.

Cited in *Printup v. Mitchell*, 17 Ga. 558, 63 A. D. 258, holding that declarations to be admissible must be deliberately made and precisely identified; *Craig v. Rohrer*, 63 Ill. 325, holding instruction implying that admissions deliberately and confessedly made were weak evidence erroneous; *Hill v. Newman*, 47 Ind. 187, to same effect.

— Of confessions.

Cited in *State v. Howard*, 17 N. H. 171, holding declaration made a month after prior involuntary confession admissible; *State v. Willis*, 71 Conn. 293, 41 Atl. 820, admitting confession made in presence of sheriff though short time prior thereto accused had been induced to confess by another officer; *State v. Vaigneur*, 5 Rich. L. 391, admitting confession made some hours after constable had advised accused to confess and magistrate warned him not to; *People v. McMahon*, 15 N. Y. 384, holding that testimony of accused arrested without warrant given before coroner is excluded because of its unreliableness due to witness's agitation; *People v. White*, 176 N. Y. 331, 68 N. E. 630, 17 N. Y. Crim. Rep. 538, holding confessions procured by deception admissible, jury to give proper consideration to surrounding circumstances; *Rutherford v. Com.* 2 Met. (Ky.) 387, to point that confession made upon promise of secrecy or of some collateral benefit is admissible; *State v. Height*, 117 Iowa, 650, 94 A. S. R. 323, 59 L.R.A. 437, 91 N. W. 935, holding rule excluding involuntary confessions inapplicable to physician's examination of accused against his will; *Com. v. Tuckerman*, 10 Gray, 173, admitting accused treasurer's confession made to friend and stockholder whom he consulted for advice and afterwards made to a director; *Smith v. Com.* 10 Gratt. 734, holding person to whom accused negro was apprenticed though a justice of the peace not a person in authority within meaning of rule against involuntary confessions; *State v. Grant*, 22 Me. 171, holding accused's confession voluntary though he was induced to make same to shield his brother.

Cited in reference notes in 65 A. D. 676, on admissibility and effect of confessions; 22 A. D. 456, on inadmissibility of confessions induced by hope or fear; 61 A. D. 730, on inadmissibility of confession induced by delusive hope of immunity from punishment.

Cited in notes in 6 A. S. R. 242; 8 E. R. C. 102,—on admissibility of confession made by prisoner; 23 A. D. 128, as to when confessions are admissible; 6 A. S. R. 250, on admissibility of confession subsequent to one induced by improper influence; 18 L.R.A. (N.S.) 774, as to when confession is voluntary; 28 L. ed. U. S. 262, as to when confessions of accused are admissible against him; 18 L.R.A. (N.S.) 828, on voluntariness of confession induced by hope of collateral benefit; 18 L.R.A. (N.S.) 825, on hope not excited by other persons as affecting voluntariness of confession; 18 L.R.A. (N.S.) 786, on connection between inducement and confession in determining whether it was voluntary.

— **Proving facts discovered as result of confession.**

Cited in *Stockwell v. United States*, 3 Cliff. 284, Fed. Cas. No. 13,466; *State v. Knight*, 19 Iowa, 94; *Duffy v. People*, 26 N. Y. 588,—to point that evidence of facts discovered in consequence of involuntary confessions is admissible; *State v. Lindsey*, 78 N. C. 499, holding it competent to prove finding of stolen property in consequence of involuntary confession; *State v. Willis*, 71 Conn. 293, 41 Atl. 820, holding fact that property was found in accordance with statement made in involuntary confession provable; *Jane v. Com.* 2 Met. (Ky.) 30, admitting evidence that the poison was found under circumstances confessed by accused, though such confession involuntary; *State v. Douglass*, 20 W. Va. 770, holding state may introduce weapon in evidence on murder trial and show where it was found although its discovery was due to communications made by accused to his counsel; *Com. v. James*, 99 Mass. 438, holding evidence that weapon was found in consequence of statements by accused admissible; *Rice v. State*, 3 Heisk. 215, holding that fact that property was discovered in consequence of involuntary confession casts on accused burden of reconciling his knowledge with his innocence; *Elizabeth v. State*, 27 Tex. 329, holding fact that accused slave after being whipped conducted witnesses to body of murdered child insufficient to prove her guilty of murder.

Cited in note in 53 L.R.A. 405, on admissibility of evidence obtained by aid of involuntary or inadmissible confession.

Distinguished in *State v. Due*, 27 N. H. 256, holding evidence that accused under inducements produced bill alleged to have been stolen inadmissible unless bill otherwise identified.

Compulsory testimony as to facts constituting crime.

Cited in *Wilkins v. Malone*, 14 Ind. 153, upholding statute compelling disclosure of usury in civil suit but providing that testimony shall not be used against witness in criminal prosecution.

Impeachment of witnesses.

Cited in reference note in 40 A. S. R. 791, on witness's impeachment by showing previous bad character.

Cited in note in 82 A. S. R. 35, on impeachment of witness by proof of character.

— **By proof of former conviction.**

Cited in *State v. Black*, 15 Mont. 143, 38 Pac. 674, holding that to attack accused's credibility as witness evidence that he was convicted of felony admissible; *Com. v. Barry*, 20 Phila. 373, 47 Phila. Leg. Int. 222, 8 Pa. Co. Ct. 216, holding a previous conviction of witness, evidence to affect his credibility; *Palmer v. Cedar Rapids & M. R. Co.* 113 Iowa, 442, 85 N. W. 756; *Gertz v. Fitchburg R. Co.* 137 Mass. 77, 50 A. R. 285; *People v. Caesar*, 1 Park. Crim. Rep. 645,—to point that

conviction in foreign jurisdiction is provable to affect credibility, but not competency of witness.

Cited in note in 73 A. D. 775, 776, on impeaching witness by showing conviction of infamous crime.

Disapproved in *Chase v. Blodgett*, 10 N. H. 22, holding evidence of witness's conviction in another state inadmissible for purpose of impeaching his credit.

Granting continuances.

Cited in *Welch v. Com.* 90 Va. 318, 18 S. E. 273, holding continuance proper where accused made affidavit to materiality of absent witness; *Phillips v. Com.* 90 Va. 401, 18 S. E. 841, holding same where witness sick and defendant swore he could be produced at another term but physician thought otherwise; *Com. v. Donovan*, 99 Mass. 425, 96 A. D. 765, holding trial judge's action in refusing to continue criminal case because of witness's absence no ground for appeal; *People v. Savant*, 112 Mich. 297, 70 N. W. 576, holding continuance unnecessary where prosecution admits that witness who is beyond court's jurisdiction will testify as stated.

Cited in reference notes in 68 A. D. 501, on continuance on ground of absence of witnesses; 55 A. D. 743, as to when continuance will be granted for absence of witness or failure to obtain his testimony.

View by jury.

Cited in *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, holding no error committed where jury in prosecution for murder viewed the premises though defendant, who was given notice, was absent; *Tully v. Fitchburg R. Co.* 134 Mass. 499, holding verdict for plaintiff in personal injury action sustainable though jury took view of scene of accident; *Chute v. State*, 19 Minn. 271, Gil. 230, holding that jury takes view to understand and apply the evidence which is given.

Cited in reference notes in 61 A. S. R. 685, on view of *locus in quo*; 52 A. D. 736, on view of premises in case of homicide.

Cited in note in 42 L.R.A. 369, on right to view by jury at common law.

Aiding and abetting crime.

Cited in *McCarney v. People*, 83 N. Y. 408, 38 A. R. 456, holding one aiding and assisting in commission of theft though not in vicinity of the property a principal; *Com. v. Clune*, 162 Mass. 206, 38 N. E. 435, holding one guilty of uttering forged check where he remained in neighborhood while one to whom he delivered it procured messenger who had it cashed; *McCarty v. State*, 26 Miss. 299, holding that one present with intention to aid in the killing is principal in second degree; *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799, 11 A. & E. Ann. Cas. 217, holding one present and assisting in procuring a miscarriage punishable under indictment charging him with using the instruments though he did not use same; *Com. v. Wallace*, 108 Mass. 12, to point that principal in second degree may be convicted on indictment charging that he committed the felony.

Cited in reference notes in 45 A. D. 473, on accessories; 13 A. R. 177, on presumption of person's intention to aid conspiracy from presence in position to do so.

Cited in notes in 13 L.R.A. 196, on aiders and abettors of crime as principals; 51 A. D. 374, as to what is aiding and abetting crime.

Presumption as to malice in homicide.

Cited in *State v. Knight*, 43 Me. 11; *Com. v. York*, 9 Met. 93, 43 A. D. 373,—holding that presumably all homicide is murder and burden is on accused to show absence of malice.

Repeal of common law by implication.

Cited in *Com. v. Rumford Chemical Works*, 16 Gray, 231, in holding common law of nuisance not repealed by statutes, to point that intention to repeal common law must clearly appear; *Com. v. Goodall*, 165 Mass. 588, 43 N. E. 520, to same point in holding common law as to disorderly houses not repealed by statutes; *Baker v. United States*, 1 Minn. 207, Gil. 181, to same point in holding one incompetent to testify in favor of his codefendant.

Construction of statutes in derogation of common law.

Cited in *Betton v. Willis*, 1 Fla. 262, holding statutes in derogation of the common law are to be strictly construed.

20 AM. DEC. 506, SQUIRE v. HOLLENBECK, 9 PICK. 551.

Mitigation of damages in trover and trespass.

Cited in *Perry v. Chandler*, 2 Cush. 237, holding that defendant may show that he accounted for the property in subsequent bankruptcy proceedings; *Jellett v. St. Paul, M. & M. R. Co.* 30 Minn. 265, 15 N. W. 237, holding carrier sued by vendor for wrongful delivery to vendee entitled to show latter subsequently settled with vendor; *Pabst Brewing Co. v. Greenberg*, 55 C. C. A. 151, 117 Fed. 135, holding value of property no element of damages when true owner takes same; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438, holding it permissible to show nature of plaintiff's interest in the property in reduction of damages; *Dahill v. Booker*, 140 Mass. 308, 64 A. R. 465, 5 N. E. 496, holding that in trover by mortgagor against stranger evidence that mortgagee subsequently took possession for breach of condition of mortgage, admissible; *Sheldon v. Southern Exp. Co.* 48 Ga. 625, holding bailee defendant in trover for conversion of note, liable only to extent of plaintiff's special property therein.

Distinguished in *Ross v. Philbrick*, 39 Me. 29, holding defendant wrongfully attaching property on mesne process liable in trespass notwithstanding pendency of the process.

— Application to plaintiff's benefit.

Cited in *Grisham v. Bodman*, 111 Ala. 194, 20 So. 514, holding defendant in trespass for wrongful levy entitled to show property applied for benefit of owner; *McWhorter v. Andrews*, 53 Ark. 307, 13 S. W. 1099, holding it a defense to action for wrongful conversion that defendant applied property, with plaintiff's consent, to liquidation of his debt; *Bird v. Womack*, 69 Ala. 390, holding damages not mitigated by defendant trespasser's applying the property to satisfy lien held thereon by stranger; *Pierce v. Benjamin*, 14 Pick. 356, 25 A. D. 396, holding that tax collector sued for converting goods is to be allowed amount applied to payment of taxes; *Clements v. Eiseley*, 63 Neb. 651, 88 N. W. 871, to same effect.

— Showing nonownership of plaintiff.

Cited in *La Page v. Hill*, 87 Me. 158, 32 Atl. 801, holding defendant may show in mitigation of damages that property did not belong to plaintiff but has been surrendered to true owner; *Huning v. Chavez*, 7 N. M. 128, 34 Pac. 44, holding that defendant acting in good faith may show he returned property to its true owner; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49, to point that defendant may show goods belonged to stranger or that they were applied to owner's benefit; *Lawrence v. Kemp*, 1 Duer, 363, holding that one failing to redeliver goods as promised may show that true owner took them from him; *Case v. Babbitt*, 16 Gray, 278, holding officer sued for serving irregular replevin entitled to show property belonged to and remained with plaintiff in replevin; *Lowell v. Parker*, 10 Met.

309, 43 A. D. 436, holding evidence in action on constable's bond that he delivered property to holder of outstanding mortgage admissible; *King v. Bangs*, 120 Mass. 514, holding that in action by mortgagee for removal of fixtures defendant entitled to show that his interest terminated prior to suit; *Anthony v. Gilbert*, 4 Blackf. 348, holding that defendant in trespass may show under general issue that property belonged to third person to whom plaintiff was not responsible.

— **Seizure under process.**

Cited in *Kaley v. Shed*, 10 Met. 317, holding damages lessened where property attached as plaintiff's while defendant trespasser was returning same to him; *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946, holding that officer sued for wrongful levy may show that property was subsequently seized under valid levy; *Hopple v. Higbee*, 23 N. J. L. 342, holding that one seizing goods under void attachment may show subsequent seizure under valid attachment; *Stewart v. Martin*, 16 Vt. 397, holding that officer attaching property beyond his precinct may show an attachment made after bringing property within same; *Wehle v. Haviland*, 42 How. Pr. 399, to point that where property is seized under illegal attachment, a subsequent seizure under valid attachment by stranger may be shown.

Distinguished in *Deutsch v. Wiggins*, 1 Colo. 299, holding defense that goods were taken under attachment against third person not provable under general issue.

Measure of damages.

Cited in *Bartlett v. Kidder*, 14 Gray, 449, holding that damages recoverable in action on replevin bond given by joint owners in replevining property attached on mesne process against one of them is value of latter's interest.

Cited in reference note in 88 A. D. 734, on recovery in trover or trespass of value of special interest in goods.

Distinguished in *Criner v. Pike*, 2 Head, 398, holding one answerable over to owner entitled to full damages against wanton wrongdoer; *Caswell v. Howard*, 16 Pick. 562, to same effect; *Hanly v. Davis*, 166 Mass. 1, 43 N. E. 523, holding mortgagee, answerable over to mortgagor, entitled to recover full value of property improperly attached.

Title required to maintain trespass.

Cited in *Tarry v. Brown*, 34 Ala. 159, holding proof of actual possession by plaintiff at time of trespass, sufficient; *Kissam v. Roberts*, 6 Bosw. 154, holding that plaintiff may maintain trespass upon proof of possession and defendant cannot plead property in stranger.

Cited in reference note in 88 A. D. 675, on right to plead property in stranger in replevin.

Admissions as to title.

Distinguished in *Stetson v. Goldsmith*, 30 Ala. 602, holding bill filed by wife with husband's knowledge asserting title to property attached as his not admissible against him in suit by him for wrongful attachment.

20 AM. DEC. 507, STRONG v. MANUFACTURERS' INS. CO. 10 PICK. 40.

Insurable interest in property.

Cited in *Horsch v. Dwelling House Ins. Co.* 77 Wis. 4, 8 L.R.A. 806, 45 N. W. 945, holding husband in possession of land conveyed his wife, he having paid for

it, entitled to insure same; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877, holding one paying purchase money and in possession under oral contract to purchase entitled to insure; *Gilman v. Dwelling-House Ins. Co.* 81 Me. 488, 17 Atl. 544, holding one in possession under contract to purchase though conditions thereof not complied with entitled to insure; *Allyn v. Allyn*, 154 Mass. 570, 28 N. E. 779, holding purchaser under agreement that vendor shall keep premises insured for his benefit acquires insurable interest to full value of property; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385, 30 A. D. 90, on right of one in possession under contract to purchase to insure; *Wilbur v. Bowditch Mut. F. Ins. Co.* 10 Cush. 446, holding that one has insurable interest where property sold for taxes is subject to redemption; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619, holding that one has insurable interest in property sold on execution while judgment creditors entitled to redeem; *Buffum v. Bowditch Mut. F. Ins. Co.* 10 Cush. 540, holding one having an estate subject to mortgages and execution sales but still redeemable entitled to insure same; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541, holding that one holding mortgage as collateral security may insure property covered thereby; *Key ex rel. Heaton v. Continental Ins. Co.* 101 Mo. App. 344, 74 S. W. 162, holding that mortgagee who indorsed mortgage notes and delivered policy as collateral security entitled to sue on policy; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377, 9 A. R. 41, holding that mortgagee who indorsed the notes upon assigning the mortgage has insurable interest; *Page v. Western Marine & Fire Ins. Co.* 19 La. 49, holding that consignor, the bill of lading being in his name, has insurable interest in cargo; *Dalton v. Milwaukee Mechanics' Ins. Co.* 126 Iowa, 377, 102 N. W. 120, holding one with an equitable interest in goods and in possession entitled to insure; *Mutual F. Ins. Co. v. Wagner*, 1 Sadler (Pa.) 66, 7 Atl. 103, holding one with a direct pecuniary interest in building entitled to insure same; *Mosser v. Donaldson*, 7 Sadler (Pa.) 277, 10 Atl. 766, to same point; *Miltonberger v. Beacom*, 9 Pa. 198, to point that value of assured's interest in the property is immaterial.

Cited in reference notes in 20 A. D. 553; 30 A. D. 101; 39 A. D. 549; 28 A. S. R. 555; 41 A. S. R. 359,—on insurable interest in property; 5 A. S. R. 163; 21 A. S. R. 720; 32 A. S. R. 506; 48 A. S. R. 753,—on what constitutes insurable interest; 93 A. D. 292, on equitable title as insurable interest; 48 A. S. R. 562, on right of lawful possessor of property to insure it; 24 A. S. R. 614, on bailee's insurable interest in subject of bailment; 44 A. S. R. 644, on insurable interest of trustee; 29 A. D. 258, on insurance by mortgagor and mortgagee.

Cited in notes in 13 E. R. C. 214, on insurable interest; 54 A. D. 693, on insurable interest of mortgagee; 52 L.R.A. 333, 334, on necessity of insurable interest at time of policy and at time of loss.

Nature and construction of insurance policy.

Cited in reference note in 55 A. D. 456, on nature of contract of insurance.

Cited in note in 4 L.R.A. 538, on method of construing clauses in insurance policies, which operate by way of forfeiture.

Extent of recovery on policy by holder of a qualified interest.

Cited in *Merritt v. Farmers' Ins. Co.* 42 Iowa, 11, holding that assured's interest in the property does not govern amount recoverable; *Adams v. Rockingham Mut. F. Ins. Co.* 29 Me. 292, to same point; *Andes Ins. Co. v. Fish*, 71 Ill. 620, holding assured entitled to recover to extent property damaged though he owned but life estate; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379,

allowing full recovery where insurer received premiums as for an absolute title with knowledge assured had but life estate; *Trade Ins. Co. v. Barracloiff*, 45 N. J. L. 543, 46 A. R. 792, holding that damage done controls amount recoverable by husband insuring with wife's consent her property in which he had qualified interest; *Motley v. Manufacturers' Ins. Co.* 29 Me. 337, 50 A. D. 591, holding mortgagee entitled to recover full amount of insurance if same do not exceed mortgage indebtedness; *Goodall v. New England Mut. F. Ins. Co.* 25 N. H. 169, holding that partner insuring firm's property as its agent has insurable interest therein to its full extent; *Franklin F. Ins. Co. v. Findlay*, 6 Whart. 483, 37 A. D. 430, holding assured entitled to recover to extent of loss though goods had been seized on execution; *French v. Rogers*, 16 N. H. 177, holding that assured has insurable interest to full extent of property though same mortgaged and entry to foreclose made; *Gilman v. Dwelling-House Ins. Co.* 81 Me. 488, 17 Atl. 544, allowing full recovery to one in possession under contract to purchase.

Cited in note in 84 A. D. 429, on respective rights of vendor and vendee to proceeds of insurance effected by vendor, where part only of purchase money has been paid.

Misrepresentations or concealment by insured as to title to, or interest in, property.

Cited in *Gilman v. Dwelling-House Ins. Co.* 81 Me. 488, 17 Atl. 544, holding that in absence of inquiry assured need not describe his interest; *Marshall v. Columbian Mut. F. Ins. Co.* 27 N. H. 157; *Campbell v. Merchants' & F. Mut. F. Ins. Co.* 37 N. H. 35, 72 A. D. 324,—to point that applicant need not volunteer information as to title and situation of property; *Walsh v. Fire Asso. of Philadelphia*, 127 Mass. 383, holding it sufficient that assured describe the property as his though he be but equitable owner; *Johannes v. Standard*, 70 Wis. 196, 5 A. S. R. 159, 35 N. W. 298, holding that assured in possession under contract to purchase need not disclose nature of his title; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159, holding policy by its terms void where one in possession under contract to purchase failed to state he was in default; *Ramsey v. Phoenix Ins. Co.* 2 Fed. 429, holding it no misrepresentation for one in possession under contract to purchase to represent property to be his; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 A. D. 684, holding policy not avoided by assured's speaking of the property as his though he was only part owner; *Fowle v. Springfield F. & M. Ins. Co.* 122 Mass. 191, 23 A. R. 308, holding policy not avoided by lessee's speaking of the property as his; *Convis v. Citizens' Mut. F. Ins. Co.* 127 Mich. 616, 86 N. W. 994, holding policy valid though applicant described herself as owner when she had but a life estate; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389, 26 A. R. 364, holding same in construing clause requiring assured to disclose his interest; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, to point that substantially untrue answers to questions as to title avoids policy; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377, 9 A. R. 41, holding it sufficient to describe mortgagee who indorsed notes upon assigning mortgage, as "mortgagee"; *Blumen v. Phoenix Ins. Co.* 45 Wis. 622 (dissenting opinion), on duty of assured to disclose nature of his interest.

Cited in reference notes in 59 A. D. 202, as to when misrepresentation will avoid insurance policy; 5 A. S. R. 163, on sufficiency of general designation of insured's interest; 37 A. D. 46, on materiality of description of property in insurance policy; 53 A. D. 53, on substantial misstatement of assured's interest in property as vitiating policy.

Cited in notes in 30 A. D. 101, on what is a misdescription of insured prop-

erty and its effect; 40 A. D. 351, on effect upon insurance of misrepresentations by assured.

Distinguished in *Catron v. Tennessee Ins. Co.* 6 Humph. 176, holding policy void where assured misrepresents, though innocently, value of his interest.

—As to encumbrances.

Cited in *Buck v. Phoenix Ins. Co.* 76 Me. 586; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 A. R. 582,—holding general statement by assured that property was his sufficient though same encumbered; *Delahay v. Memphis Ins. Co.* 8 Humph. 684, holding policy not void where assured failed to disclose existence of mortgage; *Shoemaker v. Glenn Falls Ins. Co.* 60 Barb. 84, holding policy void where application made part thereof falsely stated that property was unencumbered.

Distinguished in *Draper v. Charter Oak F. Ins. Co.* 2 Allen, 569, holding policy void where application, made part thereof, falsely denied existence of encumbrances.

What is a violation of provision against alienation and encumbrances.

Cited in *Green v. Homestead F. Ins. Co.* 17 Hun, 467, holding provision against encumbrances not violated where mechanics' lien filed against property without assured's knowledge; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624, holding contract to convey not an alienation unless purchaser comply with conditions thereof; *Hitchcock v. North Western Ins. Co.* 26 N. Y. 68, holding provision against assignment not violated by conveyance of vessel accompanied by reconveyance by way of mortgage; *Bragg v. New England Mut. F. Ins. Co.* 25 N. H. 289, allowing recovery upon policy issued to mortgagor and providing for payment to mortgagee though mortgage foreclosed; *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519, holding provision against alienation not broken by mortgaging chattels, there being no change of possession; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 A. D. 521, holding provision against alienation not violated by trust deed transferring the constructive possession; *Marts v. Cumberland Mut. F. Ins. Co.* 44 N. J. L. 478, holding alienation not established where mortgagee who had bid at foreclosure sale refused deed after the fire; *McKisick v. Mill Owners' Mut. F. Ins. Co.* 50 Iowa, 116, holding policy void where property sold under decree of foreclosure and time for redemption passed; *Stuart v. Reliance Ins. Co.* 179 Mass. 434, 60 N. E. 929, holding provision against alienation not violated while right to redeem from sale on execution exists; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 53 A. D. 44, to same effect; *Nussbaum v. Northern Ins. Co.* 1 L.R.A. 704, 37 Fed. 524, holding alienation not established where right to redeem the property pledged remained; *Hammel v. Queen's Ins. Co.* 54 Wis. 72, 41 A. R. 1, 11 N. W. 349, holding execution sale of itself no ground for forfeiture under clause against alienation; *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811, to point that void sales or sales under void process are not within provision against alienation.

Cited in notes in 1 L.R.A. 704, on conditions in fire insurance policy against alienation of property; 59 A. D. 311, on effect of clause restraining sale or alienation of insured property in whole or in part; 59 A. D. 305, on recovery by insurer retaining interest after alienation of property; 28 A. D. 158, on alienation by operation of law defeating claim for insurance; 4 L.R.A. 539, 541, as to what constitutes a sale or transfer within meaning of clause avoiding insurance policy in case of sale or transfer.

Distinguished in *Home Mut. F. Ins. Co. v. Hauslein*, 60 Ill. 521, holding pol-

icy void in hands of assignee where assignor violated its terms by conveying the property.

Mode of describing property in suits on insurance policy.

Cited in *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315, holding it sufficient that complaint on policy of insurance describe property as policy describes it.

Insurance on future property.

Cited in note in 75 A. S. R. 306, on insurance on future property.

20 AM. DEC. 518, HEYWOOD v. PERRIN, 10 PICK. 228.

Construction of writings.

Cited in *Green v. Dyersburg*, 2 Flipp. 477, Fed. Cas. No. 5,756, to point that in construing contract intention is gathered from whole instrument; *Morrill & W. Constr. Co. v. Boston*, 186 Mass. 217, 71 N. E. 550, rejecting repugnant words to give effect to the evident purpose of entire instrument; *Mason v. Alabama Iron Co.* 73 Ala. 270, holding that every word of contract is to have some effect; *New England Cotton Yarn Co. v. Laurel Lake Mills*, 190 Mass. 48, 76 N. E. 231, holding that clause reciting no riparian rights waived must be construed in connection with other parts of the agreement; *Litchfield v. Falconer*, 2 Ala. 280, to point that equivocal written contract may be explained by circumstances under which executed; *Doe ex dem. Hughes v. Wilkinson*, 35 Ala. 453, holding it competent to prove what instrument contained when acknowledgment thereto was taken; *Henschel v. Mahler*, 3 Denio, 428 (dissenting opinion), on necessity of considering every word in construing contracts.

Cited in note in 60 A. S. R. 93, as to which of repugnant clauses in a contract will prevail.

— Different writings as one contract.

Cited in *Doe ex dem. Holman v. Crane*, 16 Ala. 570, holding it allowable to show circumstances under which contemporaneous writings were executed; *Haddaway v. Post*, 35 Mo. App. 278, holding it error to exclude stipulations printed upon back of contract; *Pitkin v. Frink*, 8 Met. 12, holding note and contemporaneously executed writing in nature of conditional bill of sale independent contracts; *Richardson v. Thomas*, 28 Ark. 387, construing covenants of deed and purchase money notes as one contract; *Sewall v. Henry*, 9 Ala. 24, construing bill of sale and agreement to resell as one contract; *Verzan v. McGregor*, 23 Cal. 339, holding same to prove that unsigned agreement appended to contract was part thereof; *Littlefield v. Coombs*, 71 Me. 110, to point that memorandum made on same paper with contract and delivered therewith forms part thereof; *Doniphan v. Paxton*, 19 Mo. 288, holding memorandum added to mortgage upon execution thereof, a part of same; *White v. Cushing*, 88 Me. 339, 51 A. S. R. 402, 32 L.R.A. 590, 34 Atl. 164, holding words requiring presentation of bank book placed after signature to order on bank, part thereof.

— Memoranda on notes.

Cited in *Wilson v. Tucker*, 10 R. I. 578, holding parol evidence admissible to identify contract referred to in indorsement upon note; *Barnard v. Cushing*, 4 Met. 230, 38 A. D. 362, construing indorsement on note allowing maker to pay at his convenience as part of note; *Day v. Ridley*, 16 Vt. 26, 42 A. D. 489, holding memorandum in margin of note regulating mode of payment, part thereof; *Costello v. Crowell*, 127 Mass. 293, 34 A. R. 367, holding note with words: "given as collateral security with agreement" placed in margin non-negotiable; *Shaw v. First Methodist Episcopal Soc.* 8 Met. 223, holding memorandum at foot of

note stipulating same secured by mortgage, part thereof; *Franklin Sav. Inst. v. Reed*, 125 Mass. 365, holding memorandum at foot of demand note postponing time of payment part thereof; *Odiorne v. Sargent*, 6 N. H. 401, to point that memorandum added to note at time of its execution may be construed as part thereof; *Farnsworth v. Mullen*, 164 Mass. 112, 41 N. E. 131, holding indorsee entitled to rely on address added to maker's name by indorser; *Wheelock v. Freeman*, 13 Pick. 165, 23 A. D. 674, holding cutting off memorandum attached to note a material alteration thereof; *Benedict v. Cowden*, 49 N. Y. 396, 10 A. R. 382, holding same as to memorandum regulating payment; *Johnson v. Heagan*, 23 Me. 329, holding direction added to note to resort to third person for payment not repugnant to promise of note.

Cited in reference notes in 42 A. D. 489, as to when memorandum on note is part of the contract; 38 A. D. 368, on memorandum annexed to a note as part of the note.

Cited in note in 25 A. R. 482, on materiality of alterations of notes.

Distinguished in *Way v. Batchelder*, 129 Mass. 361, holding repugnant and self-contradictory memorandum at foot of note no part thereof; *Central Bank v. Willard*, 17 Pick. 150, 28 A. D. 284, holding renewal indorsed upon wrappers inclosing notes not part of same.

Parol evidence as to writing.

Cited in reference note in 45 A. D. 242, on parol evidence to vary writing or annex conditions thereto.

Cited in note in 43 L.R.A. 455, on contemporaneous parol agreement that payment is to be conditional as defense to note.

Accrual of limitations in action on coupon bonds.

Cited in *Griffin v. Macon County*, 2 L.R.A. 353, 36 Fed. 885, holding overdue interest on bonds represented by negotiable coupons not recoverable in action on bonds after suit on coupons barred by limitations.

20 AM. DEC. 521, SIBLEY v. HOLDEN, 10 PICK. 249.

Extent of conveyance where land is bounded by highway.

Cited in *Boston v. Richardson*, 13 Allen, 146, holding that fee to center of highway presumably passes to one acquiring adjacent land; *Bucknam v. Bucknam*, 12 Me. 463, holding fee in public road passed in partition proceeding to those assigned lots binding thereon; *O'Linda v. Lothrop*, 21 Pick. 292, 32 A. D. 261, holding fee in proposed street not conveyed by selling land upon both sides thereof to same grantee; *Buck v. Squiers*, 22 Vt. 484, holding road excluded where boundary line was to run on easterly side thereof; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 A. R. 361; *Lee v. Lee*, 27 Hun, 1; *Tag v. Keteltas*, 16 Jones & S. 241,—holding road excluded where one line began at designated side thereof and return line ran "along said road;" *Rieman v. Baltimore Belt R. Co.* 81 Md. 68, 31 Atl. 444, holding bed of street not conveyed where beginning point placed on east side of street; *Mead v. Riley*, 18 Jones & S. 20, holding road excluded where starting point placed at intersection of easterly line thereof and northerly line of another street; *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding street included where line was to begin at corner of two streets and run in named direction along street; *Holmes v. Turner's Falls Co.* 142 Mass. 590, 8 N. E. 646, holding fee to center of road not conveyed where line was to run across road and thence by side thereof; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 A. R. 306, holding fee in street not conveyed where land described

as bounded by east line of street; *Phillips v. Bowers*, 7 Gray, 21, to point fee in street not passed where line was to run to stake on side of street.

Cited in reference notes in 30 A. S. R. 853, on highways or streets as boundaries; 54 A. D. 681, on conveyance of lot on street as passing interest or right in street; 23 A. R. 234, on effect of conveyance "to" highway to convey to center thereof.

Cited in notes in 54 A. D. 793, as to when boundary on street of highway includes same; 39 A. R. 305, 307, on effect of description with road as one boundary as conveyance of title in roadbed.

Distinguished in *Peck v. Denniston*, 121 Mass. 17, holding fee to center of avenue conveyed where line ran to the avenue thence along same to a boundary stone.

Disapproved in *Adams v. Saratoga & W. R. Co.* 11 Barb. 414, holding street passed on conveying abutting lots though line commenced at stake in line of street; *Cox v. Freedley*, 33 Pa. 124. 75 A. D. 584, holding street included where line was to run along its side though distances given brought line only to side thereof; *Low v. Tibbetts*, 72 Me. 92, 39 A. R. 303, holding that conveyance of land binding on street carries fee to center thereof notwithstanding mention on monument on side of road as terminus of line; *Moore v. Johnston*, 87 Ala. 220. 6 So. 50, holding that conveyance of lot binding on dedicated street carries fee to center thereof.

When different writings are to be construed as one.

Cited in *Dean v. Lawham*, 7 Or. 422, construing as one contract contemporaneous writings between same parties and concerning same subject; *Ott v. Schroepfel*, 5 N. Y. 482, holding indorsement by arbitrators on contract referred to in arbitration bonds part of the award; *Knight v. New England Worsted Co.* 2 Cush. 271, to point that different instruments executed at one time and having relation to one another are to be construed as one; *Bates v. Bank of Alabama*, 2 Ala. 451; *Whitehurst v. Boyd*, 8 Ala. 375; *Doe ex dem. Holman v. Crane*, 16 Ala. 570,—to similar point.

20 AM. DEC. 524, MELVIN v. WHITING, 10 PICK. 295.

Acquirement of easements by prescription.

Cited in *Cutter v. Cambridge*, 6 Allen, 20, holding that one maintaining fence in highway for forty years establishes his right as against public; *Edson v. Munsell*, 10 Allen, 557, holding easement cannot be acquired by prescription in lands of insane person; *Kent v. Waite*, 10 Pick. 138, holding that right of way by prescription may be acquired in forty years; *Reed v. Northfield*, 13 Pick. 94. 23 A. D. 662, holding that highway is proved such by showing same used as public highway for forty years; *Miller v. Garlock*, 8 Barb. 153, holding that right of way may be acquired by an adverse user extending over twenty years; *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 13 L.R.A. 255, 28 N. E. 257, to point that law of prescription has altered to conform to statutes of limitations; *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539. Fed. Cas. No. 13,446, holding that deed is not to be presumed where complainants frequently remonstrated against the alleged easement.

Cited in reference notes in 59 A. D. 746, on long user as presumption of right to easement; 67 A. D. 240, on period necessary to raise presumption of grant of easement; 33 A. D. 714, on establishment of street or way by dedication or uninterrupted use; 57 A. D. 299, on presumption of grant from owners of land

from long use of road by public; 8 E. R. C. 348, on right to claim profit in land of another by custom.

— Water rights.

Cited in *Wallace v. Fletcher*, 30 N. H. 434, holding that one by exercising mill privilege under claim of right for twenty years may acquire title by prescription; *Williams v. Turner*, 7 Ga. 348, holding grant of ferry right presumed where same used for limitation period; *Hammond v. Zehner*, 23 Barb. 473, holding that right to flow another's land will be presumed after twenty years' exercise of such right; *Cobb v. Davenport*, 32 N. J. L. 369, holding right of fishery claimed by prescription not established by proof of customary right.

Cited in notes in 60 L.R.A. 497, on prescriptive right to fish as against individual; 14 L.R.A. 387, on prescriptive rights of fishery in private waters.

Distinguished in *Pearsall v. Post*, 20 Wend. 111, holding that public cannot from user acquire right to use land adjoining river as public landing place.

Explained in *McFarlin v. Essex Co.* 10 Cush. 304, on right of party to prescribe for several fishery in estate of another without alleging some estate of freehold.

20 AM. DEC. 526, BRIGGS v. RICHMOND, 10 PICK. 391.

Conclusiveness of judgments entered by default.

Cited in *American Brewing Co.* 50 C. C. A. 517, 112 Fed. 752, holding judgment by default entered in bankruptcy proceedings conclusive as to commission of act of bankruptcy charged.

Cited in reference notes in 38 A. S. R. 655, on conclusiveness of judgments by default; 50 A. D. 221, on rendition, validity, and effect of judgments by default.

Discharging claim by crediting debtor therewith in action against him.

Cited in *Abbott v. Stevens*, 117 Mass. 340, holding action not maintainable on an item with which plaintiff was credited in a previous action; *McWhorton v. Andrews*, 53 Ark. 307, 13 S. W. 1099, holding that where one is credited upon an account with certain goods and judgment recovered for balance he may show goods not properly valued.

Purchase by mortgagee as a discharge of mortgage debt.

Cited in *Hood v. Adams*, 124 Mass. 481, 26 A. R. 687, holding mortgagee not entitled to sue on mortgage note after purchasing property at sale by himself under power in mortgage for sum greater than note; *Cowgill v. Robberson*, 75 Mo. App. 412, to point that amount bid by mortgagee upon foreclosure is to be credited upon mortgage debt.

Claims available by way of set-off.

Cited in *Fiske v. Steele*, 152 Mass. 260, 25 N. E. 291, holding that in action on judgment defendant is entitled to set off independent claims existing at commencement of original suit but not pleaded therein.

Distinguished in *Hurlburt v. Pacific Ins. Co.* 2 Sumn. 471, Fed. Cas. No. 6,919, holding in action by insurance agent for benefit of owners of ship, underwriters not entitled to set off individual debt of agent.

Effect of foreclosure.

Cited in notes in 4 L.R.A. 205, on effect of foreclosure of mortgage; 4 L.R.A. 206, on action at law for deficiency after foreclosure of mortgage.

Province of jury in determining questions of malice.

Cited in *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580, holding that ordinarily in action for malicious prosecution question of malice is for jury.

Am. Dec. Vol. III.—57.

20 AM. DEC. 531, DANFORTH v. WOODWARD, 10 PICK. 423.**What within exemption statutes.**

Cited in *Trinity Church v. Boston*, 118 Mass. 164, 7 Legal Gaz. 422 (dissenting opinion), as to the necessity for the articles corresponding with description by which exemption is conferred.

Cited in notes in 25 A. R. 66, as to what articles are exempt from execution; 21 A. D. 552, on exemption of machines and articles which are not tools.

— Tools generally.

Cited in *Lovewell v. Relief Fire Ins. Co.* 124 Mass. 418, 26 A. R. 671, to point that only simply constructed and inexpensive tools are exempt from attachment; *Ford v. Johnson*, 34 Barb. 364, holding threshing machine not exempt as a tool from sale on execution; *Tucker v. Napier*, 1 Tex. App. Civ. Cas. (White & W.) 365, holding mowing machine not within statute exempting tools, apparatus, and implements.

Cited in reference note in 92 A. D. 767, on what are tools and implements of trade within meaning of exemption laws.

Distinguished in *Pierce v. Gray*, 7 Gray, 67, holding shovel, pickax, dungfork, and hoe exempt from attachment though husbandry not defendant's principal business.

— Printing presses and material.

Cited in *Frantz v. Dobson*, 64 Miss. 631, 60 A. R. 68, 2 So. 75, holding printing press not exempt from taxation as a tool; *Oliver v. White*, 18 S. C. 235, to point that printing press and type are not tools within meaning of exemption enactment; *Green v. Raymond*, 58 Tex. 80, 44 A. R. 601, holding printing press and material owned by newspaper editor and proprietor exempt as tools from forced sale.

Cited in reference note in 44 A. R. 603, on printing press, types, and cases as tools and apparatus of trade or profession.

Distinguished in *Bliss v. Vedder*, 34 Kan. 57, 55 A. R. 237, 7 Pac. 599, holding printing presses and printing material within statute exempting "tools and implements."

Disapproved in *Jenkins v. McNall*, 27 Kan. 532, 41 A. R. 422, holding printing press not exempt from execution where printing business not defendant's principal occupation.

Burden of proving violation of exemption.

Cited in *Gay v. Southworth*, 113 Mass. 333, holding burden on plaintiff to show that he was not left property sufficient to satisfy exemption statute.

20 AM. DEC. 533, BILLINGS v. TAYLOR, 10 PICK. 460.**Rights of holders of different estates as to mines, quarries, etc.**

Cited in *Traer v. Fowler*, 75 C. C. A. 540, 144 Fed. 810, holding judgment creditor redeeming from foreclosure sale of mortgaged coal in opened mine not entitled to recover damages where coal extracted during redemption period; *Ward v. Carp River Iron Co.* 47 Mich. 65, 10 N. W. 109, holding that execution debtor may during redemption period, take iron from opened mines.

— Of life tenant generally.

Cited in *Gaines v. Green Pond Iron Min. Co.* 33 N. J. Eq. 603, holding life tenant entitled to work mine though previous owner had ceased working same for long period; *Neel v. Neel*, 19 Pa. 323, 4 Clark, 520, 3 Am. L. J. 327, holding life tenant entitled to make new openings in opened coal mines with view to selling the

coal; *Andrews v. Andrews*, 31 Ind. App. 189, 67 N. E. 461, holding devisee of life estate entitled to rents from oil wells drilled under provisions of lease executed by testator; *Reed v. Reed*, 16 N. J. Eq. 248, holding life tenant entitled to work opened sandpit; *Maher v. Maher*, 73 Vt. 243, 50 Atl. 1063, holding life tenant of land not entitled to recover anything from remainderman working unopened quarries.

Cited in note in 17 E. R. C. 754, on right of tenant for life to work an open mine.

— Of dowress.

Cited in *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 267, 113 Fed. 433, to point that widow is dowerable of mines opened in husband's lifetime; *Adams v. Briggs Iron Co.* 7 Cush. 361; *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396,—to point that dower is to be assigned in mines; *Hendrix v. McBeth*, 61 Ind. 473, 28 A. R. 680, holding widow with estate in nature of dower entitled to rents accruing under mining lease executed by husband; *Clift v. Clift*, 87 Tenn. 17, 9 S. W. 198, to same effect; *Cunningham v. Gamble*, 57 Iowa, 46, 10 N. W. 278, holding widow entitled to rents from mine which was in workable condition at husband's death; *Moore v. Rollins*, 45 Me. 493, holding widow dowerable in quarry opened and wrought during coverture.

Cited in reference note in 41 A. S. R. 400, on dower in mining property.

Cited in note in 16 L.R.A. 247, on right of dower in mines.

Distinguished in *Seager v. McCabe*, 92 Mich. 186, 16 L.R.A. 247, 52 N. W. 299, holding that dower attaches to mines not opened at husband's death but situated on land available only for mining purposes.

20 AM. DEC. 534, COM. v. KNAPP, 10 PICK. 477.

Right to question juror as to his qualifications.

Cited in *State v. Mullen*, 14 La. Ann. 577, holding that state may question juror himself as to his qualifications.

Effect of disqualification or misconduct of juror.

Cited in *State v. Madoil*, 12 Fla. 161, holding that separation of juror from his fellows does not *per se* avoid the verdict; *Yates v. State*, 26 Fla. 484, 7 So. 880, holding that verdict will not be avoided for juror's misconduct when court after hearing conflicting evidence, decided that no injury was done; *Young v. State*, 90 Md. 579, 45 Atl. 531, holding objection that juror in criminal case is disqualified waived if known, by not objecting before he is sworn.

Distinguished in *West v. State*, 42 Fla. 244, 28 So. 430, holding that when juror becomes ill after being sworn, a mistrial should be ordered and remaining eleven are subject to challenge afresh.

Time to object to juror.

Cited in reference notes in 55 A. D. 87; 62 A. D. 312; 63 A. D. 288,—as to when objection to juror must be taken.

Right to summon talesmen.

Distinguished in *State v. Wright*, 53 Me. 328, holding that talesmen may be summoned whose names are not in the jury box.

Record of conviction of principal on trial of accessory.

Cited in *United States v. Hartwell*, 3 Cliff. 221, Fed. Cas. No. 15,318; *State v. Gleim*, 17 Mont. 17, 52 A. S. R. 655, 31 L.R.A. 294, 41 Pac. 998,—holding record of conviction of principal prima facie evidence of his guilt on trial of accessory; *Dent v. State*, 43 Tex. Crim. Rep. 126, 65 S. W. 627, holding judgment

against principal prima facie evidence of his guilt on trial of accessory; *Edwards v. Territory*, 1 Wash. Terr. 195, holding conviction of principal prima facie evidence of the guilt of accessory; *Com. v. York*, 9 Met. 93, 43 A. D. 373, on effect of record of conviction of principal as evidence against accessory.

Cited in reference note in 78 A. D. 756, on record of principal's conviction as prima facie evidence of his guilt.

Cited in note in 80 A. D. 97, on conviction of principal as prima facie evidence of accessories' guilt.

Time of trying accessory.

Cited in *State v. Ricker*, 29 Me. 84, holding that under Maine statute accessory may be tried before principal but that principal's guilt must be proven; *State v. York*, 37 N. H. 175, holding that accessory may be tried with the principal; *Starin v. People*, 45 N. Y. 333, 1 Cow. Crim. Rep. 369, holding that accessory may be tried and convicted when only one of principals have been convicted.

Sufficiency of allegations in indictments for homicide.

Cited in *Washington v. State*, 36 Ga. 222, holding that indictment may charge defendant as principal in first degree in one count and in the second degree in another; *Com. v. Chiovara*, 129 Mass. 489, on sufficiency of allegations in indictment against accessory to murder.

Presumption of guilt.

Cited in *State v. Knight*, 43 Me. 11, holding that unlawful killing is presumed to have been done maliciously when unexplained.

Rights of one turning state's evidence.

Cited in *United States v. Ford*, 99 U. S. 594, 25 L. ed. 399, holding that United States district attorney has no authority to contract that defendant confessing shall not be prosecuted, but such defendant has equitable claim to executive mercy; *United States v. Lee*, 4 McLean, 103, Fed. Cas. No. 15,588, holding that accomplice testifying for state has claim on executive clemency though the other defendant be acquitted; *United States v. Hinz*, 35 Fed. 272, holding that court will reject accomplice offering himself as witness with expectation of immunity if he appears to be the principal offender; *State ex rel. Butler v. Moise*, 48 La. Ann. 109, 35 L.R.A. 701, 18 So. 943, on right of accomplice turning state's evidence to pardon; *Alderman v. People*, 4 Mich. 414, 69 A. D. 321, holding that an accomplice who makes himself a witness for the people should be required to make a complete disclosure; *State v. Graham*, 41 N. J. L. 15, 32 A. R. 174, holding accomplice making full confession has equitable claim to pardon; *Bowden v. State*, 1 Tex. App. 137, holding that when an accomplice makes an agreement with the state to make full confession, a subsequent indictment will be dismissed when he was ready to fulfil his agreement; *Ex parte Greenhaw*, 41 Tex. Crim. Rep. 278, 53 S. W. 1024, holding accomplice agreeing to testify for state not entitled to bail pending disposition of case against his principal.

Cited in notes in 40 A. S. R. 773, 775, on agreements concerning state's evidence; 18 L.R.A.(N.S.) 824, on effect of repudiation of agreement to turn state's evidence on admissibility of confession.

Distinguished in *Ex parte Irvine*, 74 Fed. 954, holding that witness may refuse to incriminate himself though offered immunity, which is mere equitable right to executive clemency.

Admissibility of confessions.

Cited in *Sullivan v. State*, 66 Ark. 506, 51 S. W. 828, holding confession inadmissible if induced by promise of prosecutor to make it easy for defendant; *State*

v. Willis, 71 Conn. 293, 41 Atl. 820, holding confessions not inadmissible because made in consequence of promises; Gross v. State, 2 Ind. 135, holding that a prisoner has a right to prove that a confession was not made voluntarily; Com. v. Tuckerman, 10 Gray, 173, holding confession receivable in evidence which was not extorted by fear or promise; Ellis v. State, 65 Miss. 44, 7 A. S. R. 634, 3 So. 188, holding that jury may give such weight as they see fit to confessions of prisoner; State v. Howard, 17 N. H. 171, holding confession voluntarily made not inadmissible because a former confession was inadmissible because made under influence of hope or fear; Lopez v. State, 12 Tex. App. 27, holding that by statute confessions cannot be used against defendant unless he were first cautioned; State v. Moran, 15 Or. 262, 14 Pac. 419, holding that where defendant agreed to make a full confession on the trial and did testify before the grand jury but escaped during the trial, his confession may be used against him.

Cited in reference note in 22 A. D. 456, on inadmissibility of confessions induced by hope or fear.

Cited in notes in 8 E. R. C. 100, on admissibility of confession made by prisoner; 28 L. ed. U. S. 263, as to when confessions of accused are admissible against him; 18 L.R.A. (N.S.) 861, on necessity of entire removal of inducement to render confession voluntary.

Distinguished in Neeley v. State, 27 Tex. App. 324, 11 S. W. 376; Lauderdale v. State, 31 Tex. Crim. Rep. 46, 37 A. S. R. 788, 19 S. W. 679,—holding that by statute no confession is admissible unless made without compulsion or persuasion; State v. Due, 27 N. H. 256, holding production of goods by prisoner in consequence of inducements to confess to charge of larceny inadmissible unless goods are otherwise identified as the stolen property.

Jury as judges of the law in criminal cases.

Cited in Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273 (dissenting opinion), on right of jury in criminal cases to be judges of the law; Pierce v. State, 13 N. H. 536, holding that the jury are not the judges of the law in criminal cases; People v. Sherlock, 166 N. Y. 180, 59 N. E. 830, 15 N. Y. Crim. Rep. 412, holding that in libel cases the judge is the sole judge of the admissibility of evidence; McGowan v. State, 9 Yerg. 184, holding jury in criminal cases judges of the law as well as of the facts but it is duty of judge to explain the law to them; Com. v. Anthes, 5 Gray, 185, holding that jury, in criminal trials, has no rightful power to determine questions of law against instructions of the court; Brister v. State, 26 Ala. 107, holding that jury cannot reject as incompetent confession admitted by court, but may weigh its credibility and effect; Fincher v. People, 26 Colo. 169, 56 Pac. 902, holding instruction erroneous which tells jury that a confession is entitled to great weight as that is for jury to determine; State v. Barry, 11 N. D. 428, 92 N. W. 809, holding that instruction that jury are sole judges of credibility of testimony does not cure another instruction as to weight of certain evidence; State v. Lightfoot, 107 Iowa, 344, 78 N. W. 41, holding that court in criminal case cannot instruct jury that any essential fact is established.

Right of other attorneys to assist district attorney.

Cited in Com. v. Scott, 123 Mass. 222, 25 A. R. 81; State v. Tighe, 27 Mont. 327, 71 Pac. 3; State v. Whitworth, 26 Mont. 107, 66 Pac. 748,—holding that court may appoint counsel to assist the prosecuting officer; Taylor v. State, 49 Fla. 69, 38 So. 380, holding that when state attorney refuses to discharge his duty court may appoint another attorney to act; State v. Wilson, 24 Kan. 189, 36

A. R. 257, holding that it is not error for court to allow counsel paid by private parties to assist the district attorney at his request; *Meister v. People*, 31 Mich. 99, holding that counsel employed by private parties cannot assist the district attorney in criminal cases; *State v. Tufts*, 56 N. H. 137, on right of district attorney to control prosecution; *Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342, holding that district courts have no power to appoint an assistant to the county attorney; *McQuestion v. Atty. Gen.* 187 Mass. 185, 72 N. E. 965, holding that attorney general may authorize private attorney to represent him in appealing on behalf of the commonwealth; *Edwards v. State*, 47 Miss. 581, holding that court with consent of prosecuting officer may allow assistance of other counsel for prosecution; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, holding that attorney employed by private parties ought not to assist the district attorney; *Com. v. Tuck*, 20 Pick 356, on right of private prosecutor to employ counsel to aid the attorney general; *Com. v. Gibbs*, 4 Gray, 146, holding that acting district attorney cannot prosecute criminal case, in the civil aspect of which, he was formerly interested; *State v. Bartlett*, 55 Me. 200, holding that court may appoint counsel to assist prosecuting officer, though he may expect compensation.

Distinguished in *Taylor v. State*, 49 Fla. 69, 38 So. 380 (dissenting opinion), on effect of other attorneys assisting the district attorney; *United States v. Rosenthal*, 121 Fed. 862, holding that a special assistant to the United States Attorney General cannot aid or conduct proceedings before a Federal grand jury.

Appealability of convictions of capital offenses.

Cited in *Com. v. Dower*, 4 Allen, 297, holding questions decided at trial of capital offenses in Massachusetts not appealable of right, being decided by quorum of supreme court.

20 AM. DEC. 545, REED v. UPTON, 10 PICK. 522.

When title to chattel passes.

Cited in *Atkins v. Busby*, 25 Ark. 176, holding that vendor agreeing to execute conveyance on receipt of purchase price does not part with title until such receipt; *Wood, M. & R. Co. v. Brooke*, 2 Sawy. 576, Fed. Cas. No. 17,980, holding agreement concerning sale of specific chattels prima facie a bargain and sale transferring title, but contract may otherwise provide.

Cited in note in 13 A. D. 451, on effect of conditional sale of goods to pass title.

—Effect of delivery of possession.

Cited in *Newell v. Grant Locomotive Works*, 50 Ill App. 611, holding that title will not pass even by delivery, to property sold until fulfillment by vendee of condition, whether precedent or concurrent; *Hanway v. Wallace*, 18 Ind. 377, holding that vendee has no attachable interest in chattels sold on a condition precedent, vendee to have possession until performance of condition; *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 434, 48 A. S. R. 400, 56 N. W. 663, holding that mere possession of chattels by agent having no authority to sell does not estop principal to reclaim from innocent purchaser; *Rice v. McLarren*, 42 Me. 157, holding unconditional delivery of chattel a waiver of prepayment and title passes though chattel is destroyed before being paid for; *Sage v. Sleutz*, 23 Ohio St. 1, holding that a conditional contract of sale does not lose its executory character by a mere delivery of the property; *Sanders v. Keber*, 28 Ohio St. 630, holding that title does not pass by mere delivery of chattel when it is to be paid for in instalments, title to remain in vendor until paid; *Gibson v. Chicago Packing & Provision Co.* 108 Ill. App. 100, holding that to constitute a conditional delivery it is not

necessary that vendor declare the condition in express terms, but it may be inferred.

Distinguished in *Brundage v. Camp*, 21 Ill. 330, holding that title passes on delivery of goods to vendee though he is to give notes, with security, at a future day; *Winslow v. Leonard*, 24 Pa. 14, 62 A. D. 354, holding that title to goods may vest in vendee, even though vendor has lien, or right to stop in transit or to rescind sale.

What subject to attachment.

Cited in reference note in 2 A. S. R. 891, on attachability of equitable interest.

Giving of note or bill as payment.

Cited in *Lee v. Fontaine*, 10 Ala. 755, 44 A. D. 505; *Palmer v. Elliot*, 1 Cliff. 63, Fed. Cas. No. 10,690,—holding giving of bill or note only prima facie evidence of payment; *Real Estate Bank v. Rawdon*, 5 Ark. 558, holding receipt of negotiable note for prior debt of another prima facie evidence of payment; *Southworth v. Thompson*, 10 Heisk. 10, holding unaccepted draft not payment of debt of drawer to payee.

20 AM. DEC. 547, CURRY v. COMMONWEALTH INS. CO. 10 PICK. 535.

Materiality and effect of misrepresentation or concealment.

Cited in *Higgle v. National Lloyds*, 11 Biss. 395, 14 Fed. 143, holding that positive representation as to material fact avoids policy if untrue; *Boardman v. New Hampshire Mut. F. Ins. Co.* 20 N. H. 551, holding that false representation cannot avoid policy unless material; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, holding policy avoided by a material misrepresentation though innocently made; *Roth v. City Ins. Co.* 6 McLean, 324, Fed. Cas. No. 12,084; *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 472, Fed. Cas. No. 2,829,—holding suppression of material fact avoids policy though made without fraud; *Smith v. Cash Ins. Co.* 1 Pittsb. 428, holding insured bound to disclose every fact material to the risk; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, holding that concealment though material will not avoid policy unless fraudulent; *Beebe v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 A. D. 553, holding applicant for insurance bound to disclose frankly facts material to the risk, and failure to do so avoids policy; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 A. D. 345, holding policy avoided unless warranty is strictly true whether material or not; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553, holding that a representation that there is a force pump in the insured building is substantially correct though it has no hose; *Richards v. Protection Ins. Co.* 30 Me. 273, holding policy avoided by representation that goods belong to nonhazardous class when they are really hazardous; *Little v. Phoenix Ins. Co.* 123 Mass. 380, 25 A. R. 96, holding policy not avoided by assured's honest misstatement under oath in proof of loss; *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385, 30 A. D. 90, holding formal defects in proofs of loss not fatal to recovery, when refusal to pay was put on other grounds.

Cited in reference notes in 40 A. D. 351, on effect upon insurance of misrepresentations by assured; 53 A. D. 53, on substantial misstatement of assured's interest in property as vitiating policy; 41 A. D. 497, on effect of false or inaccurate representations in application for insurance; 32 A. D. 117, on effect of omission to state facts material to the risk; 55 A. D. 550, on invalidity of policy because

of concealment of material facts from insurer; 41 A. D. 497, on alteration or repairs in insured property as affecting risk.

Cited in notes in 30 A. D. 101, on what is a misdescription of insured property and its effect; 40 A. D. 350, on effect on validity of insurance of concealment of material fact by insurer; 74 A. D. 498, on necessity that misrepresentation or concealment be fraudulently made to avoid insurance policy; 13 E. R. C. 547, on compliance with representations in contracts of insurance.

—As to title or encumbrances.

Cited in *Allen v. Charlestown Mut. F. Ins. Co.* 5 Gray, 384, holding policy not avoided by statement of assured that she owned the land when she had a dower interest and no heir had claimed it for twelve years; *Fowle v. Springfield F. & M. Ins. Co.* 122 Mass. 191, 23 A. R. 308, holding that in the absence of particular inquiry a policy is not avoided by a general assertion of ownership when assured had an insurable interest; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877, holding policy not avoided by assured's representation that he was owner, when he owned half, bought and paid for the other half by verbal contract, and entered into possession; *Ryan v. Springfield F. & M. Ins. Co.* 46 Wis. 671, 1 N. W. 426, holding policy avoided by a misrepresentation as to the amount of encumbrances; *Buck v. Phoenix Ins. Co.* 76 Me. 586, holding applicant's verbal statement that he had some buildings he wanted insured, not misrepresentation of title, though premises were mortgaged, etc., when he was not questioned as to his interest; *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419, holding policy not avoided by failure of assured to disclose that insured building was on another's land when no inquiry was made as to title; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159, holding policy avoided by a false representation of assured made a warranty by the policy, that he was sole owner of building.

Cited in reference note in 35 A. R. 630, on mortgage as breach of condition in insurance policy against encumbrances.

Nature of title to building on land of another.

Cited in *Powers v. Dennison*, 30 Vt. 752; *Whetmore v. Rhett*, 12 Rich. L. 565,—on nature of estate of one building a house on another's land by permission; *Prince v. Case*, 10 Conn. 375, 27 A. D. 675, on title to building erected on land of another, and whether personal property; *Curtiss v. Hoyt*, 19 Conn. 154, 48 A. D. 149, on title to building erected on land of another.

Effect of change of condition in insured property.

Cited in *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding policy invalidated by permanent change in purpose to which building is put; *Kern v. South St. Louis Mut. Ins. Co.* 40 Mo. 19, holding policy void when insured fails to give notice as required of addition to a building materially increasing risk; *Dittmer v. Germania Ins. Co.* 23 La. Ann. 458, 8 A. R. 600, holding provision in policy against increase of risk by act of assured an independent condition; hence act of assured increasing risk avoids policy, though not included in class of specified hazards.

Cited in note in 66 A. S. R. 700, on increase of hazard avoiding policy, by addition to or alteration of premises.

Distinguished in *Oakes v. Manufacturers' F. & M. Ins. Co.* 131 Mass. 164, holding policy avoided under clause against conveyances, by conveyance to another who, as part of transaction, immediately conveyed to assured's wife so as to give assured curtesy.

Materiality of representation or of change in insured property as question for jury.

Cited in *Albion Lead Works v. Williamsburg City F. Ins. Co.* 2 Fed. 479, holding that jury is to say whether there is increase of risk from change in house insured; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. 756, holding that jury are the judges of the materiality of a false representation as to insurance risk; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.* 6 Ill. 236, holding it a question for jury whether addition of steam furnace to insured building increased risk; *Lyman v. State Mut. F. Ins. Co.* 14 Allen, 329, holding that it is a question for jury whether an addition to a building increased the risk; *Boardman v. New Hampshire Mut. F. Ins. Co.* 20 N. H. 551, holding materiality of misrepresentation as to insured property a question for the jury; *Lyon v. Commercial Ins. Co.* 2 Rob. (La.) 266, holding materiality of representation to insurer a question for jury.

Cited in reference note in 73 A. S. R. 132, on increase of hazard and negligence as questions for jury.

Liability of insurer on successive losses.

Cited in *Lattomus v. Farmers' Mut. F. Ins. Co.* 3 Houst. (Del.) 404, holding insurer liable not to exceed sum insured in case of successive losses; *Crombie v. Portsmouth Mut. F. Ins. Co.* 26 N. H. 389, holding insurer liable for successive losses to amount of sum insured in the aggregate, and no more; *Mechanics Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. 51 (affirming 46 Ill. App. 479), holding that on partial loss less, than amount of insurance, policy remains in force to amount not exceeding balance of insurance.

What constitutes insurable interest.

Cited in *Miltonberger v. Beacom*, 9 Pa. 198, on insurable interest of disseisor; *Buffum v. Bowditch Mut. F. Ins. Co.* 10 Cush. 540, holding that person having an estate in land, though deeply encumbered, has an insurable interest, if it can be redeemed.

Cited in notes in 20 A. D. 514, on insurable interest of husband and wife; 104 A. S. R. 989, on insurable interest of husband in wife's property where his marital rights have not been abrogated by statute.

20 AM. DEC. 554, LAWRENCE v. HAYNES, 5 N. H. 33.

Admissibility of acts and declarations of third persons.

Cited in *Seavey v. Seavey*, 37 N. H. 125, holding legal inventories of deceased persons admissible as prima facie evidence for and against strangers for many purposes.

— As to boundary.

Cited in *Putnam v. Bond*, 100 Mass. 58, 1 A. R. 82, holding perambulation of town line by selectmen evidence but not conclusive evidence of boundary in suit between private parties; *Adams v. Stanyan*, 24 N. H. 405, holding perambulations of town lines evidence in controversies between individuals whose lots are bounded on lines perambulated; *Greenville v. Mason*, 57 N. H. 385, on effect as evidence of perambulations of boundary between towns by selectmen; *Adams v. Blodgett*, 47 N. H. 219, 90 A. D. 569, holding acts and declarations of disinterested deceased surveyor while surveying admissible on question of boundaries; *Wood v. Willard*, 37 Vt. 377, 86 A. D. 716, holding declarations of disinterested deceased person having knowledge made when pointing out land admissible on question of boundaries in case of private rights; *Smith v. Powers*, 15 N. H. 546, holding declara-

tions of disinterested deceased person having knowledge admissible on question of boundaries even in case of private rights; *Smith v. Haines*, 58 N. H. 157, on effect as evidence between third parties of agreement of selectmen as to boundary between towns.

Conclusiveness of judgment against persons not parties.

Cited in *Warren v. Cochran*, 27 N. H. 339; *Warren v. Cochran*, 30 N. H. 379,—holding judgment not evidence against one not a party nor privy to it; *Littleton v. Richardson*, 34 N. H. 179, 66 A. D. 759, holding party responsible to another and notified of the suit, bound by judgment against the other.

Title to township.

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 18 L.R.A. 679, 25 Atl. 718, on title to township of Gilmanton.

20 AM. DEC. 557, HENDERSON v. McDUFFEE, 5 N. H. 38.

Right to contribution.

Cited in *Cary v. Holmes*, 16 Gray, 127, holding stockholders liable for corporate debts liable to contribute on basis of number of solvent stockholders.

Cited in reference notes in 31 A. D. 518; 61 A. D. 294,—on contribution among joint principals; 40 A. D. 431; 98 A. S. R. 31,—on contribution among joint principals, one of whom is insolvent; 26 A. D. 203, on foundation in equity of doctrine of contribution; 1 L.R.A. 313, on implied assumpsit for contribution.

— Between cosureties.

Cited in *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41; *Acers v. Curtis*, 68 Tex. 425, 4 S. W. 551; *McAllister v. Irwin*, 31 Colo. 254, 73 Pac. 47,—holding each solvent surety liable to contribution for his *pro rata* share based on number of solvent sureties; *Cass v. Stearns*, 66 N. H. 301, 23 Atl. 80; *Michael v. Allbright*, 126 Ind. 172, 25 N. E. 902,—holding that courts of law will enforce contribution based on number of solvent sureties; *Mills v. Hyde*, 19 Vt. 59, 46 A. D. 177, holding that courts of law will enforce contribution between joint contractors based on the number of solvent sureties; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294, holding that under statutes abolishing distinction between actions at law and suits in equity, courts will enforce contribution between cosureties based on number of solvent sureties; *Rice v. Morton*, 19 Mo. 263, holding one surety discharged to extent of one half of judgment against both when creditor directed sheriff to return execution as unsatisfied when half of debt could have been made out of the property of the other.

Cited in reference notes in 53 A. D. 686, on rights of surety as against cosurety; 26 A. D. 266; 27 A. D. 612; 32 A. D. 96,—on contribution between sureties; 40 A. D. 430, on right to contribution among cosureties; 51 A. D. 417, on contribution where one of several sureties is insolvent.

Cited in notes in 10 A. S. R. 645, on apportionment of contribution among cosureties; 70 A. S. R. 453, on effect of insolvency of some of sureties on liability as between different sets of sureties.

20 AM. DEC. 562, BUFFUM v. GREEN, 5 N. H. 71.

Right to prefer creditors.

Cited in reference notes in 25 A. D. 490, on preference to creditors; 25 A. D. 439, 655; 26 A. D. 247; 41 A. D. 91,—on right of debtor to prefer one creditor to another; 28 A. D. 219; 44 A. D. 229,—on right of debtor to prefer one creditor or class of creditors if done in good faith; 27 A. D. 207, on validity of assign-

ment for benefit of creditors; 24 A. D. 293, on preferences in assignments for creditors; 30 A. S. R. 816, on what preferences in assignment for creditors are void.

Cited in notes in 26 A. D. 584, 585, on preferences to creditors; 36 L.R.A. 346, on right of sureties to buy property from principal in satisfaction of claim. **Sufficiency of delivery of deed.**

Cited in reference notes in 30 A. D. 89, on necessity of delivery to validity of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed.

Distinguished in *Young v. Campbell*, 9 Ill. 156, holding that deed takes effect, if at all, from delivery, which must be mutual and concurrent with acceptance; and subsequent acceptance is insufficient.

— **To third person generally.**

Cited in *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding deed between father and son in consideration of love and affection well delivered when lodged with third person by consent to keep knowledge from public; *Hibberd v. Smith*, 67 Cal. 547, 56 A. R. 726, 4 Pac. 473, holding deed presumptively beneficial to grantee delivered to third person for his use invalid as against attachment after such delivery but before knowledge and acceptance by grantee; *Merrills v. Swift*, 18 Conn. 257, 46 A. D. 315, holding absolute delivery of mortgage deed to third person for grantee sufficient, though grantee was not present and had given no authority to such third person; *Thatcher v. St. Andrew's Church*, 37 Mich. 264, holding deed sufficiently delivered if left with conveyancer to be afterwards delivered; and sufficiently accepted if grantees assent on learning of it; *Campbell v. Kuhn*, 45 Mich. 513, 40 A. R. 479, 8 N. W. 523, holding deed left unconditionally with third person for grantee not under guardianship and accepted by him sufficiently delivered and conveys title though grantee be of unsound mind; *Lord v. Ferguson*, 9 N. H. 380, holding that title does not pass to vessel by leaving bill of sale at customhouse without vendee's knowledge and without relinquishing control; *Peavey v. Tilton*, 18 N. H. 151, 45 A. D. 365, holding delivery of deed to third person for use of grantee, sufficient; *Longfellow v. Barnard*, 58 Neb. 612, 76 A. S. R. 117, 79 N. W. 255, holding mortgage given to indemnify surety in legal effect a security to the owner of the debt, though he did not know of its existence.

Cited in reference note in 22 A. D. 563, on delivery of deed to a third person.

Cited in notes in 12 L.R.A. 174, on sufficiency of delivery of deed to third person as delivery to grantee; 53 A. S. R. 552, on delivery to third person for use of grantee as delivery of deed; 54 L.R.A. 907, on rights of third persons in case of delivery to person other than the grantee.

— **To register.**

Cited in *Boody v. Davis*, 20 N. H. 140, 51 A. D. 210, holding execution of deed and delivery to register for record sufficient to pass title though grantee not present when he later assented; *Whiting v. Hoglund*, 127 Wis. 135, 106 N. W. 391, 7 A. & E. Ann. Cas. 224, holding delivery of deed by grantor to register of deeds for record with intent that it should take effect and with consent of grantee, a sufficient delivery.

Denied in *Welch v. Sackett*, 12 Wis. 244, holding attachment takes precedence over prior chattel mortgage delivered to and recorded by mortgagor's attorney for mortgagee who was ignorant of its existence until after attachment.

Sufficiency of consideration.

Cited in *McWhorter v. Wright*, 5 Ga. 555, holding sureties' liability to pay debts

of grantor sufficient consideration to support absolute conveyance of negroes against creditors of grantor; *Whitney v. Dean*, 5 N. H. 249, holding liability of A. as surety for two out of three members of firm sufficient consideration to support conveyance of firm property to A; *Haseltine v. Guild*, 11 N. H. 390, holding liability of surety, with an implied promise to pay its amount on the principal debt, sufficient consideration for note from debtor to surety; *Pomerooy v. Bailey*, 43 N. H. 118, holding it competent to aver and prove consideration of blood for deed where consideration expressed is "\$500 and other good causes and considerations;" *Quimby v. Stebbins*, 55 N. H. 420, holding parol evidence admissible in action for rent against grantor remaining in possession that his temporary possession was part of consideration of deed; *Runnells v. Bosquet*, N. I. & S. Co. 60 N. H. 38, holding evidence admissible to show that assignment in writing, under seal, of wages to be earned was without consideration and fraudulent.

Cited in reference notes in 26 A. S. R. 675, on consideration for conveyance of land; 18 A. S. R. 145, on grantee's liability as surety of grantor as consideration to support conveyance.

Parol evidence as to consideration.

Cited in note in 20 L.R.A. 110, on parol evidence as to consideration for deed in action by creditor to set it aside.

Payment in land.

Cited in reference note in 39 A. S. R. 475, on payment in land.

20 AM. DEC. 566, GRAFTON BANK v. WOODWARD, 5 N. H. 99.

Release of surety by creditor varying terms of debtor's obligation.

Cited in *Cross v. Rowe*, 22 N. H. 77, on change of contract prejudicial to surety as an exoneration; *Crosby v. Wyatt*, 23 Me. 156, holding surety not discharged by bank allowing note to remain uncollected and collecting interest done in accordance with usage.

Cited in reference notes in 24 A. D. 334, as to acts which discharge surety; 29 A. D. 225, on what acts of creditor discharge surety; 37 A. D. 595, on discharge of surety by creditor's interference.

— By extension of time to principal.

Cited in *Williams v. Moseley*, 2 Fla. 304, on release of surety by giving extension of time of payment to principal; *Dickerson v. Ripley County*, 6 Ind. 128, 63 A. D. 373, holding surety discharged by agreement of creditor with principal extending time of payment; *Lemon v. Whitman*, 75 Ind. 318, 39 A. R. 150, holding surety discharged by extension of time in which principal may pay even though granted for usurious consideration; *Bailey v. Adams*, 10 N. H. 162, holding extension of time of payment by creditor for sufficient consideration releases surety; *New Hampshire Sav. Bank v. Downing*, 16 N. H. 187, holding surety discharged by binding contract to give time to principal without consent of surety; *Wright v. Bartlett*, 43 N. H. 548, holding surety discharged by valid agreement of creditor with principal to extend time of payments; although principal may still pay debt at any time; *Wheat v. Kendall*, 6 N. H. 504; *Christner v. Brown*, 16 Iowa, 130,—holding surety exonerated by extension of time in which principal may pay; *Dunham v. Downer*, 31 Vt. 249, holding that equity will enjoin collection of judgment against sureties when creditor for consideration extended time in which debtor might pay.

Cited in reference notes in 35 A. R. 585, on surety's discharge by indulgence to principal; 61 A. D. 294, on discharge of surety by giving time to principal.

Sufficiency of consideration to support agreement to extend time of payment.

Cited in *Walter v. Fister*, 4 Legal Gaz. 204; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 A. D. 673,—holding payment of interest in advance sufficient consideration for extension of time, which will release surety; *Crosby v. Wyatt*, 10 N. H. 318, holding valid a parol agreement subsequent to making of demand note to extend time of payment.

Cited in note in 53 L.R.A. 317, 318, on effect of payment of usury in consideration of extension of time to principal on surety's liability.

— Payment of usurious interest.

Cited in *Olathe v. Adams*, 15 Kan. 591, to point that no consideration for extension of time of payment based on increase of interest from 12 per cent, the legal rate, to 15 per cent exists when statute considered any excess over legal rate as payment on principal; *Turner v. Williams*, 73 Me. 466, holding parol agreement by principal to pay 8 per cent interest, being invalid by statute. no consideration for extension of time of payment which will release surety; *Stillwell v. Aaron*, 69 Mo. 539, 33 A. R. 517, holding payment of interest in advance even at usurious rate sufficient consideration for extension of time which will release surety; *Turrill v. Boynton*, 23 Vt. 142, holding payment of usurious interest sufficient consideration to sustain agreement to extend time; and will discharge surety; *Hamilton v. Prouty*, 50 Wis. 592, 36 A. R. 866, 7 N. W. 659, holding agreement by holder of note to extend time of payment in consideration of usurious interest discharges indorser; *Wheat v. Kendall*, 6 N. H. 504, holding agreement to pay usurious interest sufficient consideration to support creditor's promise to extend time.

Parol evidence to vary terms of written instrument.

Cited in *Piatt v. United States* (*Grandin v. United States*), 22 Wall. 496, 22 L. ed. 858, 10 Ct. Cl. 163, holding evidence admissible to show that written agreement was subsequently varied by parol; *Manchester Bank v. Moore*, 19 N. H. 564, holding parol evidence admissible to show that one apparently a maker is really a surety; *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986, holding that statute allows extension of time of note by parol only for executed consideration.

Cited in notes in 13 L.R.A. 633, on parol evidence to show waiver; 56 A. S. R. 662, on subsequent parol agreement to vary writing; 56 A. S. R. 664, on variation of writing by subsequent parol agreement changing time of performance.

Construction of agreement to extend time.

Cited in *Rochester Sav. Bank v. Chick*, 64 N. H. 410, 13 Atl. 872, holding that agreement by surety to extend the time does not bind him to indefinite extension, nor to more than one.

Maturity of note.

Cited in *Conway Sav. Bank v. Dow*, 69 N. H. 228, 39 Atl. 975, holding suit on not payable "on demand with interest after six months" not premature if brought within that time.

20 AM. DEC. 570, HADDUCK v. WILMARTH, 5 N. H. 181.**Right of grantor to testify in derogation of his grant.**

Cited in *Sims v. Killen*, 12 Ala. 497, holding grantor in deed competent witness to impeach it for fraud if not interested; *Clinton v. Estes*, 20 Ark. 216, holding witness not incompetent to testify because his testimony invalidates a title to

chattels derived from him; *Marston v. Brackett*, 9 N. H. 336, holding person who is released from covenants on mortgage he has given, a competent witness to impeach its validity; *Stevenson v. Chapman*, 12 N. H. 524, holding grantor a competent witness to prove his deed invalid even for fraud if he has no interest in the case; *Hobbs v. Cram*, 22 N. H. 130, holding admissible, declarations of former owner as to boundary though they tend to diminish his grant.

Possession as notice of possessor's title.

Cited in *Bell v. Twilight*, 22 N. H. 500, holding that to constitute notice of an unregistered deed possession under it must be exclusive and unequivocal; *Patten v. Moore*, 32 N. H. 382, holding that purchaser of realty in open, exclusive, and continuous possession of another has constructive notice of his title; *Bank of Newbury v. Eastman*, 44 N. H. 431, holding open, visible, and exclusive possession by grantee of premises conveyed by unrecorded deed, notice of his deed; *Gooding v. Riley*, 50 N. H. 400, holding one taking mortgage with notice and knowledge of prior mortgage, bound thereby though his conduct be not fraudulent; *Gallery v. Ward*, 60 N. H. 331, holding purchaser bound by constructive notice of title of stranger in possession under unrecorded deed, though claimant was not aware of that possession; *Frame v. Frame*, 32 W. Va. 463, 5 L.R.A. 323, 9 S. E. 901, holding that purchaser of realty in possession of another has notice thereof and is bound thereby though such occupant's title is but equitable; *Harris v. Arnold*, 1 R. I. 125, holding possession of land by person having unrecorded deed, not presumptive notice of existence of such deed; *Cutting v. Pike*, 21 N. H. 347, holding that lands of equitable owner in possession cannot be seized for another's debts who claimed to be owner in order to defeat creditors of equitable owner.

Cited in reference note in 28 A. D. 51, as to when possession is notice of occupant's title.

Cited in notes in 13 L.R.A.(N.S.) 55, on possession of land as notice of title; 13 L.R.A.(N.S.) 57, 58, on possession of land as putting purchaser on inquiry as to title; 104 A. S. R. 353, on purchasers chargeable with notice of rights in land from possession.

Relative rights at law of holders of legal and equitable title.

Cited in *Hutchins v. Heywood*, 50 N. H. 491, on estoppel of holder of legal title obtained by fraud to set it up at law against equitable owner; *Winkley v. Hill*, 6 N. H. 391, holding trespass for mesne profits maintainable after judgment in writ of entry without showing entry under writ of seisin.

Distinguished in *Ela v. Pennock*, 38 N. H. 154, holding tenant in possession under equitable title derived from demandant not entitled to set it up as defense to writ of entry.

Conveyance of property not in grantee's possession.

Cited in *Duke v. Harper*, 2 Mo. App. 1, holding contract whereby attorney is to get part of lands or goods recovered not void as champertous, at least where he does not agree to advance costs; *Bell v. Peabody*, 63 N. H. 233, 56 A. R. 506, holding deed, even of wild land, not evidence of seisin in grantor or grantee; since seisin of grantor is not requisite to a deed.

Distinguished in *George v. Green*, 13 N. H. 521, holding that will can only operate upon land in which testator has an interest at time of execution of will.

20 AM. DEC. 573, NORTON v. LADD, 5 N. H. 203.

Admissibility of evidence to explain words alleged to be slanderous.

Cited in *Lee v. Crump*, 146 Ala. 655, 40 So. 609; *Parmer v. Anderson*, 33

Ala. 78,—holding evidence inadmissible that words naturally slanderous were spoken concerning known transaction not amounting to slander when this was not known to the hearers; *Robinson v. Keyser*, 22 N. H. 323; *Williams v. Cawley*, 18 Ala. 206,—holding admissible, evidence that words which, standing alone, are slanderous were spoken under circumstances rendering them not so; *Smart v. Blanchard*, 42 N. H. 137, holding that plaintiff must show that words, in themselves ambiguous and whose application is doubtful, were spoken in actionable sense of plaintiff and were so understood.

Cited in reference note in 71 A. D. 334, on right to show that alleged slanderous words relate to act not an offense.

When statement is actionable.

Cited in *Haynes v. Haynes*, 29 Me. 247, holding words not actionable which, though in themselves slanderous, were spoken under such circumstances that those present would not believe they were spoken as truth; *Merrill v. Marshall*, 113 Ill. App. 447, holding use of word "thief" not actionable when spoken with reference to past transaction known to hearers not constituting a crime.

Distinguished in *Tenney v. Clement*, 10 N. H. 52, holding it no defense to action for charging another with murder that no murder had been committed if this was unknown to those present.

Property in wild animals.

Cited in note in 8 L.R.A. 448, on property in animals *feræ naturæ*.

Larceny of animals.

Cited in notes in 88 A. S. R. 587, 588, on larceny of animals; 57 A. D. 277, on what animals are subject of larceny; 40 L.R.A. 515, on larceny and obtaining of dog by false pretenses.

Protection and regulation of animals.

Cited in *Warren v. State*, 1 G. Greene, 106, holding coon not subject of larceny; *Aldrich v. Wright*, 53 N. H. 398, 16 A. R. 339, holding statute prohibiting destruction of certain fur-bearing animals inapplicable to cases in which such destruction is an exercise of constitutional right to protect property.

Denied in *State v. Shaw*, 67 Ohio St. 157, 60 L.R.A. 481, 65 N. E. 875, holding fish inclosed in a net, private property, the subject of larceny, even though escape is possible.

— Of dogs.

Cited in *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, upholding state law outlawing dogs not placed on assessment roll; *Hamby v. Samson*, 105 Iowa, 112, 67 A. S. R. 285, 40 L.R.A. 508, 74 N. W. 918, holding a dog a "chattel" within meaning of Penal Code, and its theft larceny.

Distinguished in *State v. M'Duffie*, 34 N. H. 523, 69 A. D. 516, holding dogs within protection of statute against wilful and malicious injury to personal property.

20 AM. DEC. 575, HUNT v. HAZELTON, 5 N. H. 216.

Nature of lease.

Cited in reference note in 29 A. D. 488, on nature of lease.

When partition is maintainable.

Cited in *Cook v. Webb*, 19 Minn. 167, Gil. 129; *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369; *Willard v. Willard*, 145 U. S. 116, 36 L. ed. 644, 12 Sup. Ct. Rep. 818,—holding pending lease for years no obstacle to partition between

owners of the fee; *Whittemore v. Shaw*, 8 N. H. 393, on right to partition of petitioner who has present right of possession.

Cited in note in 67 A. D. 704, on right of cotenant whose share is leased to maintain partition.

Distinguished in *Brown v. Brown*, 8 N. H. 93, holding that one interested with others in a remainder or reversion after an estate of freehold cannot have partition.

Validity of plea to petition for partition.

Cited in *Morrill v. Foster*, 25 N. H. 333, holding bad, plea to petition for partition which does not negative the material allegations of the partition.

20 AM. DEC. 578, *TOWNS v. NIMS*, 5 N. H. 259.

Conclusiveness of judgment, etc.

Cited in reference notes in 22 A. D. 183, on conclusiveness of judgment; 44 A. D. 349, as to when judgment is an estoppel; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded; 36 A. D. 373, on effect of neglect to plead former recovery.

Cited in notes in 23 A. D. 449, on *res judicata* as estoppel; 96 A. D. 783, on verdict as estoppel.

— What matters concluded.

Cited in *King v. Chase*, 15 N. H. 9, 41 A. D. 675, holding judgment conclusive only upon matter directly in issue on former trial; *Potter v. Baker*, 19 N. H. 166; *Palmer v. Russell*, 43 N. H. 625,—holding former judgment conclusive only as to matters in issue but not as to mere facts in controversy; *Lazarus v. Ludwig*, 18 Misc. 474, 41 N. Y. Supp. 999; *Coville v. Gilman*, 13 W. Va. 314; *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217,—holding verdict in former suit not conclusive in later when same points are not in issue in second suit; *Morgan v. Burr*, 58 N. H. 470, holding judgment conclusive only as to matters in issue or controverted upon determination of which the verdict was rendered; *Whittemore v. Shaw*, 8 N. H. 393, holding judgment in partition a bar to writ of entry in which the same question of title is in issue; *Dame v. Wingate*, 12 N. H. 291, holding judgment in trespass a bar to writ of entry in which same question of title was at issue and admissible under general issue when tenant had no opportunity to plead it.

Cited in note in 96 A. D. 776, on conclusiveness of judgment as to issue or point involved.

— Against whom.

Cited in *Greely v. Smith*, 1 Woodb. & M. 181, Fed. Cas. No. 5,740, holding former judgment not conclusive unless parties were the same or are privies in interest or estate; *State v. Corran*, 73 N. H. 434, 62 Atl. 1044, 6 A. & E. Ann. Cas. 486, holding finding by license commissioners, in a proceeding to revoke license, that licensee has violated the law, conclusive against his bondsmen.

Cited in note in 23 A. D. 477, on conclusiveness of judgments between the parties.

— Merger in judgment.

Cited in *Andrews v. Varrell*, 46 N. H. 17, holding that a note reduced to judgment cannot be used as a set-off as the rights of parties are merged in judgment.

20 AM. DEC. 580, ENFIELD v. PERMIT, 5 N. H. 280.**Right of court of law to correct mistake in deed or grant.**

Cited in *Prescott v. Hawkins*, 12 N. H. 19, holding that court of law in action of trespass cannot correct mistake in deed.

Manner of making legislative grant.

Cited in *Enfield v. Day*, 11 N. H. 520, holding no particular set of words or mode necessary to constitute a legislative grant; *Bradford v. McQuestion*, 182 Mass. 80, 64 N. E. 688, holding no particular words necessary to constitute legislative grant, which may be done by act of legislature; *Fletcher v. Pool*, 20 Ark. 100, holding that intent of legislature must be ascertained by construction when the words employed do not in themselves import a confirmation or grant; *Enfield v. Permit*, 8 N. H. 512, 31 A. D. 207, holding that an act correcting a charter of a town so as to include more territory amounts to a grant of such territory.

Cited in reference note in 69 A. D. 504, as to whether particular terms are necessary in grant by legislature.

Estoppel of state or legislature.

Cited in *People v. Perrin*, 56 Cal. 345, holding that a legislature may be estopped by its acts from denying that a corporation possesses certain powers; *Reid v. State*, 74 Ind. 252, as to whether state can be estopped by conduct of public ministerial officers; *Koenig v. Omaha & N. W. R. Co.* 3 Neb. 373, holding grant of lands by legislature to railroad on conditions accepted by it, a contract which state is estopped to impair; *State v. Engle*, 21 N. J. L. 347, on estoppel of state to defeat its own grant.

Relative weight of monuments and courses and distances.

Cited in *Breck v. Young*, 11 N. H. 485, holding that description of land as bordering on land of another will control courses and distances.

20 AM. DEC. 583, BACON v. SHEPPARD, 11 N. J. L. 197.**Against whom action of trespass for mesne profits is maintainable.**

Cited in *Sanderson v. Price*, 21 N. J. L. 637 (dissenting opinion), on liability of lessee of mortgagor to mortgagee for mesne profits after mortgagor suffered default in ejectment.

Cited in reference notes in 65 A. D. 614, as to when and for what action for mesne profits is maintainable; 38 A. D. 754, on right to action for mesne profits after recovery in ejectment.

Cited in note in 85 A. D. 324, on recovery of intermediate damages after regaining possession by ejectment or re-entry.

Remedy for injuries to land held adversely.

Cited in notes in 85 A. D. 322, on remedy for injuries to real estate held adversely to plaintiff; 85 A. D. 326, on remedy of disseisee against stranger.

20 AM. DEC. 589, FORD v. CAMPFIELD, 11 N. J. L. 327.**Recovery upon new promise altering conditions of old contract.**

Cited in *Peoria M. & F. Ins. Co. v. Hervey*, 34 Ill. 46, upholding recovery by assignee of insurance policy upon new promise to pay for loss upon renewal and payment of premium; *Allen v. Jaquish*, 21 Wend. 628, upholding subsequent written agreement not under seal modifying terms of prior sealed lease as surrender of lease upon contingency mentioned in agreement happening; *Flanagan v. Camden Mut. Ins. Co.* 25 N. J. L. 506, holding declaration brought by assignee of in-
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surance policy in form of debt instead of assumpsit on new promise, demurrable; *Scott v. Hawsman*, 2 McLean, 180, Fed. Cas. No. 12,532, holding lease under seal annulled by new and substantial agreement not under seal.

Nature of written contract not under seal.

Cited in *Den ex dem. Mayberry v. Johnson*, 15 N. J. L. 116, on written lease not under seal being parol agreement at common law.

Proving condition of performance of contract.

Cited in *Shinn v. Roberts*, 20 N. J. L. 435, 43 A. D. 636, holding that commissions suing purchasers of land for breach of condition of sale, must prove performance of condition as pleaded; *Brick v. Campbell*, 50 N. J. L. 282, 13 Atl. 255, holding that payee's agreement with maker that she would not sue so long as he remained her husband's assignee, postponed due-day of notes.

20 AM. DEC. 593, BRUEN v. OGDEN, 11 N. J. L. 370.

When replevin lies.

Cited in reference notes in 23 A. D. 333; 52 A. D. 159,—as to when replevin lies.

Cited in notes in 80 A. S. R. 743, as to when replevin or claim and delivery is sustainable; 38 A. D. 546, on necessity for tortious taking to authorize replevin; 80 A. S. R. 761, 763, on what property is replevable.

—Of goods taken in execution.

Cited in *Brown v. Bissett*, 21 N. J. L. 267, on replevin against officer taking goods of plaintiff in replevin not being defendant in execution; *Miller v. Adsit*, 16 Wend. 335, upholding replevin by receiptor of goods when he is bound to deliver them by specific day or pay amount of execution under which levy was made; *Sifford v. Beaty*, 12 Ohio St. 189, upholding replevin for goods levied upon by marshal as goods of another; *Hawk v. Lepple*, 51 N. J. L. 208, 14 A. S. R. 677, 4 L.R.A. 48, 17 Atl. 351, denying right of defendant in execution to replevin goods levied upon by officer.

Cited in reference notes in 44 A. D. 780, on replevin of goods wrongfully taken; 88 A. D. 734, on replevin for goods taken in execution or attachment; 28 A. D. 44, on action for possession of chattels seized under execution; 40 A. D. 204, on replevin against officer for goods taken under legal process; 54 A. D. 245, on replevin against sheriff for property taken on execution from possession of judgment debtor; 61 A. D. 141, as to whether replevin lies for property wrongfully taken under legal process.

Cited in notes in 75 A. D. 646, on replevin by debtor whose exemption rights have been disregarded; 25 A. S. R. 259, on replevin against officer by stranger to writ.

—In case when trespass would also lie.

Cited in *Caldwell v. West*, 21 N. J. L. 411, upholding action of replevin for goods wrongfully taken and detained; *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 A. D. 540, upholding replevin of machinery when defendant having lawful possession thereof unlawfully refused to deliver same to owner; *Woodside v. Adams*, 40 N. J. L. 417, on replevin where trespass *de bonis asportatis* would lie; *Frazier v. Fredericks*, 24 N. J. L. 162, on replevin being coextensive with trespass; *Trapnall v. Hattier*, 6 Ark. 18, denying right to replevin slave from innocent purchaser who supposed he had acquired title; *Harwood v. Smethurst*, 29 N. J. L. 195, 80 A. D. 207, denying replevin of goods held under lease though lease had expired for nonpayment of rent, there being no unlawful taking; *Ft. Wayne*

Electric Corp. v. Security Trust & S. D. Co. 65 N. J. L. 221, 47 Atl. 559, on nature of replevin suit.

Liability for wrongful levy.

Cited in reference note in 39 A. D. 512, on sheriff's liability for levying on stranger's goods.

Jurisdiction of state court over officer proceeding under United States writ.

Cited in *Mock v. Kennedy*, 11 La. Ann. 525, 66 A. D. 203, holding that state court may enjoin United States marshal from levying execution from Federal court on person's property not named in writ; *Ex parte Hill*, 38 Ala. 429, holding that state court has no jurisdiction on habeas corpus to discharge from custody of Confederate enrolling officer person enrolled as conscript under acts of Congress; *Ex parte Hill*, 38 Ala. 458, holding that state court had jurisdiction to pass on question as to whether substitute for drafted soldier under act of Congress was himself liable for service under second act.

Cited in reference notes in 67 A. S. R. 70, on suits in state courts for trespasses by Federal officers; 88 A. D. 675, on trespass or trover in state court against United States marshal for wrongful seizure of property.

Cited in note in 42 A. D. 58, on liability of United States officer to be sued in state court for acts done under color or process of United States court.

Distinguished in *Chapin v. James*, 6 Legal Gaz. 342, denying right of state court to enjoin execution and levy on Federal judgment under Federal writ.

What United States marshal may levy on.

Cited in *Robb v. Wagner*, 5 La. Ann. 111, denying United States marshal's right to levy on property on which landlord has lien for rent pending injunction by landlord.

20 AM. DEC. 607, BEST v. STRONG, 2 WEND. 319.

Proof of character in which plaintiff sues.

Cited in *Rockwell v. Brown*, 42 How. Pr. 226, 11 Abb. Pr. N. S. 401, 1 Jones & S. 380, denying right of insolvent's assignee to recover as such in ejectment without proving assignment; *Foster v. Smith*, 16 Ala. 192, denying claimant's right to recover property as trustee for another without proof that he was trustee; *People ex rel. Freeman v. Hulburt*, 46 N. Y. 110, holding where legislature authorized majority of taxpayers to mortgage property for purpose of railroad, commissioner's authority for said purpose must be proved.

Recovery of money paid upon illegal contract.

Cited in *Morgan v. Groff*, 4 Barb. 524, upholding recovery of money placed with person who was to bet it for plaintiff which person failed to do; *Reese v. Resburg*, 54 App. Div. 378, 66 N. Y. Supp. 633, holding that attorney may enforce agreement allowing one half amount recovered as fees, where the services have been performed and accepted; *Concord v. Delaney*, 58 Me. 309, granting recovery back of money paid to procure volunteers where defendants concealed fact that enlistment was for insufficient period; *Ackert v. Barker*, 131 Mass. 436, granting recovery of money retained under agreement by attorney void for champerty and maintenance; *Davenger v. Everett*, 4 Luzerne Leg. Reg. 159, 7 Legal Gaz. 222, granting recovery back of money paid by felon on agreement that thereby sentence should not be imposed, which sentence was imposed and served; *Strickland v. Burns*, 14 Ala. 511, holding caption in bill of exception disclosing fact that joint plaintiffs were husband and wife, insufficient proof of such relation-

ship; *Hubbell v. Flint*, 15 Gray, 550, holding that debtor directing application of payments to creditor to illegal claim cannot afterward require them to be otherwise applied.

Cited in reference notes in 29 A. D. 136, on what is champerty; 42 A. D. 197, on champerty and maintenance; 20 A. D. 611; 27 A. D. 267,—on action on illegal contract.

Validity of deed of land held adversely by another.

Cited in *Vrooman v. Shepherd*, 14 Barb. 441, denying validity of deed by tenant by courtesy to heir both being out of possession and land being held adversely.

20 AM. DEC. 612, LISHER v. PIERSON, 2 WEND. 345.

Sheriff's liability for removing property in replevin after claim of property is interposed.

Cited in *Lisher v. Pierson*, 11 Wend. 58, holding sheriff liable as trespasser for removing property in replevin without trying claim of title made seasonably.

Construction of statutes.

Cited in reference note in 34 A. D. 121, on construction of doubtful or ambiguous statutes.

Prerequisites to dispossession.

Cited in reference note in 87 A. D. 634, on necessity of trying title to property in action of replevin before defendant can be dispossessed.

Time for making claim to property in replevin.

Cited in *Lisher v. Pierson*, 17 Wend. 518, holding claim of property made after service of summons and removal of property too late to render sheriff trespasser for carrying them away without trying claim; *Mitchell v. Hinman*, 8 Wend. 667, holding that claim of property interposed by defendant in replevin at time of summons is in season.

20 AM. DEC. 616, DOUGLASS v. TOUSEY, 2 WEND. 352.

Proof of character.

Cited in *Gaines v. Relf*, 12 How. 472, 13 L. ed. 1071 (dissenting opinion), on proof of bad character by showing general character; *Simmons v. Holster*, 13 Minn. 249, Gil. 232, holding plaintiff's general reputation between time libel was written and published inadmissible in mitigation of damages for libel; *Wilder v. Peabody*, 21 Hun, 376, holding that it was error to allow witness in impeaching plaintiff's character to state that he did not regard false swearing wrong; *Dufresne v. Weise*, 46 Wis. 290, 1 N. W. 59, holding witness well acquainted with party may testify as to his character without first being asked whether they know such character; *People v. Josephs*, 7 Cal. 129, holding that evidence of good character or defense in criminal prosecution should be restricted to particular trait in issue; *Flynn v. State*, 41 Tex. Crim. Rep. 407, 66 S. W. 551, holding reputation for truth up to time witness testifies admissibility to impeach him.

Cited in reference notes in 23 A. D. 698, on admissibility of testimony as to general character only; 24 A. D. 105, on evidence of plaintiff's character, rank, and condition; 45 A. D. 775, as to when evidence of plaintiff's character is admissible in action for slander; 29 A. D. 266, on admissibility of evidence of character of plaintiff in action of slander; 82 A. S. R. 27, 28, on impeachment of witness by proof of character; 28 A. D. 723, on evidence of general moral character to impeach witness.

Cited in note in 41 L. ed. U. S. 469, on admissibility of evidence of character.

— Of prosecutrix on prosecution for sexual crime.

Cited in *Safford v. People*, 1 Park. Crim. Rep. 474, holding that defendant in seduction may prove prosecutrix's unchaste character by general reputation or by actual unchastity; *State v. Forshner*, 43 N. H. 89, 80 A. D. 132, holding that testimony of prosecutrix's reputation as to chastity in action for rape must be confined to knowledge before commission of act.

— Of bad character in mitigation of damages.

Cited in *Hamer v. McFarlin*, 4 Denio, 508, holding that defendant in slander may show plaintiff's bad character under general issue though he also plead justification; *Sayre v. Sayre*, 25 N. J. L. 235; *Calkins v. Colburn*, 10 N. Y. S. R. 778; *Corning v. Dollmeyer*, 123 Ill. App. 188,—holding general bad reputation of plaintiff suing for slander admissible in mitigation of damages.

Cited in reference notes in 36 A. D. 569, on evidence in mitigation when justification pleaded in slander; 71 A. D. 274, on right to show general bad character of plaintiff in mitigation of damages in action for libel or slander.

Cited in note in 21 A. D. 114, on general bad character of plaintiff in mitigation in libel or slander suit.

— By stranger.

Cited in *Curtis v. Fay*, 37 Barb. 64, denying right to prove reputation by stranger who merely heard what another said it was; *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110, holding character not provable by stranger who formed his opinion from evidence heard at former trial; *Gordon v. State*, 140 Ala. 29, 36 So. 1009, holding deceased's character not provable by stranger whose opinions are formed after his death; *Meyer v. Suburban Home Co.* 25 Misc. 686, 55 N. Y. Supp. 566, denying right to prove party's bad character by person who only knew what two other persons told him; *Tingley v. Times Mirror Co.* 151 Cal. 1, 89 Pac. 1097; *Reid v. Reid*, 17 N. J. Eq. 101; *Griffith v. State*, 90 Ala. 583, 8 So. 812,—holding witness's bad character not provable by stranger sent into neighborhood to learn character.

Validity of sealed verdict.

Cited in *High v. Johnson*, 28 Wis. 72, upholding sealed verdict to which each party assents; *Friar v. State*, 3 How. (Miss.) 422, upholding sealed verdict by parties' assent under direction of court whereupon jury were permitted to separate; *Green v. Bliss*, 12 How. Pr. 428, upholding sealed verdict directed by court without consent of parties; *Com. v. Heller*, 5 Phila. 123, 19 Phila. Leg. Int. 133, denying new trial because jury separated after sealing verdict in case of misdemeanor; *Willard v. Shaffer*, 6 Phila. 520, 25 Phila. Leg. Int. 52, upholding sealed verdict read openly by foreman, assented to by jury, and recorded by court, though defective in form.

Cited in note in 26 L. ed. U. S. 670, 671, on sealed verdicts.

Effect of juror's subsequent dissent from verdict.

Cited in *Farrell v. Hennesy*, 21 Wis. 639, holding new trial properly denied when juror upon being polled stated verdict to be against his conscience, verdict being received and recorded without objection; *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447, denying validity of verdict rendered to clerk which in court it appeared some jurors did not understand; *Devereux v. Champion Cotton Press Co.* 14 S. C. 396, denying validity of sealed verdict from which foreman openly stated before publication, that some jurors now dissented; *Kramer v. Kister*,

187 Pa. 227, 44 L.R.A. 432, 40 Atl. 1008, 42 W. N. C. 392, holding that where juror after verdict is sealed dissents in open court, jury should be discharged.

Subsequent correction of sealed verdict.

Cited in *Pritchard v. Hennessey*, 1 Gray, 294, upholding subsequent verdict where jury sealed verdict, separating for night and it not being satisfactory, retired again bringing in another; *Olwell v. Milwaukee Street R. Co.* 92 Wis. 330, 66 N. W. 362, upholding verdict where jury failed to answer sufficient questions in special verdict which they sealed and were sent out in morning to answer other questions.

Cited in note in 23 L.R.A. 732, on correction of sealed verdicts in criminal cases.

Misconduct of jury.

Cited in note in 15 A. D. 339, on misconduct of jurors.

—Effect of jury's separation.

Cited in *Monroe v. State*, 5 Ga. 85, holding separation of jury in trial for felony raises presumption that it was harmful to prisoner.

Cited in notes in 43 A. D. 78, 79, on effect of separation of jury after finding sealed verdict; 103 A. S. R. 158, on effect of separation of jury after agreeing upon verdict where objection to separation is made.

Sufficiency of evidence — To sustain verdict.

Cited in *Fearing v. De Wolf*, 3 Woodb. & M. 185, Fed. Cas. No. 4,711; *Fell v. Abbot*, R. M. Charl. (Ga.) 452; *Peck v. Land*, 2 Ga. 1, 46 A. D. 368; *Pensacola & G. R. Co. v. Nash*, 12 Fla. 497,—denying new trial because verdict is contrary to evidence where evidence is contradictory and jury have not abused their privilege; *Wendell v. Safford*, 12 N. H. 171, refusing to set aside verdict where witnesses's credibility must be considered, and when evidence is such that person would differ concerning it; *Moore v. Central R. Co.* 24 N. J. L. 268, refusing to set aside verdict as contrary to evidence when some evidence exists to support it and proper instructions were given as to law; *Ducker v. Myers*, 31 How. Pr. 372, holding new trial not allowable because jury found differently on conflicting evidence than court would have found; *Lansing v. Russell*, 13 Barb. 510, as to when court will set aside verdict as contrary to evidence; *Mellon v. Smith*, 2 E. D. Smith, 462, upholding finding of lower court on question of negligence in collision where evidence was conflicting.

—To sustain referee's report.

Cited in *Vansteenburgh v. Hoffman*, 15 Barb. 28, upholding referee's report when it is not against great preponderance of evidence; *Esterly v. Cole*, 1 Barb. 235, upholding report of referee when there was evidence on both sides of question of fact; *Baker v. Martin*, 3 Barb. 634, upholding referee's report on character of indorsement of note, there being no preponderance of evidence against report; *Watkins v. Stevens*, 4 Barb. 168, upholding referee's report on acknowledgment of debt there being no decided preponderance in favor of party against whom report is made; *Quackenbush v. Ehle*, 5 Barb. 469, upholding referee's report as to whether infant's services for parent were to be paid for or not.

When new trial will be granted.

Cited in reference notes in 32 A. D. 35; 62 A. S. R. 352,—as to when new trials shall be granted.

—To let in new evidence.

Cited in *Alsop v. Commercial Ins. Co.* 1 Sumn. 451, Fed. Cas. No. 262, denying

new trial merely to let in new cumulative evidence to points made at trial; *Blanchard's Gun-Stock Turning Factory v. Jacobs*, 2 Blatchf. 69, Fed. Cas. No. 1,520, denying new trial for purpose of introducing new evidence to points before in controversy.

— **Because verdict is against the evidence.**

Cited in reference notes in 22 A. D. 590; 23 A. D. 336,—on setting aside verdict as against evidence; 33 A. D. 656; 39 A. D. 592,—as to when new trial granted because verdict is against evidence; 76 A. D. 65, on new trial on ground of verdict being against the evidence.

— **Because damages are excessive.**

Cited in *Blum v. Higgins*, 1 Hilt. 147, 3 Abb. Pr. 104, holding \$500 damages for assault and battery not so excessive as to warrant setting aside verdict; *Simpson v. Pitman*, 13 Ohio, 365, holding \$850 damages for words charging sheep stealing not so excessive as to warrant new trial.

Cited in reference notes in 38 A. D. 106, on excessive verdict as ground for new trial; 2 A. S. R. 40, on setting aside verdict for excessive damages; 36 A. D. 560, on excessive damages as ground for new trial in slander.

Cited in note in 8 E. R. C. 460, on excessive damages as ground for new trial.

20 AM. DEC. 621, BELKNAP v. REINHART, 2 WEND. 375.

Personal liability on contracts made in representative capacity.

Cited in reference notes in 24 A. D. 66, as to when agent is personally bound; 44 A. D. 335, on liability of agent on his contracts.

— **Of public officers.**

Cited in *Ghent v. Adams*, 2 Ga. 214, holding public officers acting under statute in giving note for erection of courthouse not personally liable thereon; *Newman v. Sylvester*, 42 Ind. 106, holding public officers acting under ordinance authorizing improvement of street not personally liable; *Nichols v. Moody*, 22 Barb. 611, holding Federal collector of customs in absence of express promise, not liable for wages of one employed by him as night watch; *Perrin v. Lyman*, 32 Ind. 16, holding Federal quartermaster not personally liable for services performed by clerk of his department; *Crowell v. Crispin*, 4 Daly, 100, denying Federal officer's liability for charges on goods shipped for Army and contracted for in official capacity.

Cited in reference notes in 55 A. D. 692, on liability of public agents on contracts made for public; 32 A. S. R. 434, on personal liability of public agents acting in public capacity on contracts made in behalf of public; 77 A. D. 190, on right of action against army officer on promise in his official capacity to pay reward for apprehending deserter.

Cited in notes in 15 L.R.A. 510, on liability of public officers on contracts made for the public; 22 A. S. R. 570, on personal liability of public agent disclosing authority.

20 AM. DEC. 623, BENTON v. PRATT, 2 WEND. 385.

Maliciously causing another to break contract or violate duty.

Cited in *Reed v. McConnell*, 62 Hun, 153, 16 N. Y. Supp. 586, on third person's liability for unlawfully causing breach of contract; *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163 (dissenting opinion), on third person's liability for maliciously and fraudulently causing another to break his contract; *Morehouse v. Terrill*, 111 Ill. App. 460, allowing

recovery against one maliciously causing another to break his contract; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 88 A. S. R. 895, 56 L.R.A. 804, 40 S. E. 591, holding wanton inducement of another to break his contract actionable; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, holding company liable in damages for fraud in inducing legislature to terminate contract with competing company to their damage; *Boyson v. Thorn*, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492, denying recovery against one for maliciously causing hotel keeper to refuse meals and lodging to guest; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869, holding defendant liable for maliciously and deceitfully causing purchaser to refuse receipt of machine he had contracted for; *Rice v. Manley*, 66 N. Y. 82, 23 A. R. 30 (reversing *Rice v. Manley*, 2 Hun, 493), allowing plaintiff to recover for defendant's fraudulent statement causing breach of contract to purchase cheese; *Randall v. Hazelton*, 94 Mass. 412, allowing recovery for fraud where mortgagee induced by falsehood, assigns mortgage to persons who sell clandestinely after having agreed not to exercise power of sale without notice; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, on defectiveness of contract as defense for third party's maliciously causing its breach; *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. Supp. 672, denying recovery for defendant's malicious statement to guarantee company that plaintiff's character was bad causing company to refuse recommendation bond whereby insurance company refused to employ him; *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382, holding refusal to comply with agreement to rebuild station at old site with malicious intent to cause sale of property at sacrifice admissible to show fraud.

Cited in reference note in 34 A. S. R. 170, on action for procuring breach of contract.

Cited in notes in 16 L.R.A.(N.S.) 751, on right of action for damages for fraud in inducing breach of contract; 21 L.R.A. 236; 17 E. R. C. 354,—on liability for maliciously inducing party to break contract; 97 A. S. R. 926, on malice as gist of action for inducing one to break his contract; 11 L.R.A. 548, on right of protection against competition in trade or business.

—Inducing discharge of employee.

Cited in *Perkins v. Pendleton*, 90 Me. 166, 60 A. S. R. 252, 38 Atl. 96, holding it actionable to cause person to discharge employee by use of unlawful means; *Chipley v. Atkinson*, 23 Fla. 206, 11 A. S. R. 367, 1 So. 934, allowing recovery by workman against one maliciously causing employer to discharge him; *Lucke v. Clothing Cutters & T. Assembly No. 7507*, K. L. 77 Md. 396, 39 A. S. R. 421, 19 L.R.A. 408, 26 Atl. 505, holding labor union liable for damages sustained by nonunion man whose discharge was caused by union's threats.

—Inducing employee to break contract.

Cited in *Walker v. Cronin*, 107 Mass. 555, holding to fraudulently induce employee to break contract of employment, actionable; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168, 9 Abb. N. C. 393, refusing injunction to restrain union from inducing employees, by argument and persuasion, to stop work.

Cited in note in 22 A. R. 490, on right of action for enticing away servant.

—Inducing violation of duty.

Cited in *March v. Wilson*, 44 N. C. (Busbee, L.) 143, allowing bail for one arrested, to recover against one fraudulently aiding principal to leave county, whereby he had debt to pay; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730, holding labor organization

conspiring to withhold labor to compel company to violate Interstate Commerce act liable civilly to such company.

Effect of knowingly asserting falsehood.

Cited in *Terrill v. Grove*, 2 Mich. N. P. 3, on necessity that representations be known to be false and be made with intent to deceive to be actionable; *American Ins. Co. v. France*, 111 Ill. App. 382, allowing recovery against one for falsely and maliciously asserting falsehood against another causing injury to business; *Whiteside v. Hyman*, 10 Hun, 218, allowing creditor to recover against debtor for false statement that another creditor had made compromise whereby plaintiff compromises claim; *Moody v. Burton*, 27 Me. 427, 46 A. D. 612, upholding action by creditor against parties to conveyance fraudulent as to creditors; *Snow v. Judson*, 38 Barb. 210, holding fraudulent statements in regard to manufactured articles to prevent their sale, which is prevented, actionable; *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187, allowing recovery against defendant for fraudulent representations causing plaintiff to lose rent; *White v. Merritt*, 7 N. Y. 352, 57 A. D. 527, allowing recovery against one falsely stating that no note had been taken of creditor whereby plaintiff was damaged; *Dung v. Parker*, 3 Daly, 89, allowing recovery against one falsely representing himself to be another's agent in executing lease; *Bank of Havlock v. Western U. Teleg. Co.* 4 L.R.A.(N.S.) 181, 72 C. C. A. 580, 141 Fed. 522, 5 A. & E. Ann. Cas. 515, holding telegraph company falsely stating that bank promised to pay draft whereby plaintiff lost lien liable; *Flint v. Hutchinson Smoke Burner Co.* 38 Fed. 546, holding that state court has jurisdiction over bill to enjoin defendants from fraudulently and maliciously publishing that complainant's patent is infringement of his; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286, holding setting up lien for prior indebtedness, when creditor knew debtor to be on eve of bankruptcy a fraud on bankrupt act; *Dudley v. Briggs*, 141 Mass. 582, 55 A. R. 494, 6 N. E. 717, holding that declaration that defendants fraudulently asserting that plaintiffs had gone out of business, thereby selling directory that plaintiff would have sold, stated no cause of action.

Cited in reference notes in 80 A. D. 183, on actions for fraudulent representations generally; 45 A. D. 216, as to when action for deceit or false representations lies; 39 A. D. 733, on action for false representation against stranger to contract; 62 A. D. 742, as to whether person making false representations is excused from liability because he had no interest in making them.

Cited in note in 18 A. S. R. 555, on actions for false representation.

—Falsehood by vendor inducing purchase.

Cited in *Ives v. Carter*, 24 Conn. 392, holding false statement by vendor of interest in insolvent partnership to purchaser that third person offered to buy said interest for stated amount actionable; *Green v. Bryant*, 2 Ga. 66, allowing recovery from vendor who falsely stated to vendee that he paid certain sum for property; *Clark v. Rankin*, 46 Barb. 570, holding vendor of leasehold estate falsely stating that certain amount was payable thereon liable in damages to vendee, relying thereon to his damage; *Stone v. Denny*, 4 Met. 151, holding representation respecting goods sold, though untrue, not actionable if innocently made.

Fraudulent transfer of property.

Cited in *Hurwitz v. Hurwitz*, 10 Misc. 353, 31 N. Y. Supp. 25, denying creditor's right before acquiring lien on judgment debtor's property to maintain action against debtor and another for fraudulent transfer thereof; *Ring v. Ogden*, 45 Wis. 303, on second conveyance of land conveyed by prior unrecorded deed being tort only when done with intent to defraud.

Measure of damages for deceit.

Cited in *Williams v. McFadden*, 23 Fla. 143, 11 A. S. R. 345, 1 So. 618, holding measure of damages for false representations in sale of land to be difference between value of land and its value if representation had been true.

Third party's right to take advantage of statute of frauds.

Cited in *Dixon v. Duke*, 85 Ind. 434, holding execution creditor not permitted to question sale of property by debtor because same is within statute of frauds.

20 AM. DEC. 627, BALDWIN v. MUNN, 2 WEND. 399.**Pleading breach of contract.**

Cited in note in 5 L.R.A. 770, on pleading breach of contract under Code.

Proof of excuse or waiver under allegation of performance.

Cited in *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867, holding performance of contract to secure loan not proved by showing reason for nonperformance; *Edminster v. Cochrane*, 8 Daly, 138, holding waiver not admissible in evidence under plea of performance; *Crandall v. Clark*, 7 Barb. 169, holding proof of different condition inadmissible under allegation of performance of condition as to receipt and payment of goods; *Baxter v. Brooklyn L. Ins. Co.* 44 Hun, 184, holding allegation of performance sufficient without proof that certain premium had been paid, payment of which company denied where they failed to show statutory notice as to forfeiture; *Smith v. Boston C. & M. R. Co.* 36 N. H. 458, holding that where party agrees to do work under superintendence of other party's engineer, setting out such contract is insufficient for recovery on implied contract that engineer shall be suitable; *Smith v. Brown*, 17 Barb. 431, holding complaint alleging performance of conditions precedent except wherein same were waived defective on demurrer; *Clegg v. Southern R. Co.* 135 N. C. 148, 65 L.R.A. 717, 47 S. E. 667 (dissenting opinion), on admissibility of evidence of waiver of condition precedent under averment of performance.

Cited in note in 62 A. D. 119, as to when variance between allegation and proof is material.

Distinguished in *Holmes v. Holmes*, 9 N. Y. 525, holding that tender of performance, may be proved under allegation of performance in action for damages for failure to convey.

Sufficiency of performance.

Cited in *Fullager v. Reville*, 3 Hun, 600, 6 Thomp. & C. 295, on necessity that recovery be on modified contract when contract is changed; *Oakley v. Morton*, 11 N. Y. 25, 62 A. D. 49, holding condition to keep twenty cows and sell butter from their milk not performed when five whose milk failed, were sold towards close of season.

Specific performance of contract.

Cited in reference note in 48 A. S. R. 596, on vendee's right to specific performance of contract for sale of realty.

Changing time of performance.

Cited in reference note in 1 A. D. 93, on parol agreement enlarging time of performance.

Damages for breach of contract — Failure to convey.

Cited in *Fletcher v. Button*, 6 Barb. 646; *Hammond v. Hannin*, 21 Mich. 374, 4 A. R. 490,—holding measure of damages for vendor's failure to convey because of defect in title to be consideration money with interest; *Conger v. Weaver*, 20

N. Y. 140, granting only nominal damages for vendor's failure to perform executory contract to convey because of defect in title; *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58, holding damages for failure to convey because of defect in title only nominal in New York where vendor acted innocently; *Cockcroft v. New York & H. R. Co.* 69 N. Y. 201; *Peters v. McKeon*, 4 Denio, 546,—holding measure of damages for breach of covenant to convey land to be amount of purchase price paid with interest; *King v. Brown*, 2 Hill, 485, holding that purchaser of land under oral contract to be paid for in work can recover as compensation for work not to exceed contract price of land; *Stanton v. Miller*, 14 Hun, 383, holding measure of damages for breach of executory contract to convey land in return for services rendered to be value of service and not value of land; *Yates v. James*, 89 Cal. 474, 26 Pac. 1073, denying allowance of increased value of land as damage for failure to convey, caused by wife's refusal to join in deed; *Whiteside v. Jennings*, 19 Ala. 784, on measure of damages for breach of covenant to convey land; *Cullum v. Branch Bank*, 4 Ala. 21, 37 A. D. 725, on measure of damages for breach of covenant of warranty to convey; *Vann v. Lunsford*, 91 Ala. 576, 8 So. 719, holding that measure of damages for failure to convey dwelling house prevented by holder of unsatisfied mortgagee's purchase thereof does not include value of house; *Hall v. Delaplaine*, 5 Wis. 206, 68 A. D. 57, holding that when in contract to convey, parties covenant to indemnify party for increased value of land, the value of land will be measure of damage when vendors put it out of their power to convey; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, holding measure of damages for breach of contract to convey land to be value of land with interest when consideration was other than money furnishing no criterion; *Shannon v. Comstock*, 21 Wend. 457, 34 A. D. 262, holding tender of performance by plaintiff not performance so as to regulate damages for breach of contract; *Brinckerhoff v. Phelps*, 43 Barb. 469 (affirming 24 Barb. 100), holding measure of damages for vendor's failure to convey when he knew he could give no title except as another consented, to be value of land at time of breach with interest; *Pumpelly v. Phelps*, 40 N. Y. 58, 100 A. D. 463, holding trustee liable to vendee for loss of bargain where believing he could procure *cestui que trust's* consent trustee contracted to sell but consent was refused; *Kirkpatrick v. Downing*, 58 Mo. 32, 17 A. R. 678, holding measure of damages for failure to convey because vendor has conveyed to another to be value of land; *Brisbane v. Pomeroy*, 13 Daly, 358, holding difference between value of land and what it would have been had it not been subject to dower, measure of damages when vendor falsely stated that his wife joined in deed; *Dunshee v. Geoghegan*, 7 Utah, 113, 25 Pac. 731, holding measure of damage for breach of contract to convey land which defendant knew he did not own to be difference between contract price and value of land together with payments made; *Morgan v. Bell*, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925, on measure of damages when vendor contracts to sell property to which he knows he has no title; *Rogers v. Saunders*, 16 Me. 92, 33 A. D. 635, on vendor's liability for refusing to convey because of increased value of property.

Cited in reference note in 33 A. D. 227, on damages for breach of covenant to convey.

Cited in notes in 36 A. D. 94; 39 A. D. 56; 4 L.R.A. 670; 16 L.R.A.(N.S.) 769,—on damages for breach of contract to convey; 16 L.R.A.(N.S.) 77, on damages for breach of contract to convey real estate as affected by good faith of vendor; 52 L.R.A. 243, on loss of profits of purchase of real estate as damages on breach by vendor acting in bad faith; 52 L.R.A. 240, on loss of profits of pur-

chase as damages on breach by vendor selling business, good will, or exclusive right; 106 A. S. R. 969, on origin, growth, and present status of rule respecting measure of vendee's damages on breach of contract to convey realty.

— Breach of covenants in deed.

Cited in *Morris v. Rowan*, 17 N. J. L. 304; *Kinney v. Watts*, 14 Wend. 38; *Willson v. Willson*, 25 N. H. 229, 57 A. D. 320,—holding consideration with interest to be measure of damages for breach of covenant of seisin; *DeLong v. Spring Lake & S. G. Co.* 65 N. J. L. 1, 47 Atl. 491, holding interest as damages for breach of covenant against encumbrances allowable only for six years antecedent to eviction; *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498, holding purchase price with interest to be measure of damages for breach of covenant of warranty in deed; *Jenks v. Quinn*, 61 Hun, 427, 16 N. Y. Supp. 240, holding measure of damage for breach of covenant of title to be value of premises at time defendant conveyed as evinced by consideration named in deed; *Garrett v. Gaines*, 6 Tex. 435, holding measure of damages under Mexican law for breach of warranty of title to be price paid and interest, with costs of eviction suit; *Kelly v. Dutch Church*, 2 Hill, 105, holding lessee's damages for breach of covenant of quiet enjoyment to be rents paid since eviction for six years prior to suit with interests and costs; *Mack v. Patchin*, 42 N. Y. 167, 1 A. R. 500, holding value of unexpired term less rent reserved to be damages for breach of covenant of quiet enjoyment, eviction being caused by lessor's fault; *Dimmick v. Lockwood*, 10 Wend. 142, holding consideration with interest to be measure of damages for breach of covenant against encumbrances; *Malaun v. Ammon*, 34 Pa. 423, on measure of damages for grantee's eviction; *Malaun v. Ammon*, 1 Grant, Cas. 123 (dissenting opinion), on damages for eviction in case of grantor's fraud; *Brown v. Allen*, 73 Hun, 291, 26 N. Y. Supp. 299, holding measure of damages for eviction from timber land which had been cleared, to be amount of purchase price as corresponded to value of land without timber; *Carter v. Burr*, 39 Barb. 59, denying lessee's right to recoup value of lease over and above rent in action for rent, by reason of eviction of portion of privileges granted.

Cited in notes in 15 E. R. C. 738, on measure of damages for breach of express covenant for quiet enjoyment; 3 L.R.A. 792, on damages for breach of covenant against encumbrances.

— Damages for grantee's failure to perform.

Cited in *Richards v. Edick*, 17 Barb. 260, holding that vendor of realty upon tender of deed offering to perform agreement may recover contract price in action at law; *Beth Elohim v. Central Presby. Church*, 10 Abb. Pr. N. S. 484, denying vendor's right to recover balance of purchase price except in action for specific performance.

— Damages for defect in or destruction of property conveyed or leased.

Cited in *Blanchard v. Ely*, 21 Wend. 342, 34 A. D. 250, denying deduction for loss of profits by delays caused by defect in ship in action for contract price of ship; *Noyes v. Anderson*, 1 Duer, 342, granting lessee deprived of leased premises by their destruction without lessor's knowledge or fault to recovery of rent advanced, proportioned to time lessee was deprived of premises.

— Damages for auctioneer's unauthorized sale.

Cited in *Bush v. Cole*, 28 N. Y. 261, 84 A. D. 343, holding auctioneer selling realty for less sum than authorized, signing contract as agent of undisclosed principal liable to refund purchaser's deposit, together with damages if he knew sale was unauthorized.

20 AM. DEC. 632, HICKOK v. COATES, 2 WEND. 419.**Validity of plea to part of declaration.**

Cited in *Phelps v. Sowles*, 19 Wend. 547, holding plea answering but part of count bad on demurrer; *Herkimer Mfg. & Hydraulic Co. v. Small*, 21 Wend. 273, holding it necessary that pleading be answer to whole declaration or whole count; *Slocum v. Despard*, 8 Wend. 615, upholding demurrer where plea professes to answer but one of two breaches of covenant alleged in declaration; *Etheridge v. Osborn*, 12 Wend. 399, upholding demurrer to plea professing to answer but claim for one year's rent where two years' rent was sued for; *Loder v. Phelps*, 13 Wend. 46, holding plea in action for assault and battery and false imprisonment, bad on demurrer which does not answer battery allegation; *Underwood v. Campbell*, 13 Wend. 78, upholding demurrer to plea which only answers part of count though general issue is also pleaded; *Sterry v. Schuyler*, 23 Wend. 487, holding plea bad on demurrer which justifies trespass as to only part of articles alleged in declaration; *Root v. Woodruff*, 6 Hill, 418, holding plea bad which does not answer whole count or declaration to which it is pleaded and will not be aided by another plea going to whole or residue; *Carpenter v. Briggs*, 15 Vt. 34, holding plea in bar to part of declaration on count good is good answer to all it professes to answer.

Cited in reference note in 83 A. D. 243, on demurrer to plea because not constituting defense to extent it professes to go.

Denied in *Flemming v. Hoboken*, 40 N. J. L. 270, upholding plea professing to answer but part of count when that part is severable from rest of count as basis of recovery.

Practice on demurrer.

Cited in reference note in 48 A. D. 73, on demurrer bringing whole record before the court.

Effect of suspension of proceedings after levy.

Cited in *Rickards v. Cunningham*, 10 Neb. 417, 6 N. W. 475, holding that return of execution to court of issuance at creditor's direction after levy constitutes abandonment of levy; *Reynolds v. Cobb*, 15 Neb. 378, 19 N. W. 502, holding that return of execution after levy but without sale for want of bidders discharges property from levy, not impairing right to levy on other property; *Sage v. Woodin*, 66 N. Y. 578, holding that where after execution and levy upon judgment taken by default which was subsequently opened, whereby proceedings on execution were suspended, execution became dormant.

Cited in reference notes in 24 A. D. 593, on loss of lien of execution by delay; 34 A. D. 116, on how lien of execution may be lost or postponed; 52 A. D. 175, on dormancy of execution by suspension in proceeding after levy.

Cited in note in 27 L.R.A. 379, on loss of priority of execution by creditors in definite postponement of sale.

20 AM. DEC. 635, JENNINGS v. CARTER, 2 WEND. 446.**Retention of possession after transfer as fraud.**

Cited in *Osborne v. Tuller*, 14 Conn. 529, holding assignment for benefit of creditors under statute not fraudulent where assignor has not held himself out as real owner of property; *Ferguson v. Union Furnace Co.* 9 Wend. 345, holding delivery of chattel by vendee to his surety for purchase price, proper and continuance of vendee's possession does not invalidate surety's right to control the property.

— By vendor.

Cited in *Bindley v. Martin Bros.* 28 W. Va. 773, holding that continued possession of personal property by vendor after absolute sale raises presumption of fraud; *Collins v. Brush*, 9 Wend. 198, holding vendor's possession of personal property for three months subsequent to sale prima facie fraudulent when vendee gave no excuse; *Stoddard v. Butler*, 20 Wend. 507, holding debtor's sale to creditor of property more than sufficient to pay debt, pending suit by other creditors, and retaining possession of property fraudulent; *Shaw v. Thompson*, 43 N. H. 130, holding where son retained possession of horse sold to father, on pretense of breaking him such sale was fraudulent; *Archer v. Hubbell*, 4 Wend. 514, holding in absence of bad faith vendee's lease of property to vendor's brother who resided with vendor, not void as to creditors; *Hall v. Tuttle*, 8 Wend. 375, holding that where surety of purchaser of vessel was to own and control it till payment of price assignment to surety was not fraudulent though purchaser retained possession of vessel; *Hanford v. Artcher*, 4 Hill, 371, on proof of excuse to rebut presumption of fraud where vendor retains possession of goods after absolute sale.

Cited in reference notes in 33 A. D. 165, on effect of retention of possession by vendor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 6 A. D. 287, on validity as to creditors of sale of chattels with agreement that vendor keep possession; 61 A. D. 169, on presumptive evidence of fraud from vendor retaining possession of goods after sale, which may be repelled by other testimony; 30 A. S. R. 484, on retention of possession of chattels by seller as evidence of fraud; 28 A. D. 114, on retention of possession by vendor or donor as evidence of fraud.

Cited in note in 15 A. D. 263, on retention of possession by vendor or mortgagor.

— By mortgagor.

Cited in *Doane v. Eddy*, 16 Wend. 523, holding possession of horse by mortgagor fraudulent though necessary for mortgagor's following calling of traveling preacher; *Putnam v. Osgood*, 52 N. H. 148, 5 Legal Gaz. 260, holding agreement between mortgagor and mortgagee of chattels that mortgagor may sell same on his own account renders mortgage void as to creditors.

Cited in note in 20 A. D. 663, on retention of possession by one giving mortgage to secure future advances.

Justification under process.

Cited in note in 21 A. D. 209, on extension of protection of process to assistants of officer executing.

Fraud as question of law.

Cited in *East St. Louis Connecting R. Co. v. People*, 119 Ill. 182, 10 N. E. 397, holding fraud in assessment of taxes a question of law and not shown by mere fact of excessiveness.

Cited in reference notes in 56 A. D. 322, as to when fraudulent intent is question of fact; 29 A. D. 136, on existence of fraud as question for jury.

Omission of Christian name.

Cited in reference note in 35 A. S. R. 85, on omission of Christian name in judgment.

Misrecital in judgment, docket, or warrant.

Cited in *Keating v. Serrell*, 5 Daly, 278, holding that when district court judgment appeared on its face to have been rendered on Sunday, it may be shown to

have been rendered on Monday and dated by mistake; *Fish v. Emerson*, 44 N. Y. 376, holding mistake in docketing judgment as of 24th instead of 30th amendable; *Niles v. Totman*, 3 Barb. 594, denying right to contradict docket of justice's court by parol; *Borland v. Stewart*, 4 Wend. 568, upholding justice's judgment and execution thereon as justification for taking property though by mistake the amount was written as \$22.84 instead of \$23.84; *Ring v. Grout*, 7 Wend. 341, holding justification under warrant from trustees of school district No. 1, town of Ogden, supported by evidence of warrant from trustees of school district No. 1, towns of Ogden and Parma.

Cited in reference notes in 59 A. S. R. 834, on effect on execution of clerical errors; 22 A. D. 489, on explaining misrecital in judgment by parol; 42 A. D. 532, on variance between a judgment and execution; 49 A. D. 379, on effect of variance between execution and judgment.

Effect of justification.

Cited in *Jarnigan v. Fleming*, 43 Miss. 710, 5 A. R. 514, holding that justification of slander admits utterance of words as alleged.

20 AM. DEC. 639, CLARK v. FITCH, 2 WEND. 459.

Action for seduction.

Cited in reference note in 44 A. D. 741, on parent's right to sue for seduction of daughter.

Cited in notes in 53 A. D. 348, as to who may sue for seduction; 44 A. D. 166, on parent's right to sue for seduction of daughter; 76 A. S. R. 660, on foundation of civil action for seduction; 14 L.R.A. 702, on American rule of constructive service as element in father's action for seduction of daughter.

— Of minor.

Cited in *Riddle v. McGinnis*, 22 W. Va. 253, as to what acts necessary to show relation of master and servant between father and daughter; *Kahn v. Freytag*, 2 Robt. 678, upholding father's action for seduction of minor daughter who lived with parents for whom she rendered services; *Kennedy v. Shea*, 110 Mass. 147, 14 A. R. 584, allowing recovery for seduction though daughter was working for third party at time spending part of each Sunday at home; *Anderson v. Ryan*, 8 Ill. 583, holding that loss of services need not be proved to sustain father's action for minor daughter's seduction; *Hewitt v. Prime*, 21 Wend. 79, holding proof of loss of services unnecessary in seduction of plaintiff's minor daughter residing at home; *Mulvehall v. Millward*, 11 N. Y. 343, upholding father's action for seduction of minor though daughter was working for defendant at time and father expended nothing on account of her sickness; *White v. Nellis*, 31 N. Y. 405, 88 A. D. 282; *Lavery v. Croke*, 52 Wis. 612, 38 A. R. 768, 9 N. W. 599; *Bolton v. Miller*, 6 Ind. 262,—holding that father may maintain action for seduction though daughter be another's servant at time of act; *Stevenson v. Belknap*, 6 Iowa, 97, 71 A. D. 392, holding that father may maintain action for seduction of daughter while a minor even after she has become of age; *Lawyer v. Fritcher*, 54 Hun, 586, 7 N. Y. Supp. 909 (dissenting opinion), on necessity that plaintiff sustain loss of services to warrant recovery for seduction; *Furman v. Van Sise*, 50 N. Y. 435, 15 A. R. 441; *Gray v. Durland*, 50 Barb. 100,—upholding widow's recovery for seduction of minor daughter though she was employed by third party at the time; *Ellington v. Ellington*, 47 Miss. 329, upholding mother's recovery for minor daughter's seduction though she had been living with her uncle some years prior to act; *Certwell v. Hoyt*, 6 Hun, 575, upholding grandfather's action for seduction

of his minor granddaughter where he acted *in loco parentis* at request of deceased parents, though she was in defendant's services; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 A. D. 338 (reversing 2 Barb. 182), holding that stepfather whose minor stepdaughter has left his house and is seduced while in third person's employment, has no action for seduction; *Ingersoll v. Jones*, 5 Barb. 661, upholding plaintiff's recovery for seduction of girl whom they had brought up though she had living mother and girl was in third person's service at time of act.

Cited in note in 4 A. D. 404, on right of action for seduction of minor daughter.

— Of adult.

Cited in *Hudkins v. Haskins*, 22 W. Va. 645, upholding father's recovery for seduction of adult daughter who continued to reside at home, though on temporary absence at sister's for some time; *Lee v. Hodges*, 13 Gratt. 726, denying father's recovery for adult daughter's seduction by defendant for whom she was working by the year; *Parker v. Meek*, 3 Sneed, 29, upholding widow's action for seduction of adult daughter living at home and performing services for mother; *Badgley v. Decker*, 44 Barb. 577, upholding recovery by mother whose husband had deserted her for adult daughter's seduction who lived at home, but was engaged in work outside; *Anthony v. Norton*, 60 Kan. 341, 62 A. S. R. 360, 44 L.R.A. 757, 56 Pac. 529, allowing mother to maintain action for seduction of adult daughter without proving loss of services.

Emancipation of minor child.

Cited in notes in 35 A. R. 118, on effect of parent's relinquishment of right to child's earnings; 35 A. R. 121, on revival of parent's duty to support by emancipated child becoming unable to support himself.

Admissibility of continued attentions in seduction.

Cited in *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93,—holding defendant's continued conduct and his attention to female during time when intercourse occurred, competent evidence in seduction though several acts are shown.

Measure of damages for seduction.

Cited in *Morgan v. Ross*, 74 Mo. 318, allowing damages for father's mental suffering and anxiety caused by daughter's loss of virtue in action for seduction.

Cited in reference note in 26 A. S. R. 56, on measure of damages in seduction.

Admissibility of marriage promise in seduction.

Cited in *Gillet v. Mead*, 7 Wend. 193, 22 A. D. 578, holding evidence of promise of marriage inadmissible in action for seduction; *Comer v. Taylor*, 82 Mo. 341, holding proof of promise of marriage not permissible in parent's action for seduction; *Brownell v. McEwen*, 5 Denio, 367, holding promise of marriage inadmissible in seduction but defendant may be shown to have addressed honorable proposals; *White v. Campbell*, 13 Gratt. 573, holding promise of marriage by means of which defendant debauched plaintiff's daughter admissible in action for seduction; *Kip v. Berdan*, 20 N. J. L. 239, holding evidence of promise of marriage subsequent to illicit intercourse admissible in parent's action for seduction to explain why defendant was allowed to call after parent knew of act.

Cited in note in 44 A. D. 175, on admissibility of evidence of promise of marriage in action for seduction.

Admissibility of evidence of seduction in breach of promise suit.

Cited in note in 44 A. D. 172, on evidence of fact of seduction.

Distinguished in *Wells v. Padgett*, 8 Barb. 323, upholding admission of evidence

of seduction in action for breach of promise of marriage made to accomplish seduction.

Attack on attorney's authority to appear.

Cited in *People v. Lamb*, 85 Hun, 171, 32 N. Y. Supp. 584, holding question of attorney's right to appear and bring suit not to be issue at trial but question for motion before trial.

Father's recovery for injury to minor.

Cited in *Sawyer v. Sauer*, 10 Kan. 519, allowing father to recover for negligent injury to minor son though at time son was working for another and receiving his own money; *Berry v. Louisville, E. & St. L. R. Co.* 128 Ind. 484, 28 N. E. 182, denying father's right to maintain action as administrator for negligent killing of minor son who had not been emancipated; *Dennis v. Clark*, 2 Cush. 347, 48 A. D. 671, allowing father to recover for third person's injury to minor child too young to render services.

Father's right to minor's services.

Cited in *Swartz v. Hazlett*, 8 Cal. 118, holding that father's conveyance to minor son in return for services is voluntary conveyance, father not being bound to pay therefor.

20 AM. DEC. 644, ELLIOT v. BROWN, 2 WEND. 497.

Separate actions by each party in mutual assault.

Cited in *Bailey v. Kay*, 50 Barb. 110, allowing amendment to answer showing defendant to have recovered of plaintiff in prior action for assault of which present assault was part.

Effect of excessive force in repelling assault in civil actions.

Cited in *Cremore v. Huber*, 18 App. Div. 231, 45 N. Y. Supp. 947, holding negro forcefully ejected from concert hall after having paid for admission not barred from recovery by resisting ejection; *Sanford v. Eighth Ave. R. Co.* 7 Bosw. 122, on effect of using excessive force in repelling assault; *Hogan v. Ryan*, 5 N. Y. S. R. 110, holding defendant only liable for excessive force if he stabbed plaintiff in self-defense as he claimed.

Cited in reference notes in 26 A. D. 191, as to when assault and battery is justifiable; 47 A. D. 268, on extent of right of self-defense in assault and battery.

Cited in note in 82 A. D. 674, on degree of force which is justifiable to defend one's property.

Criticized in *Dole v. Erskine*, 35 N. H. 503, holding that party guilty of excessive force in resisting assault may recover for assault though he be liable in cross action.

Justification in repelling assault.

Cited in *Scribner v. Beach*, 4 Denio, 448, 47 A. D. 265, holding taking hold of rake in defendant's hand no justification for knocking plaintiff down; *People v. McGrath*, 47 Hun, 325, 6 N. Y. Crim. Rep. 161, on what constitutes justification for using force in repelling assault; *Keyes v. Devlin*, 3 E. D. Smith, 518, on duty of one assailed to avoid assault.

Liability for assault where parties fought by agreement.

Cited in *Barholt v. Wright*, 45 Ohio St. 177, 4 A. S. R. 536, 12 N. E. 185, holding evidence that parties fought by agreement no bar to action for assault.

Instruction as to costs.

Cited in *Nolton v. Moses*, 3 Barb. 31; *Tucker v. Ely*, 37 Hun, 565; *Waffle v.*

Dillenback, 38 N. Y. 53, 4 Abb. Pr. N. S. 457 (affirming 39 Barb. 123),—upholding instruction appraising jury of effect of their verdict upon parties in respect to costs.

Cited in note in 27 A. R. 529, on telling jury amount of damages necessary to carry costs.

Distinguished in *Hicks v. Foster*, 13 Barb. 663, holding it error to charge jury that they may consider plaintiff's expense in coming into court to prosecute slanderer.

20 AM. DEC. 647, ALLEN v. CROFOOT, 2 WEND. 515.

Privileged communications.

Cited in reference notes in 22 A. D. 420; 27 A. D. 158; 33 A. D. 541,—on privileged communications.

Liability for words used in judicial proceeding.

Cited in *Stewart v. Hall*, 83 Ky. 375, holding republishing newspaper libel in counsel's brief not actionable when party considered it relevant; *Hastings v. Lusk*, 22 Wend. 410, 34 A. D. 330, denying arrest of judgment for slander by party defending suit when the words spoken were found not pertinent to issue; *Perkins v. Mitchell*, 31 Barb. 461, holding physician's affidavit that person is insane not libelous when made in connection with judicial proceeding.

Cited in reference notes in 34 A. D. 340, on privilege as to words spoken in judicial proceedings; 26 A. D. 169, on actionability of words spoken in judicial proceedings.

Cited in notes in 22 L.R.A. 839, on privilege as to defamatory statements contained in affidavits and depositions; 28 L. ed. U. S. 159, on privileged communications to magistrate or grand jury charging a crime.

20 AM. DEC. 649, JACKSON v. OSBORN, 2 WEND. 555.

Sufficiency of certificate of proof of deed.

Cited in *McIntyre v. Kamm*, 12 Or. 253, 7 Pac. 27, holding that in proof of acknowledged deed certificate must state that witness was sworn; *Irving v. Campbell*, 24 Jones & S. 224, 4 N. Y. Supp. 103, upholding certificate of acknowledgment of deed, although witness's place of residence be omitted; *Jackson ex dem. Gould v. Gould*, 7 Wend. 364, holding that in proof of deed by subscribing witness he must state that he knows grantor; *Averill v. Wilson*, 4 Barb. 180; *Dias v. Glover*, Hoffm. Ch. 71,—on sufficiency of certificate of acknowledgment of deed; *Hartley v. James*, 50 N. Y. 38, on defectiveness of certificate of proof of deed for failure to identify grantor therein; *Hughes v. McDivitt*, 102 Mo. 77, 15 S. W. 756 (dissenting opinion), on sufficiency of knowledge of identity as shown in certificate of acknowledgment.

Evidence to impeach witness.

Cited as leading case in *Berner v. Mittmacht*, 2 Sweeny, 582, holding proof of accusation of crime inadmissible to affect witness's credibility.

Cited in *McKay v. Lasher*, 42 Hun, 270, on impeachment of witness; *West v. Lynch*, 7 Daly, 245, holding indictment for crime inadmissible to impeach witness's credibility; *Brown v. People*, 8 Hun, 562, holding it improper to ask prisoner how many times he has been arrested to impeach his character for truth; *McKenna v. People*, 18 Hun, 580, holding question whether witness has ever been arrested improper to show character; *Crapo v. People*, 15 Hun, 269, holding question of prisoner's being arrested for bigamy improper to impeach him in prose-

cution for burglary; *Haitt v. Moulton*, 21 N. H. 586, holding evidence of intemperate acts inadmissible to impeach witness's character for truth; *Gilbert v. Sheldon*, 13 Barb. 623, holding proof of general bad character not necessarily proof that witness's character for veracity is bad; *People v. McGloin*, 91 N. Y. 241, 12 Abb. N. C. 172, 1 N. Y. Crim. Rep. 154, holding person convicted of crime and sentenced as competent as a witness as one who has been convicted only; *Newcomb v. Griswold*, 24 N. Y. 298, holding question as to whether witness has been convicted of petit larceny, improper to impeach witness.

Cited in note in 14 L.R.A.(N.S.) 698, 701, on impeachment of character of witnesses.

Effect of alteration of instrument.

Cited in *Fontaine v. Gunter*, 31 Ala. 258, holding that accommodation indorser paying bill of exchange containing alterations must prove their making with drawer's consent in action to charge him; *Tillou v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564, holding mutilated instrument purporting to consent to altered terms in insurance application inadmissible court finding same to have been altered since execution; *Stoner v. Ellis*, 6 Ind. 152, holding deed containing erasures of certain names properly admitted in evidence though unexplained; *Beaman v. Russell*, 20 Vt. 205, 49 A. D. 775, holding question of alteration of instrument to be question for jury; *Ridgeley v. Johnson*, 11 Barb. 527, on effect of material alterations in deed.

Cited in reference note in 46 A. D. 167, on alteration of instruments.

Cited in notes in 37 A. R. 263, as to when alteration of written instrument made; 61 A. D. 204, on interlineations, erasures, or alterations in deeds as affecting their validity.

— Presumptions and burden of proof.

Cited in *Dow v. Jewell*, 18 N. H. 340, 45 A. D. 371, holding filling of blank originally left in description of land presumed to have been made prior to deed's execution; *Maybee v. Sniffen*, 2 E. D. Smith, 1, 10 N. Y. Legal Obs. 18, holding court cannot presume erasure of date in release was made after signing from mere fact of its appearance on face of instrument; *Smith v. McGowan*, 1 N. Y. Code Rep. 27, 3 Barb. 404, holding that erasure in deed creates no presumption that it was altered after execution; *Gist v. Gans*, 30 Ark. 285, holding that apparent alteration of note creates no presumption that it was fraudulently altered; *Wilde v. Armsby*, 6 Cush. 314, holding burden of showing that interlineation of words "and company" in written guaranty were made before execution of instrument to be on plaintiff; *Bailey v. Taylor*, 11 Conn. 531, 29 A. D. 321, holding party suing on note apparently altered from \$600 to \$500 not to have burden of accounting for it; *Low v. Merrill*, *Burnett* (Wis.) 185, 1 Pinney (Wis.) 340, holding burden of explaining alteration of date in note to be on holder; *Herrick v. Malin*, 22 Wend. 388, holding alterations in deed must be explained even though it be admissible as ancient document; *Van Buren v. Cockburn*, 14 Barb. 118, holding party producing altered will bound to explain alterations; *Taylor v. Crowninshield*, 5 N. Y. Legal Obs. 209, on duty of explaining alteration in date of instrument.

Cited in reference note in 75 A. D. 735, on necessity of party offering altered instrument accounting for the alteration.

Cited in notes in 13 L.R.A. 314, on necessity that party producing instrument account for alterations; 86 A. S. R. 131, on presumption as to time of apparent alteration of instrument.

20 AM. DEC. 652, LANGWORTHY v. SMITH, 2 WEND. 587.**Parol modification of written contract.**

Cited in *March v. Bellew*, 45 Wis. 36, upholding subsequent parol modification of written contract partly executed on one side; *Wadsworth v. Thompson*, 8 Ill. 423, holding that time for performance of written contract may be varied by parol.

Validity of parol enlargement of sealed instrument.

Cited in *Bloomer v. Sherman*, 2 Edw. Ch. 452, holding that time limited by deed for making award on arbitration may be extended by parol; *French v. New*, 20 Barb. 481, holding that parties after covenanting that arbitration award be in writing may waive acquirement by parol; *Stryker v. Vanderbilt*, 25 N. J. L. 482, holding that time for performance of sealed contract may be extended by parol; *Franklin F. Ins. Co. v. Hamill*, 5 Ind. 170, upholding oral agreement extending time within which insurance company had covenanted to repair machinery; *Hastings v. Lovejoy*, 140 Mass. 261, 54 A. R. 462, 2 N. E. 776, holding subsequent parol agreement for good consideration reducing rent stipulated for in sealed lease binding; *Cox v. Bennet*, 13 N. J. L. 165, upholding agreement enlarging term for performance of covenant though no consideration therefor be expressed; *Vanhouten v. McCarty*, 4 N. J. Eq. 141, holding that time for payment of mortgage bond may be extended by parol; *Tallman v. Earle*, 37 N. Y. S. R. 271, 13 N. Y. Supp. 8, holding that contract under seal may be abrogated by executed parol agreement; *Horgan v. Krumwiede*, 25 Hun, 116, on validity of modification of sealed lease by parol; *Hunt v. Bloomer*, 5 Duer, 202, on extension of time for payment of bond by subsequent parol agreement; *Strylar v. Vanderbilt*, 27 N. J. L. 66, on enlargement of time for performance of sealed contract by parol.

— Effect of modification of sealed instrument by parol.

Cited in *Herzog v. Sawyer*, 61 Ind. 344, holding parol evidence of abandonment of sealed contract to perform services, and substitution of new agreement therefor admissible; *Smith v. Brown*, 17 Barb. 431, holding averment in complaint for contract price of labor and materials, of performance except wherein performance had been waived bad on demurrer; *Leavitt v. Savage*, 16 Me. 72, holding surety on bond not discharged by written agreement of extension of time without consideration; *Barelli v. O'Conner*, 6 Ala. 617, on rescission of lease under seal by subsequent parol agreement; *Avery v. Kellogg*, 11 Conn. 562, on enlargement of covenant by parol agreement.

Remedy where sealed instrument is modified by parol.

Cited in *Ford v. Campfield*, 11 N. J. L. 327, 20 A. D. 589, holding action not maintainable on bond, time for performance of which, has been varied by parol; *Fullager v. Reville*, 3 Hun, 600, holding that where contract is changed, action must be brought on modified contract; *M'Voy v. Wheeler*, 6 Port. (Ala.) 201, denying right to sue on sealed contract varied by subsequent parol agreement; *Raymond v. Fisher*, 6 Mo. 29, denying recovery on covenant modified by subsequent parol agreement; *Crane v. Maynard*, 12 Wend. 408, holding that party may sue on covenant for not performing in certain manner, though time for performance has been extended by subsequent agreement; *Scott v. Hawaman*, 2 McLean, 180, Fed. Cas. No. 12,532, upholding recovery of rent for occupation of premises leased under seal occupation being under subsequent parol agreement; *Patterson v. Ackerson*, 1 Edw. Ch. 96, on right to recover for use and occupation where there can be no recovery under lease.

20 AM. DEC. 655, DIVVER v. McLAUGHLIN, 2 WEND. 596.**Retention of possession of property after transfer — After sale.**

Cited in *Stoddard v. Butler*, 20 Wend. 507, denying validity of sale of goods to creditor pending suit by other creditors possession being retained by vendor acting as agent for vendee; *Hanford v. Artcher*, 4 Hill, 271, on what constitutes good faith to render absolute sale of chattels valid though vendor retain possession.

Cited in reference notes in 33 A. D. 165, on effect of retention of possession by vendor; 57 A. D. 216, on effect of retention of possession of personal property by vendor or mortgagor; 30 A. D. 262, on retention of possession by vendor or mortgagor as evidence of fraud; 28 A. D. 114, on retention of possession by vendor or donor as evidence of fraud; 6 A. D. 287, on validity as to creditors of sale of chattels with agreement that vendor keep possession.

Cited in notes in 15 A. D. 263; 20 A. D. 639,—on retention of possession by vendor or mortgagor.

— After assignment.

Cited in *Hall v. Tuttle*, 8 Wend. 375, upholding validity of assignment of bill of sale of vessel to surety who is to be owner till payment of purchase price though assignor retained possession of vessel; *Chophard v. Bayard*, 4 Minn. 533, Gil. 418, holding assignment of goods to creditor, assignor to retain possession and sell same according to schedule, fraudulent as to creditors.

— After mortgage.

Cited in *Curtis v. Leavitt*, 15 N. Y. 9, on effect of continued possession of goods by vendor or mortgagor after sale or mortgage; *The Romp, Olcott*, 196, Fed. Cas. No. 12,030, upholding rights of bona fide purchaser of vessel mortgaged but which remained in mortgagor's possession; *Watson v. Williams*, 4 Blackf. 26, 28 A. D. 36, holding mortgagor's possession of mortgaged property not conclusive evidence of fraud but may be explained by parol; *Putnam v. Osgood*, 61 N. H. 192; *Place v. Langworthy*, 13 Wis. 630, 80 A. D. 758; *Tallon v. Ellison*, 3 Neb. 63,—denying validity of mortgage of stock of goods where mortgagor retains possession thereof with power to sell; *McLaughlan v. Wright*, 3 Wend. 348, holding that mortgage of brewer's stock and utensils in trade possession of which mortgagor retained keeping mortgage secret is void; *Wood v. Lowry*, 17 Wend. 492, denying validity of mortgage of stock of goods which mortgagor retains and sells in ordinary course of business; *Gassner v. Patterson*, 23 Cal. 299, holding chattel mortgage of no validity as to creditors where statute relating to change of possession is not complied with; *Griswold v. Sheldon*, 4 N. Y. 581, holding mortgage on stock of goods which mortgagor was to retain and sell in usual course of business to be fraudulent; *Cook v. Bennett*, 60 Hun, 8, 14 N. Y. Supp. 683, holding that mortgage of stock of goods by vendee to secure purchase price, vendee to retain possession with right to sell and buy others to which lien should attach, is void; *Freeman v. Rawson*, 5 Ohio St. 1, holding chattel mortgage with possession and power of disposition reserved to mortgagor void; *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736, on effect of mortgagor's retention of mortgaged property as evidence of fraud; *Butler v. Van Wyck*, 1 Hill, 438 (dissenting opinion), on validity of mortgage of personalty where mortgagor retains possession; *Frankhouser v. Ellett*, 22 Kan. 127, 31 A. R. 171 (dissenting opinion), on validity of mortgage on stock of goods of which mortgagor retains possession; *Ferguson v. Union Furnace Co.* 9 Wend. 345, upholding mortgage to surety of oxen to secure purchase price though purchaser have continued possession of oxen.

Cited in reference note in 26 A. D. 552, on effect of retention of possession by mortgagor of personal property.

Cited in notes in 15 A. S. R. 914, on validity of chattel mortgage permitting mortgagor to retain and sell the property; 18 L.R.A. 620, on analysis of law as to validity of mortgage of merchandise giving mortgagor possession with power of sale.

Distinguished in *Levy v. Welsh*, 2 Edw. 438, upholding mortgage on stock of goods, possession to remain in mortgagor till default where in two months assignment was made for benefit of creditors.

Fraud as question of law or fact.

Cited in reference notes in 29 A. D. 136, on existence of fraud as question for jury; 56 A. D. 322, on when fraudulent intent is question of fact.

Badges of fraud.

Cited in *Low v. Wortman*, 44 N. J. Eq. 193, 7 Atl. 654, upholding mortgage of farm to sons to whom father was jointly indebted as against judgment creditor, though made pending appeal from creditor's judgment.

Cited in reference note in 29 A. S. R. 506, as to when chattel mortgages are fraudulent.

Innocent purchasers as against unrecorded mortgage.

Cited in *City Bank v. Boston Boot & Shoe Co.* 6 Northampton Co. Rep. 21, holding that notes given to secure contract price constitute vendee bona fide purchaser as against unrecorded chattel mortgage when notes have passed to innocent holders.

Validity of mortgage for future advances.

Cited in *Hendrix v. Gore*, 8 Or. 406; *Tully v. Harloe*, 35 Cal. 302, 95 A. D. 102,—upholding mortgage for greater sum than that loaned though it was not stated to be for future advances, if made in good faith; *McCown v. Russell*, 84 Wis. 122, 54 N. W. 31, upholding mortgage for future advances to extent of advances made; *Speer v. Skinner*, 35 Ill. 282, upholding chattel mortgage for future advances, if bona fide; *Lawson v. Alabama Warehouse Co.* 80 Ala. 341, upholding mortgage for \$5,000 only half of which was loaned balance being for future advances; *Collier v. Faulk*, 69 Ala. 58, upholding mortgage for future advances as against subsequent purchasers with notice; *Wescott v. Gunn*, 4 Duer, 107, upholding mortgage to extent of actual amount loaned though it be invalid as to future advances; *Craig v. Tappin*, 2 Sandf. Ch. 78, upholding mortgage for future advances if extent of intended lien be clearly defined; *Townsend v. Empire Stone-Dressing Co.* 6 Duer, 208, upholding mortgage for future advances up to specified amount but not as to additional sums loaned by virtue of parol agreement; *Walker v. Snediker*, Hoffm. Ch. 145, holding mortgage for larger sum than that loaned cannot be rendered mortgage for future advances by subsequent parol agreement; *Marks v. Robinson*, 82 Ala. 69, 2 So. 292, on rights of mortgagees for future advances; *Brace v. Berdan*, 104 Mich. 356, 62 N. W. 568 (dissenting opinion), on chattel mortgage for future advances which fact is not stated on face of instrument being void; *Butts v. Peacock*, 23 Wis. 359, denying validity of mortgage for greater amount than is due even though designed to secure future advances, such fact not appearing on its face and mortgagee knowing mortgagor to be hard pressed.

Annotation cited in *Schmidt v. Zahrindt*, 148 Ind. 447, 47 N. E. 335, holding future advances to mortgagor relate back to execution of mortgage which is valid lien for such advances.

Cited in reference notes in 48 A. D. 724, on provision to secure future advances; 23 A. D. 417, on mortgage to secure future advances; 42 A. D. 517; 49 A. D. 178; 71 A. D. 653,—on validity of mortgages to secure future advances; 51 A. S. R. 739, on validity of mortgage to secure debt and future advances; 49 A. D. 463, on priority of mortgages to secure future advances over subsequent mortgages; 44 A. R. 525, on effect of mortgage on unplanted crop.

Cited in notes in 49 A. S. R. 209, on validity of mortgage to secure future advances; 116 A. S. R. 695, on necessity of specifying that future debts are to be secured by mortgage.

Upholding correct verdict.

Cited in *Den ex dem. Steelman v. Steelman*, 16 N. J. L. 66, upholding verdict where justice has been done though judge gave misdirection.

20 AM. DEC. 664, BARKER v. MECHANICS' F. INS. CO. 3 WEND. 94.

Necessity of corporate seal.

Cited in reference notes in 30 A. D. 590, on validity of corporate notes without seal; 71 A. D. 181, on necessity of corporation acting through common seal; 48 A. D. 364, on liability of corporation for contracts by its agents not under seal.

Cited in note in 50 A. S. R. 152, on necessity for corporate seal in the United States.

Powers of corporation.

Cited in *Toppa v. Cleveland, C. & C. R. Co.* 1 Flipp. 74, Fed. Cas. No. 14,099, holding allegation that "defendants being thereunto duly authorized by laws of Ohio," sufficient as to authority to execute guaranty.

Cited in reference note in 57 A. D. 414, on incidental powers possessed by corporations.

— To issue negotiable paper.

Cited in *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341; *Lucas v. Pitney*, 27 N. J. L. 221; *Moss v. Oakley*, 2 Hill, 265; *Partridge v. Badger*, 25 Barb. 146; *Moss v. Averell*, 10 N. Y. 449; *Curtis v. Leavitt*, 15 N. Y. 9; *McMasters v. Reed*, 1 Grant, Cas. 36,—*Bayerque v. San Francisco*, McAll. 175, Fed. Cas. No. 1,137,—holding that corporation may issue negotiable paper in general course of business in absence of express prohibition; *Halstead v. New York*, 7 N. Y. Legal Obs. 74, 5 Barb. 218, holding draft drawn by corporation having no power to issue negotiable paper void if not drawn in course of its legitimate business; *Straus v. Eagle Ins. Co.* 5 Ohio St. 59, holding that note issued by insurance company not expressly restrained from issuing notes is prima facie valid; *Barry v. Merchants' Exch. Co.* 1 Sandf. Ch. 280, holding corporation created with power to purchase and hold realty authorized thereby to borrow money and execute bond and mortgage therefor; *Reade v. Pacific Supply Asso.* 40 Or. 60, 66 Pac. 443, on corporations implied or incidental power to issue negotiable paper; *Safford v. Wyckoff*, 4 Hill, 442 (dissenting opinion), on corporation's incidental power to issue notes in general course of business; *Lawrence v. Gebhard*, 41 Barb. 575 (dissenting opinion), on corporation's implied power to issue negotiable paper; *Dubois v. New York & H. R. Co.* 1 N. Y. Legal Obs. 362, holding demurrer to complaint on corporation note because corporation had no power to issue note bad, defense being by plea of confession and avoidance; *State ex rel. Carpenter v. Hastings*, 10 Wis. 518, on right to object on demurrer that corporation had no authority to issue note; *McIntire v. Preston*, 10 Ill. 48, 48 A. D. 321, holding insurance company having power to make and transfer negotiable

paper presumed to do so in ordinary course of business; *Ketchum v. Buffalo*, 14 N. Y. 356, holding city of Buffalo with power to establish markets has power to purchase market grounds giving bond in payment; *Wiley v. Board of Education*, 11 Minn. 371, Gil. 268, holding board of education having power to issue bonds they will be presumed to have been legally issued.

Cited in reference notes in 35 A. D. 174, on power of corporation to make notes; 48 A. D. 329, on power of corporations to make and receive notes.

Cited in note in 13 A. D. 562, on power of corporation to make mortgage on negotiable bill, note, or bond.

— To take land in foreign state as security.

Cited in *New York Dry Dock v. Hicks*, 5 McLean, 111, Fed. Cas. No. 10,204, holding corporation may hold land in another state taken as payment or security for debt.

Liability of principal on agent's contract.

Cited *Briggs v. Partridge*, 64 N. Y. 357, 21 A. R. 617, holding vendee under sealed contract cannot bind another whose name does not appear in instrument by showing parol authority; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346, upholding lease signed by agent as principal's lease, it appearing it was intended as principal's contract.

Cited in reference note in 54 A. D. 345, on effect of corporate approval of unauthorized acts of agents.

Cited in notes in 25 A. D. 563, on liability of principal under agent's written contract; 20 A. D. 666, on distinction between liabilities of principal and agent on sealed and unsealed contracts.

— On notes and drafts.

Cited in *Barlow v. Congregational Soc.* 8 Allen, 460, holding that note running, I as treasurer of, etc., promise to pay, signed S. S. R. treasurer is society's note; *Hood v. Hallenbeck*, 7 Hun, 362, holding that note signed by five persons to which was added "Trustees of St. John's Ev. Lutheran Church, Hudson, N. Y." and stamped with corporate seal binds church; *Hascall v. Life Asso. of America*, 5 Hun, 151, holding draft to insurance company accepted by "B. H. Robertson, Manager" who intended and assumed to act for company binding on company; *Gillig v. Lake Bigler Road Co.* 2 Nev. 214, holding bill headed "Lake Bigler Road Company" signed by "Butler Ives, Superintendent," and accepted by "J. E. Garrett, Secretary, L. B. R. Co.," sufficient to charge company; *La Salle Nat. Bank v. Tolu Rock & Rye Co.* 14 Ill. App. 141, holding parol evidence admissible to show that draft signed R. D. S. Pres. was company's draft and was so understood by parties; *First Nat. Bank v. Turner*, 24 N. Y. Supp. 793, holding principal not liable on note made by agent though signed as such, where agent's authority is not alleged in complaint or ratification shown; *Farmers' & M. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457, holding bill of exchange directed to "John A. Wells, cashier Farmers and Mechanics Bank" and accepted by "John A. Wells, cashier," drawn on and accepted by bank; *DeWitt v. Walton*, 9 N. Y. 571, holding note signed by "D. H. agent for The Churchman," with no further expression of intention to bind principal not principal's note; *Lay v. Austin*, 25 Fla. 933, 7 So. 143 (dissenting opinion), on what is sufficient assignment of note by corporation's officers to charge company.

Cited in reference note in 51 A. D. 73, on binding force on corporation of its agent's note.

Cited in note in 27 L. ed. U. S. 904, on conclusiveness on undisclosed principal of note or bill of agent signed or drawn in agent's own name.

Denied in *Lyman v. Sherwood*, 20 Vt. 42, holding indorsement in the words "Pay within balance to Lyman & Cole, without recourse to Burlington Mill Co." (signed) "Sidney Barlow, agent," sufficient as indorsement of corporation.

Personal liability of agent, etc., on contract.

Cited in *Rollins v. Phelps*, 5 Minn. 463, Gil. 373, holding contract signed by individuals as agents without disclosing name of principals to be contract of parties signing; *Leavens v. Thompson*, 48 Hun, 389, 1 N. Y. Supp. 18, on personal liability of agent on notes executed by him.

Cited in reference note in 26 A. D. 524, on agent's liability in case of contract not under seal.

Cited in notes in 12 L.R.A. 346, on responsibility of agent on his contract; 17 A. D. 532, on personal liability of agent or trustee; 57 A. R. 536, on binding effect as against agent of contract made on behalf of principal.

— Corporate officers.

Cited in *Wing v. Glick*, 56 Iowa, 473, 41 A. R. 118, 9 N. W. 384, holding contract containing words "we promise to pay" and signed by persons as president and secretary of school board respectively, to be personal obligation of signers; *Babcock v. Beman*, 1 E. D. Smith, 593, holding individual not liable on note indorsed by treasurer of corporation as such, it being intended to bind corporation and indorsee taking with that understanding; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101, holding that bill of exchange drawn on insurance company by agent's ending, "charge same to account of F. & Co. agents insurance company," binds agents; *Fiske v. Eldridge*, 12 Gray, 474, holding that note by which one promises to pay money signing "J. S. Trustee of Sullivan Railroad" binds trustee personally; *Scott v. Baker*, 3 W. Va. 285, holding note signed "William Scott, President Blannerhassett Oil Co., W. H. Hornor Treasurer" to be individual note of signers; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 A. R. 829, 8 N. E. 583, holding that acceptance of bill of exchange by "John A. Robinson, agent K. & O. C. Co." was Robinson's personal acceptance; *Moss v. Livingston*, 4 N. Y. 208, holding that where bill of exchange was accepted by "J. R. L. president of Rosendale Manufacturing Co.," president was properly sued, his authority to accept not being shown; *Kean v. Davis*, 21 N. J. L. 683, 47 A. D. 182 (reversing 20 N. J. L. 425), holding that in bill of exchange signed J. K., President of E. & S. R. R. Co., J. K. is individually liable in absence of explanatory proof; *Patrick v. Boonville Gaslight Co.* 17 Mo. App. 462, on note signed W. H. Pres. Boonville Gas Co., being prima facie note of W. H.

Cited in reference notes in 37 A. D. 69, on personal liability of corporate trustees on note; 36 A. S. R. 710, on liability on negotiable instruments executed by corporate officers; 36 A. D. 758, on liability of corporate trustees on notes signed by them individually.

Cited in notes in 19 L.R.A. 679, on personal liability of officers on note made for corporation; 8 L.R.A. 254, on personal liability of directors for acts done without authority; 48 A. S. R. 918, on personal liability to third persons of agent assuming without authority to make contract for corporation.

— Public officers.

Cited in *Revolving Scraper Co. v. Tuttle*, 61 Iowa, 423, 47 A. R. 816, 16 N. W. 353, holding that contract signed by defendant as township trustees but purporting to be personal contract in body of instrument binds trustees in individual capacity; *Virginia Exch. Bank v. Lewis County*, 28 W. Va. 273, holding that note signed "J. B. Agent for Lewis County" was individual note of J. B.;

Chemung Canal Bank v. Chemung County, 5 Denio, 517, on persons signing instrument as supervisors being personally liable thereon.

Cited in note in 37 A. R. 142, on liability of public officer signing negotiable instrument with official designation.

— **Members of committee.**

Cited in *Stanton v. Camp*, 4 Barb. 274, holding that facts that parties signed as committee of church, its intent being to bind church, which facts appeared on face of contract may be shown in bar to action against committee; *Simonds v. Heard*, 23 Pick. 120, 34 A. D. 41, holding members of committee for erection of town bridge personally liable on instrument describing themselves as committee.

— **Trustees of religious society.**

Cited in *Powers v. Briggs*, 79 Ill. 493, 23 A. R. 175, 5 Luzerne Leg. Reg. 167, holding that note running "we, the trustees of the Seventh Presbyterian Church, promise" and signed by individuals after which appears word "trustees" is signer's note.

— **Executors or guardians.**

Cited in *Winter v. Hite*, 3 Iowa, 142, holding one signing note as executor personally liable; *Sperry v. Fanning*, 80 Ill. 371, holding that signing name as guardian will not discharge guardian from personal liability on contract for ward.

20 AM. DEC. 667, MOOERS v. WAIT, 3 WEND. 104.

Nature and effect of right to enter and possess land.

Cited in *Dolittle v. Eddy*, 7 Barb. 74, holding executory contract for sale of land with right to enter and possess but a license; *Babcock v. Utter*, 1 Keyes, 397, 1 Abb. App. Dec. 27, on nature of license to enter and use land for particular purpose; *Huddleston v. Johnson*, 71 Wis. 336, 37 N. W. 407, on agreement to sell land not giving implied license to cut trees; *Pierrepoint v. Barnard*, 6 N. Y. 279 (dissenting opinion), on effect of license to enter land and cut timber thereon.

Effect of severance of property affixed to land.

Cited in *Peyton v. Desmond*, 63 C. C. A. 651, 129 Fed. 1, on right to follow and retake timber severed from realty; *Cope v. Romeyne*, 4 McLean, 384, Fed. Cas. No. 3,207, on validity of mortgagor's sale of fixture that is severed; *Hamlin v. Parsons*, 12 Minn. 108, Gil. 59, 90 A. D. 284, holding that where mortgagor removes house to another lot, lien still attaches to house; *Burgett v. Bissell*, 14 Barb. 638, holding that one under contract of purchase has equitable right to timber severed upon performance of his contract.

— **On title to.**

Cited in *Morgan v. Varick*, 8 Wend. 587, holding that severance of machinery from mill does not divest owner of his property; *O'Dougherty v. Felt*, 65 Barb. 220, holding that fixtures severed and lying about mill do not pass with sale of realty; *Sands v. Pfeiffer*, 10 Cal. 258, on fixtures upon severance becoming personal property of owner of land; *Keeton v. Audsley*, 19 Mo. 362, 61 A. D. 560, holding that entry of public lands gives no title to timber cut and lying upon it at time of entry; *Lester v. Young*, 14 R. I. 679, holding timber trees severed by life tenant thereupon become property of owner of inheritance; *Rogers v. Gilinger*, 30 Pa. 185, 72 A. D. 694, holding fragments of building blown down by storm pass to purchaser of realty; *Rockwell v. Saunders*, 19 Barb. 473, hold-

ing that purchaser acquires no title to lumber purchased from one in possession of land under vendee who had no right to cut timber; *Brock v. Smith*, 14 Ark. 431, holding that one entering upon land belonging to United States and cutting trees acquires no property in them, they becoming United States property; *Busch v. Nester*, 62 Mich. 381, 28 N. W. 911, on change of title to property severed from land as between owner and original wrongdoer; *Clement v. Wheeler*, 25 N. H. 361, on title to timber cut by life tenant; *Missouri Lumber & Min. Co. v. Zeitinger*, 45 Mo. App. 114 (dissenting opinion), on timber becoming personal property of landowner after severance.

— Recovery for.

Cited in *Simpkins v. Rogers*, 15 Ill. 397, holding that landowner may recover in trover for crop put upon land without license; *Harlan v. Harlan*, 15 Pa. 507, 53 A. D. 612, upholding replevin by purchaser of fixtures severed by former owner after execution sale; *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386, holding that landlord may maintain trover against tenant for wood wrongfully cut from demised premises and converted by tenant; *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550, upholding trover for sand severed from land in Missouri conveyed into Kansas and there converted; *Washburn v. Cutler*, 17 Minn. 361, Gil. 335, on right to replevin logs where acts of severance and taking away amount to adverse possession; *Whitney v. Huntington*, 34 Minn. 458, 57 A. R. 68, 26 N. W. 631, holding that purchaser at execution sale may recover for trees cut and converted during period of redemption; *Warren County v. Gans*, 80 Miss. 76, 31 So. 539, on right of reversioner to replevin timber unlawfully severed by tenant; *Worrall v. Munn*, 53 N. Y. 185, holding that vendee may recover in equity value of sand unlawfully removed by vendor before delivery of possession; *American U. Teleg. v. Middleton*, 80 N. Y. 408, on right to replevin telegraph poles unlawfully cut and removed; *Adams v. Green*, 34 Barb. 176 (dissenting opinion), on trover for recovery of timber severed; *Martin v. Thompson*, 62 Cal. 618; *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* 55 N. J. L. 350, 26 Atl. 920,—denying landowner's right to recover property after severance by one holding land adversely; *Morgan v. Negley*, 3 Pittsb. 33, 14 Pittsb. L. J. 229, denying recovery in trover for lessee's removal of railroad tracks during term, put down under agreement that they should be lessor's property; *Ward v. Carp River Iron Co.* 47 Mich. 65, 10 N. W. 109, denying trover for iron taken from mines after execution sale by purchaser from execution debtor, no injury to freehold being alleged; *Baker v. Campbell*, 32 Mo. App. 529, denying husband's right to sue for timber severed from wife's land, by trespasser under married woman's acts; *Coomalt v. Stanley*, 3 Clark (Pa.) 389, holding one in possession of land under contract of purchase on which purchase money remains unpaid not permitted to sell timber growing thereon; *United States v. Loughrey*, 172 U. S. 206, 43 L. ed. 420, 19 Sup. Ct. Rep. 153, holding United States having granted land to Michigan for purpose of aiding railroad upon condition subsequent, could not recover for value of timber cut thereon by trespasser.

Cited in reference note in 36 A. D. 115, on property necessary to maintain trover for chattels.

Distinguished in *Beckwith v. Philleo*, 15 Wis. 224, denying vendor's right to replevin timber severed from timber land, part payment for which was to be made in lumber.

— Liability for waste.

Cited in *Kidd v. Dennison*, 6 Barb. 9, holding that to what extent lessee may

cut wood without being guilty of waste is question for jury; *Moss Pointer Lumber Co. v. Harrison County*, 89 Miss. 448, 42 So. 290, on tenant's liability for waste in cutting trees; *Van Deusen v. Young*, 29 N. Y. 9, on contract to purchase giving no authority to enter and commit waste.

20 AM. DEC. 670, RUSSELL v. NICOLL, 3 WEND. 112.

Sufficiency of signature to memorandum to take case out of statute of frauds.

Cited in *Justice v. Lang*, 42 N. Y. 493, 1 A. R. 576, holding that vendor's signature to contract takes case out of statute of frauds though not subscribed by vendee; *Calkins v. Falk*, 39 Barb. 620, on signing by vendor as sufficient compliance with statute of frauds; *Worrall v. Munn*, 5 N. Y. 229, 55 A. D. 330, holding vendor in land contract who has signed same estopped to set up statute of frauds; *Dykers v. Townsend*, 24 N. Y. 57, holding subscription of agent of party to be charged sufficient compliance with statute of frauds.

Cited in reference notes in 66 A. D. 549, on requisites of memorandum required by statute of frauds; 51 A. S. R. 616, on sufficiency of memorandum with in statute of frauds; 30 A. D. 116; 65 A. D. 668,—on sufficiency of signing by party to be charged or defendant alone to satisfy statute of frauds.

Cited in note in 55 A. D. 344, on sufficiency of signing of contract or memorandum by vendor alone on sale of land.

Denied in *Justice v. Lang*, 30 How. Pr. 425; *Justice v. Lang*, 2 Robt. 333,—holding agreement for sale of goods of greater value than \$50 void unless in writing and signed by both parties.

Executory or absolute contract to sell.

Cited in *Jackson v. Jones*, 22 Ark. 158, holding agreement to deliver specified quantity of produce in future, providing such quantity remained, to be executory; *Johnston v. Eichelberger*, 13 Fla. 230, holding agreement to sell goods not in actual possession, vendee agreeing to pay cost to be afterward determined, an executory contract; *Currie v. White*, 37 How. Pr. 330, 1 Sweeney, 166, 6 Abb. Pr. N. S. 352, holding contract running, "we have purchased stock, payable and deliverable seller's option," to be executory; *Chapman v. Kent*, 3 Duer, 224, holding that agreement to sell wool, same to be weighed and costs and balance of purchase price to be paid on delivery, is executory contract; *Kein v. Tupper*, 1 Jones & S. 465, holding contract for sale and delivery of 119 bales of cotton not performed so as to pass title till whole is delivered; *Woodward v. Solomon*, 7 Ga. 246, on what renders contract absolute though goods be not delivered; *Reimers v. Ridner*, 26 How. Pr. 385, 17 Abb. Pr. 292, 2 Robt. 11, holding contract running, sold saltpeter to arrive on certain ship, no guaranty as to time of arrival, being mere executory contract; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 A. R. 276, holding that contract for sale of goods to arrive by certain date, did not show warranty of delivery on such date; *Shields v. Pettie*, 4 N. Y. 122, holding memorandum importing sale of iron "on board ship" not yet arrived to indicate contract to sell; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292, holding contract running, sold certain phosphates to be paid for on delivery, shipments to be made in future, to be executory contract to sell; *Dunnigan v. Crummey*, 44 Barb. 528, holding that agreement to sell machine part of which was delivered, remainder at vendee's request to be cleaned first, was absolute sale.

Cited in reference notes in 28 A. D. 550, as to when sales are complete; 26 A. D. 284, on what is sufficient delivery on a sale of chattels; 63 A. D. 608, as to when contract for sale of chattels, passes title.

Distinguished in *Havemeyer v. Cunningham*, 35 Barb. 515, 22 How. Pr. 87, holding that agreement running, sold sugar to arrive by "Anna Kimball," for cash, "to arrive on or before 1st August," is absolute sale.

Interpretation of word "sold."

Cited in *Hildebrand v. Bloodsworth*, 12 Or. 75, 6 Pac. 233, on interpretation of word "sold" in contract as meaning "to sell."

Conditions precedent in sale of goods.

Cited in *Thompson v. McLean*, 38 N. Y. S. R. 283, 14 N. Y. Supp. 55, holding where sale of goods is indivisible vendor may replevin part delivered when vendee refuses to take balance; *Thompson v. McLean*, 32 N. Y. S. R. 736, 10 N. Y. Supp. 411, holding vendor may replevin goods delivered where vendee refuses to pay, sale being for cash; *Evans v. Harris*, 19 Barb. 416, holding title to logs not delivered, did not pass though part were marked with vendee's mark.

— Arrival of goods.

Cited in *Middleton v. Ballingall*, 1 Cal. 446, holding that in agreement to sell goods shipped by vessel, contract to be binding till arrival of vessel, arrival of vessel in condition precedent; *Matthews v. Hobby*, 48 Barb. 167, holding contract to sell and deliver 100 bales of cotton "to arrive" to be entire contract conditioned upon arrival of whole amount; *Stokes v. Baars*, 18 Fla. 656, holding that when delivery of goods was conditioned on condition of water, declaration for nondelivery is defective for failing to allege that water would permit delivery; *Kein v. Tupper*, 52 N. Y. 550, holding that title did not pass to cotton sold cash on delivery same to be weighed before delivery, where it was burned before being weighed; *Kein v. Tupper*, 22 How. Pr. 437, holding sale of 19 bales of cotton to be paid for on delivery to be entire contract requiring entire performance; *Hubler v. Gaston*, 9 Or. 66, 42 A. R. 794, holding present right of property did not attach in vendee to oats to be delivered on demand; *Olyphant v. Baker*, 5 Denio, 379, holding that where barley was sold to remain in vendor's storehouse till certain day, the amount being ascertained and partial payment having been made, title passed; *Neldon v. Smith*, 36 N. J. L. 148, holding that sale of coal as soon as delivered from mine with stipulation that contract shall not be binding if not delivered according to agreement, is conditional; *Welsh v. Gossler*, 89 N. Y. 540, 11 Abb. N. C. 452, holding that where seller contracted to deliver sugar by vessel at certain time, buyer is not bound to accept after such time; *Bradley v. Wheeler*, 4 Robt. 18 (dissenting opinion), on passing of title in sale of goods where something remains to be done before delivery; *Decker v. Furniss*, 3 Duer, 291 (dissenting opinion), on delivery being essential to pass title in conditional sale.

20 AM. DEC. 673, DEPUY v. SWART, 3 WEND. 135.

Effect of bankruptcy on note.

Cited in *White v. Cushing*, 30 Me. 267, holding discharge in bankruptcy to annul validity of note.

Effect of discharge in bankruptcy or insolvency.

Cited in *Dewey v. Moyer*, 72 N. Y. 70, upholding confession of judgment subsequent to bankruptcy of debt barred by discharge; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12, on bankrupt's discharge as absolute discharge of debt; *Judd v. Porter*, 7 Me. 337, on effect of discharge under state insolvent law upon recovery for debt in another state.

Cited in reference notes in 44 A. D. 191, as to how negotiability is destroyed

and impaired; 64 A. D. 168, 346, on discharge in insolvency of maker of note as discharge of debt.

Revival of debt barred by bankruptcy.

Cited in *Watkins v. Stevens*, 4 Barb. 168, on revival of debt barred by bankruptcy.

— By new promise.

Cited in *Way v. Sperry*, 6 Cush. 238, 52 A. D. 779, on new promise not reviving negotiability of note barred by discharge in bankruptcy; *Crandall v. Moston*, 24 App. Div. 547, 50 N. Y. Supp. 145, on effect of new promise to pay debt barred by bankruptcy; *Waltermire v. Westover*, 14 N. Y. 16, on recovery on new promise to pay debt barred by bankruptcy.

Cited in reference notes in 64 A. D. 126, on promise to pay debt discharged by bankruptcy; 43 A. D. 176; 64 A. D. 346,—on effect of distinct promise to pay debt barred by bankruptcy; 66 A. D. 739, on revival of negotiability of note by new promise after discharge in bankruptcy; 44 A. D. 353, on enforceability of new promise to pay debt discharged by bankruptcy.

Cited in note in 27 A. D. 289, on promise to pay debt discharged in bankruptcy.

— Sufficiency of new promise.

Cited in *Stebbins v. Sherman*, 1 Sandf. 510, holding that new promise to overcome effect of bankrupt discharge must be made after bankruptcy; *Merriam v. Bayley*, 1 Cush. 77, 48 A. D. 591, holding part payment of note after discharge in bankruptcy insufficient to warrant inference of new promise; *Ingersoll v. Rhoades*, Hill & D. Supp. 371, holding that moral obligation to pay constitutes sufficient consideration for new promise to pay debt barred by bankruptcy; *Russell v. Buck*, 11 Vt. 166 (dissenting opinion), on new promise to pay debt barred by bankruptcy being a new contract, consideration therefor being old debt.

Revival of debt barred by statute of limitations.

Cited in *Soulden v. Van Rensselaer*, 9 Wend. 293; *Carshore v. Huyck*, 6 Barb. 583; *Pinkerton v. Bailey*, 8 Wend. 600,—on distinction between bar of statute of limitations and bankruptcy; *Chilcott v. Trimble*, 13 Barb. 502; *Reid v. McNaughton*, 15 Barb. 168,—on sufficiency of acknowledgment of debt to take case out of statute of limitations; *Soulden v. Van Rensselaer*, 3 Wend. 472; *Philips v. Peters*, 21 Barb. 351,—on revival of debt barred by statute of limitations by new promise; *Henry v. Root*, 33 N. Y. 526, on revival of debt barred by statute of limitations by acknowledgment.

Form of action on new promise to pay debt barred by discharge in bankruptcy.

Cited in *Fleming v. Lullman*, 11 Mo. App. 104, holding new promise to pay debt discharged in bankruptcy to be only cause of action; *Hopkins v. Ward*, 67 Barb. 452, holding new promise to pay note barred by bankruptcy to be foundation of action to recover such debt; *Ross v. Hamilton*, 3 Barb. 609, denying right to prove new promise where defendant alleged discharge in bankruptcy and plaintiff failed to reply.

— Action on original debt.

Cited as leading case in *Badger v. Gilmore*, 33 N. H. 361, 66 A. D. 729, holding that promise to pay note barred by bankruptcy revives debt permitting suit on original note.

Cited in *Underwood v. Eastman*, 18 N. H. 582, holding that promise to pay note barred by bankruptcy revives debt permitting suit on original note; *Turner v. Chrisman*, 20 Ohio, 332, upholding recovery for debt barred by bankruptcy

where bankrupt subsequently promises to pay though action is brought on old debt; *Graham v. O'Hern*, 24 Hun, 221, upholding action on original debt where bankrupt subsequently promises to pay same; *Stafford v. Bacon*, 25 Wend. 384, allowing recovery upon original indebtedness where after compromise debtor promises to pay balance; *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 A. R. 543, holding the original debt to be cause of action for purpose of remedy and that new promise waiving discharge in bankruptcy may be shown on trial; *Wolffe v. Eberlein*, 74 Ala. 99, 49 A. R. 809, holding that suit may be brought either upon original debt or new promise where debtor discharged in bankruptcy, promises to pay old debt; *Fitzgerald v. Alexander*, 19 Wend. 402, holding in case of new promise after discharge in insolvency plaintiff may declare on original promise and set up new promise in replication.

Cited in reference note in 52 A. D. 782, as to whether old debt or new promise is cause of action in case of revival by new promise of debt barred by limitations or discharge in bankruptcy.

— **Necessity of specially pleading new promise.**

Cited in *Chabot v. Tucker*, 39 Cal. 434; *Stafford v. Bacon*, 1 Hill, 532, 37 A. D. 366; *Dusenbury v. Hoyt*, 45 How. Pr. 147, 14 Abb. Pr. N. S. 132, 4 Jones & S. 94,—holding that new promise to pay debt barred by bankruptcy must be specially pleaded; *Gruenberg v. Treanor*, 40 Misc. 232, 81 N. Y. Supp. 675, holding that creditor might sue for goods sold without pleading new promise where debt is barred by bankruptcy; *Taylor v. Hotchkiss*, 81 App. Div. 470, 80 N. Y. Supp. 1042, on nature of pleading new promise to debt barred by bankruptcy.

Transferee's right to sue on bankrupt's note revived by new promise.

Cited in *Stearns v. Tappin*, 5 Duer, 294, holding that bankrupt's subsequent promise to pay note does not inure to benefit of subsequent indorsee; *Clark v. Atkinson*, 2 E. D. Smith, 112, holding that in order that assignee of note barred by bankruptcy, be entitled to recover, he must be assignee of note and cause of action as renewed by new promise; *Walbridge v. Harroon*, 18 Vt. 448; *Moore v. Viele*, 4 Wend. 420,—denying assignee's right to sue directly on note whose negotiability has been destroyed by bankruptcy.

20 AM. DEC. 678, HOLLADAY v. MARSH, 3 WEND. 142.

Necessity for fencing close.

Cited in *Chamberlain v. Reed*, 14 Hun, 403 holding that adjoining owners agreeing upon apportionment of line fence may later give notice to let land be open which revokes former apportionment.

Cited in reference notes in 71 A. D. 727, on duty as to fencing against cattle on highway; 92 A. D. 405, on duty of tenant at common law to fence against adjoining close.

Cited in notes in 68 A. D. 626, on landowner's duty at common law as to maintaining partition fences; 68 A. D. 632, on who is bound to contribute to partition fence and who may enforce liability.

Rights in commons.

Cited in reference note in 25 A. D. 589, on commons.

Liability for injury by animals where proper fence is lacking.

Cited in *Clark v. Brown*, 18 Wend. 213, holding that fence viewers may appraise damage to crops due to failure to repair division fence; *Griffin v. Martin*, 7 Barb. 297, denying trespass for entry of cattle from adjoining land through plaintiff's defective fence into his close; *Lawrence v. Combs*, 37 N. H. 331, 72 A.

D. 332, denying recovery in trespass for third person's cattle breaking through fence of adjoining landowner; *Canefox v. Crenshaw*, 24 Mo. 199, 69 A. D. 427, holding that where wild bull breaks into close, he may be killed if necessary, though close be not fenced according to statute; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 A. D. 239, upholding trespass by railroad for entry of cattle on its right of way although no fence had been erected; *Wood v. Snider*, 187 N. Y. 28, 12 L.R.A. (N.S.) 912, 79 N. E. 858, upholding trespass for entry of cattle from highway across intervening unfenced field into plaintiff's close also unfenced.

Cited in reference notes in 49 A. S. R. 745, on liability of owner of animals for their trespasses; 34 A. D. 80, on effect of failure to maintain fence on right to distrain; 25 A. D. 66, on remedy where cattle do damage on another's lands.

Cited in notes in 49 A. D. 249, on common-law rule as to liability for trespasses of animals; 4 L.R.A. 840, on liability for damage by trespassing animals; 22 L.R.A. 58, on liability of owner for injury by trespassing stock; 49 A. D. 251, 253, 254, on liability for trespass by animals as affected by duty to maintain fences.

— For injury to animal.

Cited in *Jackson v. Rutland & B. R. Co.* 25 Vt. 150, 60 A. D. 246, denying railroad's liability for killing animal straying on its tracks though it failed to erect fence; *Terry v. New York C. R. Co.* 22 Barb. 574, denying railroad's liability for killing horse which strayed on track from adjoining close through hole in fence burned by company's engine; *Brooks v. New York & E. R. Co.* 13 Barb. 594, denying recovery for cattle killed on railroad which strayed thereon from intervening close through open gate, though company did not fence in other places.

Rights in highway.

Cited in *People v. Foss*, 80 Mich. 559, 20 A. S. R. 532, 8 L.R.A. 472, 45 N. W. 480, upholding trespass by owner of fee against one taking grass from roadside; *Woodruff v. Neal*, 28 Conn. 165, holding that owner of land bounded by highway has exclusive right to herbage therein; *Blashfield v. Empire State Teleph. & Teleg. Co.* 18 N. Y. Supp. 250, holding erection of telephone line along roadside to be additional burden; *Harrison v. Brown*, 5 Wis. 27, holding that public have no right to pasture highway; *Caulkins v. Mathews*, 5 Kan. 191, on right of cattle in highway; *Seeley v. Peters*, 10 Ill. 130 (dissenting opinion), on ownership of products of highway.

— In railroad's right of way.

Cited in *Williams v. Michigan C. R. Co.* 2 Mich. 259, 55 A. D. 59, holding that township has no authority to confer upon individuals right to graze cattle on railroad company's road.

Use of memoranda by witnesses.

Cited in reference notes in 48 A. S. R. 296, 52 A. S. R. 159,—on refreshing of witness's memory; 49 A. D. 46, on use by witness of memoranda to refresh memory; 11 A. S. R. 637, on right of witness to use memorandum to refresh memory; 29 A. D. 443, as to when memoranda may be used to refresh witness's memory.

Cited in note in 20 L. ed. U. S. 895, on use of memoranda to refresh memory of witnesses.

Validity of statute allowing animals to run at large.

Cited in *Hardenburgh v. Lockwood*, 25 Barb. 9, upholding validity of statute authorizing town electors to regulate matter of cattle going at large; *Haigh v.*

Bell, 41 W. Va. 19, 31 L.R.A. 131, 23 S. E. 666, holding act making it unlawful to allow hogs to run at large proper exercise of police power.

20 AM. DEC. 683, JACKSON v. RICE, 3 WEND. 180.

Grantor's competency to prove deed.

Cited in Harris v. Fletcher, 10 N. H. 20, holding grantor incompetent witness to prove validity of title where the title he conveyed is in dispute.

Cited in reference note in 40 A. D. 109, on grantor as a witness.

Proof of deed by copy of record.

Cited in Briggs v. Henderson, 49 Mo. 531, upholding admission of copy of record of deed proved to have been lost; Hancock v. Tram Lumber Co. 65 Tex. 225, holding certified copy of recorded deed to be admissible to prove deed if original cannot be found; Wendell v. Abbott, 43 N. H. 68, holding office copy of deed not authorized to be recorded incompetent to show existence of original deed.

Cited in reference notes in 42 A. D. 254, on admissibility in evidence of record copy of deed not required to be recorded; 124 A. S. R. 187, on admissibility of exemplification of record in one county of deed conveying land in two counties, in ejectment for land lying in the other county.

Sufficiency of foundation for admission of deposition.

Cited in Boise v. Atchison, T. & S. F. R. Co. 6 Okla. 243, 51 Pac. 662, denying admissibility of wife's deposition where six days before trial she was caring for husband and no other reason appeared for her not being at trial; Fry v. Bennett, 1 Abb. Pr. 289, 4 Duer, 247, holding evidence that wife said husband had gone to Cincinnati insufficient ground for admitting his deposition.

Cited in reference notes in 29 A. D. 567; 61 A. S. R. 816,—on admissibility of deposition in evidence; 47 A. S. R. 622, on admissibility of deposition as affected by ability of witness to attend court; 51 A. D. 210; 40 A. S. R. 894,—on admissibility of deposition without proof that witness could not attend.

Burden of proving breach of warranty.

Cited in Beddoe v. Wadsworth, 21 Wend. 120; Blydenburgh v. Cotheal, 1 Duer, 176,—holding that in order to sustain action for breach of covenant of warranty in deed, actual ouster must be averred and proved.

20 AM. DEC. 686, PUTNAM v. MAN, 3 WEND. 202.

By whom process may be served.

Cited in reference notes in 49 A. D. 379, on interest of officer as disqualification to serve process; 55 A. D. 427, on issuance of process to coroner where sheriff is a party.

Cited in note in 61 A. S. R. 487, on persons by whom service of process may be made.

— By party.

Cited in Barker v. Remick, 43 N. H. 235, denying sheriff's right to serve process where he is party, but not disqualifying him because he is interested; McLeod v. Harper, 43 Miss. 42, denying sheriff's right to serve process in suit in which he is party or is interested.

Distinguished in Warring v. Keeler, 11 Misc. 451, 33 N. Y. Supp. 415, 24 N. Y. Civ. Proc. Rep. 7, denying plaintiff's right to serve process in his own action under the Code; Smith v. Burliss, 23 Misc. 544, 52 N. Y. Supp. 841, 28 N. Y. Civ. Proc. Rep. 89, denying right of party to serve process even though he be constable, under Code.

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Denied in *Morton v. Crane*, 39 Mich. 526, denying constable's right to serve summons in action in which he is plaintiff.

Conclusiveness of return to writ.

Cited in *Black's Case*, 4 Abb. Pr. 162, 4 Bradf. 174; *New York & E. R. Co. v. Purdy*, 18 Barb. 574; *Haughey v. Wilson*, 1 Hilt. 259; *Sperling v. Levy*, 1 Daly, 95,—denying right to question sheriff's return collaterally; *Von Roy v. Blackman*, 3 Woods, 98, Fed. Cas. No. 16,997, holding officer's return conclusive upon the parties; *Jeffries v. Wright*, 51 Mo. 215, denying right to traverse sheriff's return in proceedings in *scire facias* to revive judgment; *Columbia Ins. Co. v. Force*, 8 How. Pr. 355, holding that where sheriff verbally deputed another, not deputy, to serve process making return that he had served it, such return is conclusive in that suit; *Sperling v. Levy*, 10 Abb. Pr. 426, denying right to question return in execution except on direct motion to set it aside; *Chapman v. Fuller*, 7 Barb. 70, on right to attack sheriff's return collaterally; *Ansonia Brass Co. v. Conner*, 62 How. Pr. 272 (dissenting opinion), on conclusiveness of sheriff's return.

Doubted in *Fitch v. Devlin*, 15 Barb. 47, granting reversal on appeal where sheriff served process on party's son in his absence and returned summons personally served; *Van Rensselaer v. Chadwick*, 7 How. Pr. 297, holding sheriff's return of service of process not conclusive on defendant and may be disproved on motion to set aside proceedings; *Allen v. Martin*, 10 Wend. 300, 25 A. D. 564, denying right to attack sheriff's service of writ of arrest collaterally.

Jurisdiction of courts.

Cited in *Manning v. Johnson*, 7 Barb. 457, holding that to give justice of peace jurisdiction there must be return showing personal service; *Wavel v. Wiles*, 24 N. Y. 635, holding that return of summons with indorsement of due personal service thereof confers jurisdiction on the justice; *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372, holding that court acquire jurisdiction where defendant is actually served though service is defective; *Campau v. Fairbanks*, 1 Mich. 151, holding that court acquired no jurisdiction where sheriff's return did not show compliance with statute.

Cited in reference note in 22 A. D. 717, on effect of want of jurisdiction to render judgment void.

Collateral attack on judgment.

Cited in *Whitaker v. Merrill*, 28 Barb. 526, denying right to attack judgment and attachment collaterally; *Peck v. Strauss*, 33 Cal. 678, denying right to attack judgment rendered by default collaterally by showing irregularity in return of service of summons; *Clark v. Holmes*, 1 Dougl. (Mich.) 390, holding that jurisdiction of justice of peace in particular case may be inquired into collaterally; *Russell v. Perry*, 14 N. H. 152, holding that judgment of inferior court of another state may be impeached for want of jurisdiction; *Alabama & C. R. Co. v. Jones*, 7 Nat. Bankr. Reg. 145, Fed. Cas. No. 127, holding record of district court showing that petition in bankruptcy was filed at certain time conclusive.

Process as justification.

Cited in reference note in 43 A. D. 765, on process regular on face as justification of acts of officer under it.

Cited in note in 61 A. D. 409, as to when process is justification for acts done under it.

Trespass where court has jurisdiction.

Cited in *Horton v. Auchmoody*, 7 Wend. 200, holding that justice of peace having acquired jurisdiction is no trespasser for erroneously granting adjournment and later rendering judgment in the case.

20 AM. DEC. 688, LITTLE v. MARTIN, 3 WEND. 219.**Occupancy justifying action for use and occupation.**

Cited in *Dwight v. Cutler*, 3 Mich. 566, 64 A. D. 105, holding beneficial occupancy sufficient to raise implied promise to pay reasonable sum for same; *Wood v. Wilcox*, 1 Denio, 37, denying assumpsit for use and occupation of land where lessee never went into possession of premises under the lease or agreement; *Hoffman v. Delihanty*, 13 Abb. Pr. 388, upholding action for use and occupation of land held by lessee though not actually occupied; *Pierce v. Pierce*, 25 Barb. 243, holding vendee liable for use and occupation of farm held under contract of sale subject to vendor's right to sell to another for enhanced price within two years, which was done; *Kiersted v. Orange & A. R. Co.* 1 Hun, 161, 3 Thomp. & C. 662, holding lessee's principals liable for use and occupation of premises leased by agent and later occupied by principals; *Isaacs v. Minkofsky*, 29 Misc. 347, 60 N. Y. Supp. 506, upholding action for use and occupation of shed occupied under agreement to lease but which was never leased.

Cited in reference notes in 23 A. D. 407, on assumpsit for use and occupation; 70 A. D. 505, on owner's remedy where lessee occupies under void agreement, with his consent.

Cited in notes in 46 A. D. 290, on action for use and occupation; 26 L.R.A. 801, on compensation for use and occupation of tenants where lease is invalid under statute of frauds.

— Effect of taking key.

Cited in *Hall v. Western Transp. Co.* 34 N. Y. 284, upholding action for use and occupation of barn under agreement for three years lease where lessee did not actually occupy but kept the key; *Seaman v. Ward*, 1 Hilt. 52, upholding action for use and occupation where key to premises was delivered and accepted by lessee; *Levy v. Long Island Brewery*, 26 Misc. 410, 56 N. Y. Supp. 242, holding that receipt of key by corporation without its solicitation, raises no presumption of tenancy.

Rights under instrument within statute of frauds.

Cited in *Marr v. Ray*, 50 Ill. App. 415, holding that though lease be void as within statute of frauds, for all purposes except duration of term, it will regulate character of occupancy; *Holbrook v. Armstrong*, 10 Me. 31, granting recovery on general counts for reasonable worth of cattle though agreement under which cows were held was within statute of frauds.

Distinguished in *Delano v. Montague*, 4 Cush. 42, holding parol agreement to renew lease for years for another year on like conditions within statute of frauds and unenforceable.

— Agreement not to be performed within year.

Cited in *Pierce v. Paine*, 28 Vt. 34, on recovery on common counts where consideration has been given but contract is not to be performed within year.

Estoppel of tenant.

Cited in note in 89 A. S. R. 68, on estoppel of tenant holding under lease to deny landlord's title.

20 AM. DEC. 690, JACKSON v. McKENNY, 3 WEND. 233.**Construction and effect of contemporaneous instruments.**

Cited in *Schott v. Burton*, 13 Barb. 173; *Bailey v. Hannibal & St. J. R. Co.* 17 Wall. 96, 21 L. ed. 611,—on construction of instruments executed simultaneously; *MacDonald v. Wolff*, 40 Mo. App. 302, holding that where several instruments are

executed at same time for same common purpose, in relation to same subject-matter, they will be construed as one contract; *Bronson v. Green*, Walk. Ch. (Mich.) 56, holding that several contracts executed by same parties at same time and relating to same subject-matter will be construed together; *Sutton v. Beckwith*, 68 Mich. 303, 13 A. S. R. 344, 36 N. W. 79, holding agreement forming real consideration for note executed at same time as note to be performed before maturity, part of transaction; *Sise v. Rockingham Co.* 62 N. H. 441, holding that in agreement to sell two lots of coal, proposal to sell first at so much per 2,240 pounds is evidence that same standard was intended for second lot; *Thomas v. Austin*, 4 Barb. 265, holding that receipt for payment upon contract may be contradicted by other papers executed simultaneously with contract and receipt forming part of same transaction; *Hanford v. Rogers*, 11 Barb. 18, holding assignment of bond and guaranty thereof at same time to be one contract allowing recovery upon guaranty though no consideration was expressed.

Cited in reference notes in 23 A. D. 364; 24 A. D. 222; 34 A. D. 685,—on construing together different instruments executed at the same time; 47 A. D. 337; 13 A. S. R. 351,—on construing together instruments executed at same time between same persons relating to same subject-matter.

Cited in notes in 3 L.R.A. 579, on construing together separate instruments as one agreement; 6 L.R.A. 499, on construing together several instruments made at same time and relating to same subject-matter.

Distinguished in *Mott v. Richtmyer*, 57 N. Y. 49, holding that instruments executed sixteen and four days apart respectively by same parties relating to same realty were not so cotemporaneous as to be construed together; *Beatie v. Butler*, 21 Mo. 313, 64 A. D. 234, holding that rights of purchaser at mortgage sale under power in mortgage are unaffected by unrecorded agreement executed at date of mortgage extending time of payment.

—Deed and other instrument generally.

Cited in *Strong v. Brewer*, 17 Ala. 706, holding that deed to son and bond executed by son on same day giving father life use of property deeded, will be construed together; *Wildman v. Taylor*, 4 Ben. 42, Fed. Cas. No. 17,654, holding that deed to part of certain property with lease of balance to same party executed at same time, would be construed together; *McCreary v. Gewinner*, 103 Ga. 523, 29 S. E. 960, holding that instrument explaining that deed was made to husband for daughter's benefit must be construed in connection with deed thus giving daughter equitable interest; *Cloves v. Sweetser*, 4 Cush. 403, holding that deed to certain property together with lease executed by grantee at same time concerning same property will be construed together to determine nature of contract.

—Two deeds.

Cited in *Protestant Reformed Dutch Church v. Bogardus*, 5 Hun. 304, holding that deed of premises to church and cotemporaneous deed by church to vendor giving right of way across church lot must be read together; *Cornell v. Todd*, 2 Denio, 130, holding that two deeds to adjoining parcels of land executed on same day between same parties but neither mentioned other, one containing an exception which other did not, will not be taken together.

—Purchase money, note, or mortgage and other instrument.

Cited in *Duncan v. Charles*, 5 Ill. 561, holding that note for purchase price of property and bond for conveyance of same executed on same day are one contract; *Howards v. Davis*, 6 Tex. 174, holding that notes given for purchase money of land secured by mortgage executed simultaneously with notes and deed will all be

taken as one transaction; *Moring v. Dickerson*, 85 N. C. 466; *Kennedy v. Babcock*, 19 Misc. 87, 43 N. Y. Supp. 832; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Dunlap v. Wright*, 11 Tex. 597, 62 A. D. 506; *Scott v. Warren*, 21 Ga. 408,—holding that where vendee of land gives back mortgage at same time to secure purchase price they are considered parts of same contract, the lien attaching immediately; *Bradley v. Byran*, 43 N. J. Eq. 396, 3 Atl. 349, holding purchase money mortgage given at same time deed was executed to be superior to judgment against vendor; *Pope v. Mead*, 99 N. Y. 201, 1 N. E. 671, holding purchase money mortgage on land subject to widow's dower to be prior lien as against former judgment; *Boies v. Benham*, 127 N. Y. 620, 14 L.R.A. 55, 28 N. E. 657, holding mortgage to secure balance of purchase price to be superior lien to mortgage to third party to secure money borrowed to make cash payment; *Barber v. Cary*, 11 Barb. 549, holding that where two purchase money mortgages were executed at same time the holder of the second is entitled to have his mortgage paid from surplus of sale under first.

Deed taking effect in future.

Cited in *Planters' Bank v. Davis*, 31 Ala. 626, holding that deed in fee from mother to daughter with stipulation by daughter that mother shall enjoy same for life, gives mother life estate with remainder to daughter; *Casey v. Buttolph*, 12 Barb. 637, upholding deed of land to son possession to be taken at grantor's death; *Rogers v. Eagle Fire Co.* 9 Wend. 611, upholding deed of bargain and sale, grantor to remain in possession during life with right to use, possession to be given at his death; *Gullett v. Lamberton*, 6 Ark. 109, upholding absolute deed of slave with reservation of life use in grantor; *Trafton v. Hawes*, 102 Mass. 533, 3 A. R. 494, upholding deed of land to take effect at grantor's death notwithstanding absence of relationship between parties.

Cited in reference note in 41 A. D. 714, on conveyance of estate to take effect in futuro.

Covenant to stand seised.

Cited in *Wall v. Wall*, 30 Miss. 91, 64 A. D. 147, upholding voluntary deed of land to brothers and sisters to take effect after grantor's death as covenant to stand seised; *Bell v. Scammon*, 15 N. H. 381, 41 A. D. 706, upholding grant of freehold in futuro in consideration of love and good will as covenant to stand seised.

Cited in reference notes in 44 A. D. 73, on what construed as covenant to stand seised to future use; 41 A. D. 714, as to when covenant to stand seised is good as a deed; 33 A. D. 749, on consideration of covenant to stand seised to uses.

Absolute deed as mortgage.

Cited in note in 23 A. D. 727, on absolute deed and agreement to reconvey as a mortgage.

Reservations in grant of land.

Cited in note in 2 L.R.A. 87, on reservations and exceptions in grant of land.

When lien attaches.

Cited in note in 4 L.R.A. 607, on nonattachment of lien where seisin is transitory.

20 AM. DEC. 692, BURTON v. STEWART, 3 WEND. 236.

Forfeiture of right to show fraud.

Cited in *Baird v. New York*, 96 N. Y. 567, holding that vendee accepting property with knowledge of fraud waives right to set it up in action for purchase price; *Lamerson v. Marvin*, 8 Barb. 9, denying grantee's right to rescind grant

for fraud where he fails to do so within reasonable time; *Lilley v. Randall*, 3 Colo. 298, holding that where party elects to affirm contract voidable for fraud his right to rescind is extinguished.

Cited in note in 18 A. D. 623, on estoppel to attack conveyance as fraudulent.

Failure of consideration as defense.

Cited in *Wheat v. Dotson*, 12 Ark. 699, holding that defense of failure of consideration may be set up to action on note as in other actions; *Lewis v. Wilson*, 1 Edw. Ch. 305, holding that in either law or equity in suit for purchase price or on note given therefor, vendee may set up fraud showing failure of consideration; *Jones v. Swan*, 6 Wend. 589, on right to give evidence of total failure of consideration for notes under general issue; *Granklin v. Ezell*, 1 Sneed, 497, holding plea of fraud in that slave was worthless if established, complete defense to action on note for purchase price.

Cited in note in 25 A. D. 393, on failure or want of consideration of note as defense.

Relief from contract because of fraud.

Cited in reference note in 82 A. S. R. 299, on rescission of sale for fraud.

Cited in notes in 8 L.R.A. 476, on relief from contract obtained by fraud; 9 L.R.A. 607, on rights of defrauded party to rescind contract.

—Duty to restore benefits generally.

Cited in reference notes in 44 A. S. R. 596, on restoration of benefits received as prerequisite to rescission; 103 A. S. R. 59, on return of property as prerequisite to vendor's rescission of contract.

Cited in notes in 74 A. D. 661, on rule that party rescinding contract must do equity; 50 A. D. 674, on return of purchase money or of placing the other party *in statu quo* as prerequisite to rescission by vendor.

—Vendee's right generally to retain property and avoid sale.

Cited in *Kneedler v. Sternbergh*, 10 How. Pr. 67; *Pittsburgh & N. Turnp. Road Co. v. Com.* 2 Watts, 433; *Pearsoll v. Chapin*, 44 Pa. 9; *Johnson v. McLane*, 7 Blackf. 501, 43 A. D. 102,—denying vendor's right to rescind contract voidable for fraud while he retains consideration; *Gifford v. Carvill*, 29 Cal. 589, denying right to resist payment of note on ground of fraudulent representations unless vendee offers to rescind and return property; *Pulsifer v. Hotchkiss*, 12 Conn. 234, denying right to show partial failure of consideration of note given for patent right, due to fraud, where vendee failed to repudiate contract; *Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1059, denying vendee's right to avoid payment of note given for property, voidable for fraud without offering to surrender property; *Quintard v. Newton*, 5 Robt. 72, denying vendee's right to recover difference between value of horse and purchase price because of fraudulent concealment of disease where no restoration was made; *Bishop v. Stewart*, 13 Nev. 25, denying vendee's right to rescind contract and retain consideration; *Henninger v. Heald*, 52 N. J. Eq. 431, 29 Atl. 190, holding that one wishing to rescind contract for fraud must retain possession of property in order to restore same before filing bill; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, holding that in action to rescind sale of land paid for in stock, for fraud, stock if of any value, must be restored; *Dill v. Camp*, 22 Ala. 249, holding that party wishing to rescind contract must within reasonable time return property; *Barker v. Northern P. R. Co.* 65 Fed. 460; *Drohan v. Lake Shore & M. S. R. Co.* 162 Mass. 435, 38 N. E. 1116; *Hill v. Northern P. R. Co.* 51 C. C. A. 544, 113 Fed. 914,—denying right to rescind contract releasing railroad from liability for injuries, on ground of fraud, unless money received thereunder be re-

turned; *Lyons v. Allen*, 11 App. D. C. 543, denying right to rescind release of claim for damages on ground of fraud unless money received thereunder be restored; *Barnett v. Stanton*, 2 Ala. 181, on necessity for return of property to entitle one to set up fraud as defense to action on note; *Lemay v. Bibeau*, 2 Minn. 291, Gil. 251, on necessity for restoring property in case of rescission of contract; *Sumner v. Gray*, 4 Ark. 467, 38 A. D. 39, denying vendee's right to retain possession of chattels and refuse to pay purchase price because title is in another.

Cited in reference notes in 43 A. D. 106, on vendee's right to retain property and avoid sale; 56 A. D. 563, on right of vendee in fraudulent sale to retain property and treat sale as void.

Cited in notes in 40 A. D. 330, as to whether goods must be returned or tendered to obtain right to recoup on action for price; 4 L.R.A.(N.S.) 1169, on buyer's right to retain goods and defeat action for price on discovering that they do not comply with requirements of contract.

— **Effect of worthlessness of property.**

Cited in *Jemison v. Woodruff*, 34 Ala. 143, denying right to abate part of purchase price on ground of fraud where vendee retains article without offering to rescind unless article is valueless; *Hancock v. Tucker*, 8 Fla. 435, holding that where property is of no value it need not be returned to permit setting up fraud as defense to purchase price.

Distinguished in *Morehead v. Gayle*, 2 Stew. & P. (Ala.) 224, holding that breach of soundness of slave is perfect defense to action on note for purchase price, though slave was not returned, where he died before reasonable time had expired for return.

Evidence in mitigation of damages.

Cited in *McAlpin v. Lee*, 12 Conn. 129, 30 A. D. 609, holding that vendees in action for purchase price of goods of inferior quality may have reduction price corresponding to difference in value; *Harrington v. Stratton*, 39 Mass. 510, allowing maker of note for price of goods to show fraud in suit thereon in mitigation of damages, though goods be not returned; *M'Allister v. Reab*, 4 Wend. 483, allowing vendee to give evidence of breach of warranty in assumpsit for price of article although article sold be not returned; *Reab v. McAlister*, 8 Wend. 109, holding that vendee may show breach of warranty in sale of goods in mitigation of vendor's claim for price; *Murden v. Priment*, 1 Hilt. 75, on right to set up fraud by vendor in mitigation of recovery of purchase price.

Cited in reference note in 30 A. D. 611, on mitigation of damages in action for price of goods.

— **Notice of.**

Cited in *People ex rel. Fleming v. Niagara*, 12 Wend. 246; *Norton v. Rooker*, 1 Pinney (Wis.) 195, *Burnett (Wis.)* 33; *Eldridge v. Mather*, 2 N. Y. 157,—denying right to show partial failure of consideration for notes where there was no notice that such evidence was to be given.

— **Employer's showing employee's failure to perform.**

Cited in *Blodgett v. Berlin Mills Co.* 52 N. H. 215, 5 Phila. Legal Gaz. 281, holding that employer may show employee's failure of performance as defense *pro tanto* to action for wages.

Remedies for breach of duty.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Buena Vista Fruit & Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386,—holding party defrauded may rescind and restore property or affirm and sue for damages for fraud; *Wainwright*

v. Weske, 82 Cal. 193, 23 Pac. 12, on rescission of contract for fraudulent representations; Collins v. Townsend, 58 Cal. 608 (dissenting opinion), on rescission of contract for fraud; Chicago, St. P. & K. C. R. Co. v. Pierce, 12 C. C. A. 110, 24 U. S. App. 331, 64 Fed. 293, on disaffirmance of contract; Tallmadge v. Wallis, 25 Wend. 107, denying vendee's right to plead want of seisin in vendor to defeat recovery of purchase price if he acquires any title.

— **Recoupment.**

Cited in *Batterman v. Pierce*, 3 Hill, 171, allowing vendee to recoup in action on note for price of wood, for destruction of wood by fire for which vendor agreed to indemnify him; *Byrne v. Weeks*, 7 Bosw. 372, on acceptance of part of goods as affecting right to recoup for failure to deliver balance.

Cited in note in 40 A. D. 329, on right to recoupment for fraud or breach of contract on sale of chattel.

Parol contemporaneous agreement as to written contract.

Cited in *Weaver v. Fletcher*, 27 Ark. 510, allowing admission of evidence of parol contemporaneous agreement relating to same subject as written contract.

20 AM. DEC. 695, DUNHAM v. WYCKOFF, 3 WEND. 280.

When replevin maintainable.

Cited in *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 A. D. 540, holding that general or special property in goods is sufficient to entitle one to maintain replevin; *Brockway v. Burnap*, 16 Barb. 309 (reversing 12 Barb. 347), upholding action to recover possession of personalty though defendant has wrongfully parted with possession before suit; *Hoffman v. Markham*, 88 Hun, 18, 34 N. Y. Supp. 508, holding complaint alleging ownership of property wrongfully taken by defendant who refuses to redeliver sufficient to show cause of action in replevin; *Miller v. Adsit*, 16 Wend. 335, upholding replevin by receptor of goods when he is bound to deliver by specific day; *Beebe v. DeBaun*, 8 Ark. 510, holding right to immediate possession to be sufficient to entitle one to replevin property.

Cited in reference notes in 19 A. D. 468; 26 A. D. 689; 40 A. D. 204; 52 A. D. 159,—as to when replevin lies; 20 A. D. 606, on right to maintain replevin; 79 A. D. 488, on scope of action of replevin.

Cited in note in 80 A. S. R. 761, 763, on what property is repleviable.

— **Necessity of demand.**

Cited in *Emerson v. Bleakley*, 41 How. Pr. 511, 5 Abb. Pr. N. S. 350, 2 Abb. App. Dec. 22, holding that no demand need be made for personalty wrongfully taken by sheriff from plaintiff's agent in action for its recovery.

— **Replevin of goods in possession of officer.**

Cited in *Wheeler v. McFarland*, 10 Wend. 318, holding that parties having lien on boards might replevin same where sheriff advertised and sold entire property in them under execution against owner; *Klee v. Grant*, 4 Misc. 88, 23 N. Y. Supp. 855, holding that where goods in another's possession are taken in attachment, owner may replevin them from sheriff; *Neff v. Thompson*, 8 Barb. 213, upholding owner's right to replevin sheep where sheriff sold same by virtue of execution as another's property; *Allen v. Crary*, 10 Wend. 349, 25 A. D. 566; *Marsh v. Backus*, 16 Barb. 483,—holding that where plaintiffs in attachment or execution direct sheriff to levy on property which does not belong to defendant, they are liable in replevin; *Settles v. Bond*, 49 Ark. 114, 4 S. W. 286, denying right to replevin personalty under execution until claimed in manner provided by statute; *Mills v. Pryor*, 65 Ark. 214, 45 S. W. 350, allowing tenant to replevin property seized

under attachment to enforce landlord's lien, by virtue of statute; *Keyser v. Waterbury*, 7 Barb. 650, 3 Code Rep. 233, denying owner's right to replevin personally held by constable by virtue of attachment; *Lowry v. Kinsey*, 26 Ill. App. 309, on right to replevin goods held by officer under attachment; *Rogers v. Weir*, 34 N. Y. 463, holding that principle *in custodia legis* of goods attached only applies between sheriff and defendant in attachment.

Annotation cited in *Prescott v. Starkey*, 71 Vt. 118, 41 Atl. 1021, denying right of defendant in attachment to replevin goods though they be exempt.

Cited in reference notes in 22 A. D. 467; 23 A. D. 333; 28 A. D. 44; 39 A. D. 363; 44 A. D. 780; 80 A. S. R. 741,—on action for possession of chattels levied upon under execution; 88 A. D. 734, on replevin for goods taken in execution or attachment; 40 A. D. 204, on replevin against officer for goods taken under legal process; 54 A. D. 245, on replevin against sheriff for property taken on execution from possession of judgment debtor; 61 A. D. 141, as to whether replevin lies for property wrongfully taken under legal process; 91 A. D. 432, on trespass, trover, and replevin as concurrent remedies for wrongful taking of goods; 66 A. S. R. 642, on replevin of property in custody of law as a contempt.

Cited in note in 75 A. D. 646, on replevin by debtor whose exemption rights have been disregarded.

Criticized in *McLeod v. Oates*, 30 N. C. (8 Ired. L.) 387, denying right to replevin goods held by sheriff under execution.

Wrongful refusal to restore goods rightfully taken.

Cited in *Taylor v. Jones*, 42 N. H. 25, holding person taking goods under lawful authority does not become trespasser *ab initio* by refusing to restore them after his authority is determined.

Liability for wrongful levy.

Cited in notes in 25 A. D. 568, on sheriff's liability for levying on goods of stranger; 39 A. D. 512, on sheriff's liability for levying on stranger's goods; 14 A. D. 365, as to what abuse of process constitutes an officer a trespasser.

Avowry in replevin.

Cited in *People ex rel. Lownds v. New York Common Pleas*, 2 Wend. 644, holding that avowry in replevin showing conclusive bar to action requires answer.

20 AM. DEC. 699, JACKSON v. FRENCH. 3 WEND. 337.

Privileged communications.

Cited in *Brayton v. Chase*, 3 Wis. 456, holding communication to nonprofessional person employed to assist in trial before justice not privileged.

Cited in reference note in 83 A. D. 118, on privileged communications.

— With attorney's clerk.

Cited in *Sibley v. Waffle*, 16 N. Y. 180, holding communications made by client to attorney's clerk privileged.

— With attorney generally.

Cited in *People ex rel. Shufeldt v. Barker*, 56 Ill. 299; *Landsberger v. Gorham*, 5 Cal. 450,—denying right to compel counselor, solicitor, or attorney of party to disclose confidential communication; *Butler v. Fayerweather*, 33 C. C. A. 625, 63 U. S. App. 120, 91 Fed. 458, holding that attorney cannot be compelled to testify to contents of codicil prepared by him and published by client but destroyed by third party attorney not having attested codicil; *Re Boone*, 83 Fed. 944, holding that attorney must not use knowledge acquired in professional capacity as against former client.

Cited in reference notes in 22 A. D. 410, on privileged communications to attorney; 54 A. D. 736, on privileged communications between attorney and client.

Cited in notes in 25 A. D. 420; 66 A. S. R. 224,—on privileged communications to attorney; 36 A. R. 632, on communications by client to attorney as privileged; 6 L.R.A. 482, on exceptions to privilege of communications between attorney and client.

— In another's presence.

Cited in *Goddard v. Gardner*, 28 Conn. 172; *State v. Sterrett*, 68 Iowa, 76, 25 N. W. 936; *Tyler v. Hall*, 106 Mo. 313, 27 A. S. R. 327, 17 S. W. 319; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846, 9 N. Y. Crim. Rep. 428,—holding that protection extended by statute to communication with attorneys does not apply where same is made in another's presence; *Probst's Appeal*, 163 Pa. 423, 30 Atl. 226, 35 W. N. C. 401; *Brown v. Moosic Mountain Coal Co.* 211 Pa. 579, 61 Atl. 76,—holding that where two employ same attorney in same business, communications by them in relation to said business are not privileged *inter sese*; *Seip's Estate*, 25 Pittsb. L. J. N. S. 186, holding where three persons left out of will contest, same attorney employed by them may testify in action by one for his share, that such person was contestant.

Cited in reference note in 83 A. D. 118, on privilege of persons present when communication made to counsel from disclosing it.

Cited in note in 66 A. S. R. 240, on persons to whom privilege of confidential communications to attorney extends.

What is adverse possession.

Cited in *Farrar v. Fessenden*, 39 N. H. 268; *Grant v. Fowler*, 39 N. H. 101,—holding that continued and open possession of land under claim of title for twenty years gives good title; *Doe ex dem. Kennedy v. Townsley*, 16 Ala. 239, holding that to acquire title by running of statute of limitations, possession must be under adverse claim.

Necessity for notice to tenant to quit.

Cited in *Herrell v. Sizeland*, 81 Ill. 457, holding notice to quit unnecessary where tenant repudiates tenancy and claims the fee; *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. 627, holding that where tenant at will sets up claim as owner, landlord may treat tenancy as terminated without notice; *Emerick v. Tavener*, 9 Gratt. 220, 58 A. D. 217, holding that where tenant had disclaimed to hold as such, depriving himself of notice to quit, landlord might proceed against both tenant and under tenant without notice; *Ingraham v. Baldwin*, 9 N. Y. 45, on necessity for notice to quit where tenant has repudiated his landlord's title.

Cited in reference notes in 25 A. D. 708, on necessity of notice to quit before bringing ejectment; 27 A. D. 466, on necessity of notice to quit when tenant disclaims landlord's title and refuses to pay rent.

Cited in notes in 42 A. D. 134, on effect of disclaimer of lessor's title on necessity of giving notice to quit; 15 E. R. C. 656, on necessity of notice to tenant to quit where he disclaims to hold under landlord.

20 AM. DEC. 702, HOLLEY v. MIX, 3 WEND. 350.

Arrest without warrant.

Cited in reference note in 35 A. S. R. 612, on arrest without warrant for supposed felony.

Cited in notes in 67 A. S. R. 415, on arrest without warrant or process as false imprisonment; 46 A. R. 259, on right to arrest without warrant; 8 L.R.A. 530, on

arrest without warrant for crime committed within view; 44 A. D. 292, on liability for arresting wrong person without warrant, on suspicion.

— **By private person generally.**

Cited in *Davis v. United States*, 16 App. D. C. 442, holding arrest of person whom there is cause to suspect of committing same, by private person, without warrant justifiable where felony has been committed; *Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801, upholding conductor's holding and delivery to police officer of passenger guilty of breach of peace though he had no warrant; *Burns v. Erben*, 40 N. Y. 463 (affirming 1 Robt. 555), holding private person not liable where felony has been committed and he assists in arrest of suspected person; *Brooks v. Com.* 61 Pa. 352, 100 A. D. 645, holding that private person may arrest one suspected of robbing his house when robbery was actually committed; *Morris v. Kasling*, 79 Tex. 141, 11 L.R.A. 398, 15 S. W. 226, holding that if felony has been committed by person arrested without warrant, it may be justified by any person making it; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005, holding private person making arrest without warrant acts at his peril; *Wilson v. Manhattan R. Co.* 2 Misc. 127, 20 N. Y. Supp. 852, holding railroad company liable for arrest without warrant, of person for indecent assault upon woman when no assault was committed; *People v. Adler*, 3 Park Crim. Rep. 249, denying private person's right to make arrest for petit larceny occurring week previous, without warrant; *Morley v. Chase*, 143 Mass. 396, 9 N. E. 767, denying justification of storekeeper's arrest of one in charge of his goods, upon charge that such person stole money from drawer, though storekeeper honestly believed such charge; *Slater v. Wood*, 9 Bosw. 15, on right of private person to make arrest; *Scanlan v. Cowley*, 9 Abb. Pr. 94, 2 Hilt. 489 (dissenting opinion), on effect of arresting one for commission of felony when none has been committed; *State v. Julian*, 25 Mo. App. 133 (dissenting opinion), as to when private person may make arrest without warrant.

Cited in reference notes in 31 A. S. R. 579; 62 A. S. R. 845,—on arrest by private person without warrant.

Cited in notes in 8 L.R.A. 532, on distinction between private person and peace officer as to right to arrest; 67 A. S. R. 420, 421, on arrest by private party as false imprisonment; 67 A. S. R. 421, on arrest by private citizen aiding officer as false imprisonment; 44 A. D. 293, on liability for arrest of innocent person by private person without warrant.

— **Railroad detective.**

Cited in *Newman v. New York L. E. & W. R. Co.* 54 Hun, 335, 7 N. Y. Supp. 560, holding railroad detective justified for arresting one whose appearance was suspicious upon honest belief that he had or was about to commit felony, though detective was mistaken.

— **Sheriff of other state.**

Cited in *Mandeville v. Guernsey*, 51 Barb. 99, holding that sheriff of another state with bench warrant is not authorized to arrest one in this state but is treated as private person making arrest without warrant.

— **By officer generally.**

Cited in *Re Henry*, 29 How. Pr. 185, upholding officer's arrest without warrant of one upon telegraphic information; *Willis v. Warren*, 1 Hilt. 590, 17 How. Pr. 100, upholding arrest by justice without warrant of persons found gambling; *Hill v. Smith*, 107 Va. 848, 59 S. E. 475, holding that officer may arrest without warrant, one whom he has reasonable ground to suspect of commission of felony;

Diers v. Mallon, 46 Neb. 121, 50 A. S. R. 598, 64 N. W. 722, holding that officer without warrant may arrest upon information that person has committed felony; *Filer v. Smith*, 96 Mich. 347, 35 A. S. R. 603, 55 N. W. 999, holding that officer may arrest without warrant if he know a crime to have been committed and have cause to believe that one arrested is guilty; *Doering v. State*, 49 Ind. 56, 19 A. R. 669, holding that policeman may arrest without warrant on information when he has reasonable cause to believe felony to have been committed; *Martin v. Houck*, 141 N. C. 317, 7 L.R.A. (N.S.) 576, 54 S. E. 291, holding policeman liable for arresting one without warrant on information that he had stolen pair of shoes, when there was no reason to believe he would escape and he was in fact innocent; *Meyer v. Clark*, 9 Jones & S. 107, denying policeman's right without warrant, to arrest for illegal liquor selling when sale is not made in officer's presence; *Butolph v. Blust*, 41 How. Pr. 481, 5 Lans. 84, denying policeman's right to arrest without warrant, man for horse beating in violation of ordinance where man has gone beyond city limits; *Palmer v. Maine C. R. Co.* 92 Me. 399, 69 A. S. R. 513, 44 L.R.A. 673, 42 Atl. 800, denying constable's right to arrest passenger without warrant upon conductor's information that he had not paid fare; *Bright v. Patton*, 5 Mackey, 534, 60 A. R. 396, denying officer's right to arrest without warrant after commission of offense where punishment attached is only fine or imprisonment in district jail; *McCullough v. Greenfield*, 133 Mich. 463, 62 L.R.A. 906, 95 N. W. 532, 1 A. & E. Ann. Cas. 924, holding that arrest by undersheriff without warrant for misdemeanor is illegal where sheriff is in distant place with warrant; *Wills v. Jordan*, 20 R. I. 630, 41 Atl. 233, holding that statement by one confessing himself guilty of felony, that another is also guilty, will not justify officer's arrest of such one without warrant; *Croom v. State*, 85 Ga. 718, 21 A. S. R. 179, 11 S. E. 1035; *Simmons v. Vandyke*, 138 Ind. 380, 46 A. S. R. 411, 26 L.R.A. 33, 37 N. E. 973; *Pratt v. Hill*, 16 Barb. 303,—on officer's right to arrest without warrant; *Balbo v. People*, 80 N. Y. 484, on arrest of murderer in another state by police without warrant.

Cited in notes in 5 A. R. 574, on right of officer to arrest without warrant; 55 A. D. 104, as to when officer will be permitted to arrest without warrant; 84 A. S. R. 683, on policeman's right to arrest for felony without warrant; 84 A. S. R. 684, 695, on policeman's power to arrest without warrant on suspicion of felony; 84 A. S. R. 702, on right to resist arrest without warrant by officer not making known his character.

— Of deserter.

Cited in *Hawley v. Butler*, 54 Barb. 490, holding that provost marshal having probable cause for suspecting one of being deserter is justified in arresting him; *Teagarden v. Graham*, 31 Ind. 422, holding sergeant with orders to arrest deserters justified in arresting one suspected of harboring deserters though he had lost the order; *Kurtz v. Moffit*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148, holding that police officer without warrant or military order has no authority to arrest deserter from United States Army.

— Officer's arrest of fugitive from other state.

Cited in *Rea v. Smith*, 2 Handy (Ohio) 193, on sheriff's right to arrest, without warrant, fugitive from justice; *Cunningham v. Baker*, 104 Ala. 160, 53 A. S. R. 27, 16 So. 68, holding that officer may arrest without warrant, person in state whom he has reasonable cause to suppose committed felony in another state and is a fugitive therefrom.

Forfeiture of protection of process.

Cited in note in 21 A. D. 209, on forfeit of protection of process by conduct of officer in executing it.

Officer's duties and liabilities in searching property of suspected person.

Cited in *City Bank v. Banks*, 2 Edw. Ch. 95, holding that when felony has been committed officer without warrant is justified in examining boarders' trunks upon landlord's request and suspicion; *Clossom v. Morrison*, 47 N. H. 482, 93 A. D. 459, on duties and rights of officers under search warrants.

Arrest of one not named in warrant.

Cited in *Gurnsey v. Lovell*, 9 Wend. 319, holding that warrant for arrest of John Doe will not justify arrest of any other person; *West v. Cabell*, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752, holding that warrant designating arrest of one of certain name for murder will not justify arrest of one with different name though he be the one intended; *Formwalt v. Hylton*, 66 Tex. 288, 1 S. W. 376, holding that mistake of identity will not excuse for arrest of wrong person; *Stuber v. Schuartz*, 1 N. Y. City Ct. Rep. 110, denying motion to set aside order of arrest because of misnomer.

Cited in note in 51 L.R.A. 219, on liability of officer for making arrest under name unknown.

Liability to action for false imprisonment.

Cited in *Carson v. Dessau*, 142 N. Y. 445, 37 N. E. 493, holding person guilty of false imprisonment for aiding arrest of woman on charge of blackmail when no crime had been committed; *Brown v. Chadsey*, 39 Barb. 253, denying person's liability for false imprisonment for giving officer information upon which he arrests upon his own judgment; *Farnam v. Feeley*, 56 N. Y. 451, holding pawnbroker identifying woman as one who stole goods not liable for false imprisonment when the officer acted directly in making the arrest.

Cited in reference note in 39 A. S. R. 414, on liability for false imprisonment.

— Liability of officer.

Cited in *Wood v. Craves*, 144 Mass. 365, 59 A. R. 95, 11 N. E. 567, upholding action of false imprisonment for abuse of legal process; *Marlatte v. Weickgennant*, 147 Mich. 268, 110 N. W. 1061, on action for false imprisonment where one abuses legal process; *Castro v. Uriarte*, 2 N. Y. Civ. Proc. Rep. (McCarty) 199, 2 N. Y. Civ. Proc. Rep. (Brown) 210, on officer's liability for false imprisonment because of unlawful arrest; *Castro v. De Uriarte*, 12 Fed. 250, holding where subject-matter of offense charged is wholly beyond jurisdiction of committing magistrate, false imprisonment lies.

Cited in note in 51 L.R.A. 217, on liability of officer for unreasonable detention of prisoner.

Effect of assessment of several damages against wrongdoers.

Cited in *Yeazel v. Alexander*, 58 Ill. 254, holding where in action against several tort feasons, damages are assessed against more than are guilty, such irregularity may be cured by *nolle prosequi* against those not guilty; *Nashville R. & Light Co. v. Trawick*, 118 Tenn. 273, 121 A. S. R. 996, 10 L.R.A. (N.S.) 191, 99 S. W. 695; *Warren v. Westrup*, 44 Minn. 237, 20 A. S. R. 578, 46 N. W. 347,—holding that where jury improperly severed damages between defendants, irregularity may be cured by entering *nolle prosequi* as to all but one; *Bulkley v. Smith*, 1 Duer, 643, holding that where jury sever damages against tort feasons, judgment for largest sum against all will not be set aside as irregular; *O'Shea v. Kirker*, 8 Abb. Pr. 69, 4 Bosw. 120, holding that where referee improperly severed

damages against joint wrongdoers, it was proper to take judgment for largest sum against all although there was no formal remittitur; *Krug v. Pitass*, 16 App. Div. 480, 44 N. Y. Supp. 864, on right to enter *nolle prosequi* as to one defendant and take judgment against other; *Turner v. McCarthy*, 4 E. D. Smith, 247, on plaintiff's right to discontinue as to one where jury improperly assess separate damages against cotrespassers; *Wallace v. Brown*, 25 N. H. 216, on entry of *nolle prosequi* as to some of defendants in trespass where jury assess several damages.

What constitutes a severance.

Cited in *Berry v. St. Louis & S. F. R. Co.* 118 Fed. 911, holding where suit is brought on joint and severed liability against resident and nonresident, resident not being served nor appearing, but suit proceeds against nonresident, there is a severance entitling removal to Federal court.

Curing verdict.

Cited in note in 10 L.R.A. (N.S.) 192, on curing separate verdicts rendered in action for joint tort.

Measure of damages.

Cited in reference note in 27 A. D. 627, on measure of damages for breach of contract.

20 AM. DEC. 706, WORMOUTH v. CRAMER, 3 WEND. 395.

Evidence in mitigation of damages in libel and slander.

Cited in *Minesinger v. Kerr*, 9 Pa. 312, holding that defendant in slander may show under general issue, facts in mitigation of damages; *Arrington v. Jones*, 9 Port (Ala.) 139, denying right of defendant in slander to give evidence of truth of charge under general issue; *Van Ingen v. Newton*, 1 Disney (Ohio) 458, allowing defendant in libel to set up justification and facts in mitigation of damages in answer, under Code.

Cited in reference notes in 24 A. D. 104, on evidence in mitigation under general issue; 25 A. D. 470, on evidence in mitigation of damages in slander.

20 AM. DEC. 707, BEEKMAN v. LANSING, 3 WEND. 446.

Sufficiency of levy.

Cited as leading case in *Auby v. Rathbun*, 11 S. D. 474, 78 N. W. 952, holding written notice to debtor accompanied by officer's statement that sheriff may never come for property, officer assuming no control over same, insufficient; *Rodgers v. Bonner*, 55 Barb. 9, holding levy on realty under attachment sufficient though officer made no oral declaration but merely indorsed same on paper.

Cited in *Cawthorn v. McCraw*, 9 Ala. 519, holding that officer must have property within his power and control to constitute valid levy on personalty; *Ray v. Harcourt*, 19 Wend. 495, holding that goods must be in view of officer and subject to his control to constitute valid levy; *Westervelt v. Pinckney*, 14 Wend. 123. 28 A. D. 516; *Camp v. Chamberlain*, 5 Denio, 198; *Portis v. Parker*, 8 Tex. 23, 53 A. D. 95; *State ex rel. McPherson v. Beckner*, 132 Ind. 371, 32 A. S. R. 257, 31 N. E. 950,—holding that levy on personalty to be sufficient must be such as would render officer trespasser were it not for writ; *Goode v. Longmire*, 35 Ala. 668, 76 A. D. 309, holding that to constitute levy on personal property, officer must assume dominion over it; *Gates v. Bushnell*, 9 Conn. 530, holding that nothing short of actual attachment will create lien; *State v. Cassidy*, 4 S. D. 58, 54 N. W. 928, holding that, officer with levy forcing entrance to granary and estimating bushels of grain, acquires custody thereby; *Quackenbush v. Henry*, 42 Mich. 75,

3 N. W. 262, holding that to render levy sufficient there must be manual seizure or such assertion of control as to keep property within dominion of law for purpose of sale; *Caldwell v. Sibley*, 3 Minn. 406, Gil. 300, holding that to constitute valid levy on bonds, sheriff must take actual custody; *Vanosdall v. Hamilton*, 118 Mich. 533, 77 N. W. 9, holding levy on goods valid where owing to lateness of hour, officer notified clerk of levy indorsing same on execution and left goods in possession of keeper; *Bond v. Willet*, 29 How. Pr. 47, 1 Abb. App. Dec. 165, 1 Keyes, 377, holding levy on stock of goods sufficient where officer showed owner execution, told him he must levy on goods and made memorandum thereof on firm billhead also indorsing levy on execution; *Roth v. Wells*, 29 N. Y. 471, holding that where sheriff with execution enters store, looks over goods showing owners execution and tells them he would hold levy but give little more time, indorsing levy on execution, it was valid; *Gallagher v. Bishop*, 15 Wis. 277, holding levy upon sacks of grain by officer with direction not to touch them, sufficient without manual seizure; *Culver v. Rumsey*, 6 Ill. App. 598, holding mere indorsement of levy upon writ of attachment to be insufficient levy on grain where officer never went near property; *Lyeth v. Griffs*, 44 Kan. 159, 24 Pac. 59, holding that appraisal by officer under writ of attachment without taking possession, does not constitute sufficient levy; *Nelson v. Van Gazelle Valve Mfg. Co.* 45 N. J. Eq. 594, 17 Atl. 943, holding levy insufficient where officer could not enter warehouse but was compelled to make incomplete inventory by looking through window; *Minturn v. Stryker*, 1 Edm. Sel. Cas. 356, denying sufficiency of levy on personalty where no one was around, formal levy not being made till later; *Minor v. Smith*, 13 Ohio St. 79, holding that entry into church on week day and in view of organ but with no one's knowledge, indorsing levy thereon on execution, invalid levy as against subsequent mortgagee; *Bradley v. Keesee*, 5 Coldw. (Tenn.) 223, 94 A. D. 246, holding that proclamation of levy upon goods locked up and not in sight is not good levy; *Wilson v. Powers*, 21 Minn. 193 (dissenting opinion), on necessity for officer's removal of goods to preserve levy; *Green v. Burke*, 23 Wend. 490, on sufficiency of levy on personalty; *Eastman v. Eveleth*, 4 Met. 137, on what constitutes valid levy; *Crisfield v. Neal*, 36 Kan. 278, 13 Pac. 272, denying sufficiency of levy on personalty by indorsement thereof on execution but without informing anyone of levy, and levying property in debtor's possessions and citing annotation also on this point.

Cited in reference notes in 49 A. D. 626, on what constitutes a levy; 31 A. D. 490, on mode of levying on personalty; 11 A. S. R. 716, on requisites of levy on personalty; 24 A. D. 356, on requisites and effect of levy on personalty; 28 A. D. 518, on necessity of officer asserting title to constitute levy of execution on goods.

Cited in note in 27 A. D. 104, on what constitutes a valid levy.

Sufficiency of notice to sheriff with execution of rent due landlord.

Cited in reference note in 28 A. D. 518, on sufficiency of landlord's demand of sheriff for rent due from tenant on whose property levy has been made.

Distinguished in *Bussing v. Bushnell*, 6 Hill, 382, holding that notice must be given before sale if landlord acquire preference for rent over execution creditor.

Landlord's right to rent as against execution creditor.

Cited in *Theriat v. Hart*, 2 Hill, 380, holding that where tenant's goods are taken in execution, landlord can claim of officer only rent due at time of levy.

20 AM. DEC. 711, PELTIER v. COLLINS, 3 WEND. 459.

Sufficiency of memorandum under statute of frauds.

Cited in *Boardman v. Spooner*, 13 Allen, 353, 90 A. D. 196, holding that memo-

random in broker's book not stating that woods were sold on approval does not satisfy statute of frauds; *Rucker v. Harrington*, 52 Mo. App. 481, holding that memorandum of land contract must contain whole agreement to satisfy statute of frauds; *Sale v. Darragh*, 2 Hilt. 184, on sufficiency of memorandum of sale of hemp which failed to state number of bales.

Cited in reference notes in 65 A. D. 668; 66 A. D. 549,—on requisites of memorandum required by statute of frauds; 87 A. D. 644, on requisites of memorandum of agreement for sale of lands required by statute of frauds; 62 A. S. R. 350, on expression of consideration in memorandum within statute of frauds.

Cited in notes in 26 A. D. 668, on certainty as to consideration as essential to specific performance; 11 L.R.A. 98, on necessity that consideration appear in memorandum of contract to authorize specific performance.

Parol evidence to supply omission of warranty in memorandum.

Cited in *Smith v. Killam*, 16 N. Y. S. R. 568, holding parol evidence of warranty as to amount of timber on land conveyed inadmissible; *McCray Refrigerators & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 A. S. R. 599, 58 N. W. 320, holding parol evidence inadmissible to show warranty in sale of refrigerators where writing does not contain one.

Cited in reference note in 20 A. D. 84, on parol evidence to vary, control, or alter written instrument.

Effect of bought and sold notes.

Cited in *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950, holding that bought and sold notes taken together form sufficient memorandum as between broker or principals and vendee to satisfy statute of frauds; *Starr & Co. v. Galgate Ship Co.* 15 C. C. A. 366, 29 U. S. App. 599, 68 Fed. 234, holding that letter of notification and answer of confirmation of charter could not be treated as bought and sold notes so as to constitute them sole evidence of contract where principal had no knowledge of material condition; *Fenly v. Stewart*, 5 Sandf. 101, 10 N. Y. Leg. Obs. 40, on sufficiency of form of broker's notes; *Gallagher v. Waring*, 9 Wend. 20, on memorandum by broker as to goods sold being equivalent to bought and sold note.

— Variance between.

Cited in *Eau Clair Canning Co. v. Western Brokerage Co.* 115 Ill. App. 71, holding that where there is variance between bought and sold notes the contract is not provable by them; *Suydam v. Clark*, 2 Sandf. 133, holding that where bought and sold notes delivered by broker to vendor and vendee differed as to manner of delivery, no contract is effected.

Distinguished in *Howell v. Maas*, 13 Daly, 221, allowing recovery for sugar sold by broker though note delivered to buyer stated amount to be "about 240 cases" and note to seller "about 250 cases."

20 AM. DEC. 716, ROGERS v. ROGERS, 3 WEND. 503.

Nature of estate created.

Cited in *Fraser v. Chene*, 2 Mich. 81, holding that devise of farm to son for life and after his death, right and title to become property of son's male heirs, gives son an allodial estate.

— Life estate or fee.

Cited in *Re Sanders*, 4 Paige, 293, holding that devise to granddaughter of land from time youngest grandchild named should be twenty-one to hold for life with remainder in fee to children, gives devisee life estate; *Daniel v. Whartenby*, 17

Wall. 639, 21 L. ed. 661, holding that devise to son during natural life and after death to issue, their heirs and assigns forever, gives devisee life estate; Beacroft v. Strawn, 67 Ill. 28, holding that devise to woman for natural life and at her death to belong to her children, gave woman only life estate; Tanner v. Livingston, 12 Wend. 83, holding that devise to son and wife and survivor of them for natural life with subsequent clause giving premises to their heirs immediately upon their decease, gives son and wife life estates; Jackson ex dem. Nicoll v. Brown, 13 Wend. 437, holding devise to son for natural life with remainder to first grandson, gives son life estate; Taggart v. Murray, 53 N. Y. 233, holding that devise of property to daughter for her support and comfort, to be held and controlled by her and at death to pass to her heirs, gives daughter life estate; Provoost v. Calyer 62 N. Y. 545, holding that devise to son during natural life and after decease to lawful children, gave son life estate with remainder in fee to children; Brown v. Brown. 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81, holding that conveyance to one for life and at her death to her children, does not give grantee fee; Bond v. McNiff, 6 Jones & S. 83, holding that devise to wife of one moiety for natural life and at her decease to be joint property of son and daughter, gives children fee, subject to wife's life estate; Post v. Post, 47 Barb. 72, holding that devise of property after death of wife to children and after their decease to go unto their legal heirs, gives children fee; Chrystie v. Phyfe, 19 N. Y. 344, holding that devise of land to daughter her heirs and assigns forever but if she die unmarried and without issue to certain others, gave daughter fee; Schoonmaker v. Sheely, 3 Denio, 485, holding that devise to son during life and after his decease to his heirs, gives son fee simple; Den ex dem. Howell v. Howell, 20 N. J. L. 411, holding that devise of property to two sons upon becoming twenty-one and if either die without issue his share to go to other, gives fee simple with remainder over in fee to survivor; Prindle v. Beveridge, 7 Lans. 225, holding that devise to son for life and if he leaves no legitimate heirs to other son was devise to children of first son living at his death and not an estate tail.

Cited in reference notes in 63 A. D. 551; 73 A. D. 190,—on effect of devise to one for life and to his children.

Cited in note in 2 L.R.A. 458, on the rule in Shelleys Case.

Conclusiveness of decree on probate of will.

Cited in Bower v. Sweeney, 89 Hun, 359, 35 N. Y. Supp. 400, 25 N. Y. Civ. Proc. Rep. 134, holding final decree of surrogate, after determination of issues by common pleas, that will is valid, not conclusive against heir as to realty; Bogardus v. Clarke, 1 Edw. Ch. 266, holding that where surrogate passes upon testator's sanity and on appeal chancellor determines against will, it is only conclusive as to personality.

Cited in note in 21 L.R.A. 686, on conclusiveness of probate decree in chancery.

Relief in equity against will.

Cited in de Bussierre v. Holladay, 55 How. Pr. 210. 4 Abb. N. C. 111, holding that equity will relieve for fraud in execution of will where probate court is powerless to grant relief.

Direction of issue *devisavit vel non*.

Cited in Wise v. Lamb, 9 Gratt, 294, on right to direct issue *devisavit vel non*.

Executor, etc, as trustee.

Cited in McHardy v. McHardy, 7 Fla. 301, holding that devise of property to pay debts creates trust and presentment of debts under advertisement to executor is sufficient.

Cited in reference note in 42 A. D. 542, on executor as trustee for devisees and creditors.

Cited in note in 45 A. D. 324, on administrator as trustee for creditors.

— **Right to purchase trust property.**

Cited in *Conger v. Ring*, 11 Barb. 356, holding that where executor with power to sell, sells trust property himself becoming purchaser, he must take it for those for whom he is bound to act; *Merrick v. Waters*, 51 App. Div. 83, 64 N. Y. Supp. 542, holding that where executor purchased mortgages of trust property foreclosed and bought property, *cestuis que trustent* were entitled to have sale set aside; *Scott v. Gamble*, 9 N. J. Eq. 218, denying right of executor selling land in execution of trust to become purchaser; *Martin v. Wyncoop*, 12 Ind. 266, 74 A. D. 209, denying administrator's right to purchase decedent's realty at sheriff's sale; *Sheldon v. Rice*, 30 Mich. 296, 18 A. R. 136, on administrator's right to purchase intestate property; *Horton v. Maine*, 22 R. I. 126, 46 Atl. 403, denying guardian's right to sell ward's property by virtue of power of sale in mortgage, and himself become purchaser.

Cited in reference note in 57 A. D. 136, on right of administrator or executor to purchase at sale of decedent's estate.

Cited in note in 9 L.R.A. 792, on trustee's right to purchase trust property.

Limitations of claims against decedents.

Cited in *Gilbert v. Comstock*, 93 N. Y. 484, holding that in claim for testatrix's board from 1863 to her death in 1879, it was error to limit recovery to six years prior to death where she made part payment in 1875; *Bevens v. Park*, 88 N. C. 456, holding that administrator's admissions that debt is just, do not deprive heir of right to set up statute of limitations; *Tunstall v. Pollard*, 11 Leigh, 1, holding statute bar to debt on judgment where it has run after administrator qualified though no funds came into his hands during that time; *Burnett v. Noble*, 5 Redf. 69, denying executor's right to be paid, on theory of implied assumpsit, for services rendered more than six years prior to testatrix's death; *Steele v. Steele*, 64 Ala. 438, 38 A. R. 15, on bar of decedent's debts by statute of limitations.

Cited in note in 2 E. R. C. 165, on payment of debts barred at time of debtor's death.

— **Power of personal representative to revive debt.**

Cited in *Seig v. Acord*, 21 Gratt. 365, 8 A. R. 605, denying right of personal representative to revive debt barred by statute of limitations at debtor's death; *Patterson v. Cobb*, 4 Fla. 481, denying executor's right to bind testator's estate by promise to pay debt barred by statute; *Smith v. Pattie*, 81 Va. 654, denying administrator's right to revive debt barred by statute; *Young v. Cannon*, 2 Utah, 560, on effect of executor's allowing claim barred by statute of limitation.

Cited in reference notes in 71 A. D. 194; 92 A. S. R. 406,—on right of administrator to retain debt barred by limitations.

Cited in note in 78 A. S. R. 186, on powers of executors as to paying debts.

— **Representative's right to allow debts due himself.**

Cited in *Martin v. Gage*, 9 N. Y. 398, holding that devise of realty to executor for payment of debts generally does not prevent running of statute against debts due prior to testator's death; *Re Durham*, 1 Redf. 231, 1 N. Y. Leg. Obs. 245, denying administrator's right to prove debt against estate where he neglected for ten years to take proceedings provided by statute; *Knight v. Godbolt*, 7 Ala.

304, upholding right of administrator to show retainer of assets for debt due himself though within bar of statute of limitations.

—Duty to interpose statute.

Cited in *Hodgdon v. White*, 11 N. H. 208, holding that administrator is not bound to interpose statute of limitations against claim otherwise well founded.

Cited in note in 104 A. S. R. 745, on right to waive privilege of statute of limitations.

Executor's rights of retainer.

Cited in *Dolman v. Cook*, 14 N. J. Eq. 56, denying executor's right, in case of deficiency to retain his own debt in preference to preferred creditor's.

Cited in reference note in 35 A. D. 681, on right of executor or administrator to retain for his own debt.

Cited in note in 2 E. R. C. 152, on right of executor or administrator to retain his claim against estate.

Primary liability of personalty for debts.

Cited in *Re Oosterhoudt*, 15 Misc. 566, 38 N. Y. Supp. 179, 1 Gibbins Sur. Rep. 516; *Gray v. Missionary Soc.* 2 N. Y. Supp. 878; *Nagle v. McGinnis*, 49 How. Pr. 193,—holding that personal property though specifically bequeathed by will must be applied to payment of debts before realty; *Turner v. Mather*, 86 App. Div. 172, 83 N. Y. Supp. 1013, holding that where testator's debts are not charged upon realty, assets must not be marshaled for general legatee as to throw debts upon lands passing under residuary devise.

Cited in reference notes in 35 A. D. 291, on marshaling of assets; 43 A. D. 629, on order to be observed in marshaling assets for payment of debts of decedent; 22 A. D. 744, on personalty primarily liable for payment of decedent's debts.

Right to jury trial.

Cited in note in 1 L.R.A. 481, on constitutional right to trial by jury.

20 AM. DEC. 738, ABRAHAM v. PLESTORO, 3 WEND. 538.

Effect of assignment under foreign insolvency or bankruptcy law.

Cited in *Willink v. Renwick*, 23 Wend. 63; *Re Merrick*, 2 Ashm. (Pa.) 485; *Del Valle's Appeal*, 2 Sadler (Pa.) 270, 5 Atl. 441; *Lowry v. Hall*, 2 Watts & S. 129, 37 A. D. 495,—on effect given to assignment under foreign bankrupt law; *Weider v. Maddox*, 66 Tex. 372, 59 A. R. 617, 1 S. W. 168, holding that statutory assignments for creditors do not pass property in foreign states or countries; *Mowry v. Croker*, 6 Wis. 326, holding that voluntary assignment for benefit of creditors passes personal property wherever situated; *Moore v. Horton*, 32 Hun, 393, holding that discharge in bankruptcy in New York does not affect subsequent judgment for debt recovered in Canada and sued on in New York; *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, holding where upon creditors' bill receiver is appointed and debtor enjoined from further disposing of property but who in another state submits to Federal bankrupt law, assignee in bankruptcy has best right to money on claim accruing prior to judgments.

Cited in reference notes in 45 A. D. 93, on effect of foreign assignment for benefit of creditors; 78 A. D. 617, on extraterritorial effect of assignments for benefit of creditors; 93 A. D. 438, on extraterritorial effect of assignments in bankruptcy and insolvency.

Cited in notes in 1 L.R.A. 120, on foreign bankrupt and insolvent laws; 94 A. S. R. 555, 556, on foreign proceedings in bankruptcy and in insolvency; 3 L.R.A. 702, on what law governs validity of voluntary assignment; 23 A. D. 347, on as-

assignment under bankrupt laws of another country; 23 L.R.A. 44, on transfer of personal property out of state by bankruptcy transfers; 55 A. R. 132, on extraterritorial effect of transfers of personal property; 17 L.R.A. 87, on protection of domestic creditors.

— Of other state.

Cited in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, holding that assignment for benefit of creditors under insolvent laws of Minnesota did not vest personalty of debtor in Massachusetts in assignee; *Betton v. Valentine*, 1 Curt. C. C. 168, Fed. Cas. No. 1,370, denying right of assignee under Massachusetts insolvent law to set aside conveyance of personalty in Rhode Island; *Rhawn v. Pearce*, 110 Ill. 350, 51 A. R. 691, holding that assignment *in invitum* under insolvent law of other state does not operate upon debt as against citizen of Illinois; *Dunlap v. Rogers*, 47 N. H. 281, 93 A. D. 433, holding that prior assignment of personalty under insolvent law of another state by citizen thereof will not prevail against attachment of property in New Hampshire; *Upton v. Hubbard*, 28 Conn. 274, 73 A. D. 670, holding that lien of attaching creditors in Connecticut would not be affected by insolvency proceedings in Massachusetts; *Willits v. Waite*, 25 N. Y. 577, holding that receivers of Ohio bank took its assets in New York subject to claims of subsequent attaching creditors; *Kelly v. Crapo*, 45 N. Y. 86, 6 A. R. 35, holding that levy on foreign debtor's interest in ship for benefit of resident creditors must prevail against assignee under foreign insolvent law, though assignment was made while vessel was in Pacific; *Barth v. Backus*, 140 N. Y. 230, 37 A. S. R. 545, 23 L.R.A. 47, 35 N. E. 425, holding assignment under insolvency law of Wisconsin ineffectual to transfer title to property in New York as against resident attaching creditors; *Johnson v. Hunt*, 23 Wend. 87, holding that property of absconding debtor taken to another state and transferred to satisfy judgment here rendered is not subject to control of debtor's trustees of this state; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 A. R. 518 (affirming 21 Hun. 166), holding that assignment under bankrupt law of Louisiana has no effect upon right of creditor pursuing remedy on draft in courts of New York; *Vanbuskirk v. Warren*, 34 Barb. 457, 13 Abb. Pr. 145, holding assignment in one state of property in another in payment of a debt governed by law of the state where the assignment is made; *Owen v. Miller*, 10 Ohio St. 136, 75 A. D. 502, holding that where resident of Ohio takes notes and mortgage for sale of land to citizen of Ohio and afterward removes to New Jersey where notes are attached because payee is absconding debtor, their sale does not divest property in debt; *Towne v. Smith*, 1 Woodb. & M. 115, Fed. Cas. No. 14,115, holding that note not restricted on face to be payable in state is not barred by maker's subsequent discharge in state where note was made, if indorsee live in another state; *Hooper v. Tuckerman*, 3 Sandf. 311, holding that assignment under insolvent laws of Massachusetts affects transfer of personalty in New York; *Hoyt v. Thompson*, 5 N. Y. 320, holding that assignee of insolvent corporation under laws of another state may sell and assign debt due corporation from citizen of New York; *Finnell v. Burt*, 2 Handy (Ohio) 202, holding that assignees under proceedings in bankruptcy in Kentucky may sue to recover insolvent's personalty in Ohio; *Re Bristol*, 16 Abb. Pr. 184, denying claim under insolvency proceedings of other state to property within state as against domestic attaching creditor.

Criticized in *Wilson v. Matthews*, 32 Ala. 332, holding that surrender under insolvent law of Louisiana passes to assignee all debtor's personalty whether within or without state.

— Of other country.

Cited in *Mosselman v. Caen*, 1 Hun, 647, 4 Thomp. & C. 171, denying right of assignee under Belgium bankruptcy law to recover property in New York fraudulently taken from bankrupts; *Goodsell v. Benson*, 13 R. I. 225, holding that debtor's assignment in bankruptcy in England will not affect right of attaching creditor in Rhode Island; *Ackerman v. Cross*, 40 Barb. 465, holding voluntary assignment in Canada effectual there to pass debtor's property, sufficient to pass property in New York as against attaching creditor of this state; *Olyphant v. Atwood*, 4 Bosw. 459, holding resident of England owing resident of United States on draft, after going through bankruptcy there, is discharged of such debt; *Mosselman v. Caen*, 34 Barb. 66, 21 How. Pr. 248, holding that defendant cannot raise question of plaintiff's capacity to sue because being assignee under foreign bankrupt law, for first time on appeal.

Distinguished in *Re Waite*, 99 N. Y. 433, 2 N. E. 440, holding trustee under English bankruptcy law of firm doing business in New York and London entitled to debt due firm from New York bankrupt of whom firm member was assignee.

Jurisdiction of property at time of assignment.

Cited in *Bell v. Hunt*, 3 Barb. Ch. 391, on jurisdiction of bankrupt's property at time of assignment.

— Assignment of goods on board vessel.

Cited in *Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430, holding as between assignee under Massachusetts insolvent law of goods on board a Massachusetts vessel on high seas, and subsequent attaching creditor in New York, goods belong to assignee.

Pleading foreign laws.

Cited in *Jack v. Martin*, 12 Wend. 311, on pleading statute, or common law of foreign state, or country.

Effect of multifariousness in bill.

Cited in *Gilmore v. Sapp*, 100 Ill. 297, holding that multifariousness in bill cannot be urged as ground for reversal of decree rendered on default.

20 AM. DEC. 763, DICKEY v. AMERICAN INS. CO. 3 WEND. 658.**Right to abandon ship as constructive total loss.**

Cited in *Taber v. China Mut. Ins. Co.* 131 Mass. 239, holding that assured may abandon ship as constructive total loss, though damage was caused by successive perils; *Murray v. Great Western Ins. Co.* 72 Hun, 282, 25 N. Y. Supp. 414, holding that value as stated in policy governs in determining whether vessel is so injured as to be constructive total loss; *Hughes v. Sun Mut. Ins. Co.* 12 Daly, 45, on abandonment of insured vessel.

Cited in reference notes in 22 A. D. 349, on abandonment of insured property; 28 A. D. 252, on abandonment of insured vessel; 35 A. D. 243; 59 A. S. R. 814,—on what constitutes total loss under marine policy; 23 A. S. R. 817, on total and partial loss in case of marine insurance; 29 A. D. 576, on injury to more than half of value of vessel as technical total loss authorizing abandonment.

Cited in notes in 22 L. ed. U. S. 217, on what is a total loss within marine insurance policy; 1 E. R. C. 130, on right to abandon as dependent on state of facts existing at time of offer.

Distinguished in *Saurez v. Sun Mut. Ins. Co.* 2 Sandf. 482, holding partial repairs by master at port of distress in order to sail vessel to another port for purpose of making repairs cheaper, does not impair owner's right to abandon.

For whom master is agent.

Cited in reference note in 29 A. D. 576, as to when master is agent for owner or insurer.

Insured as agent after abandonment.

Cited in reference note in 60 A. D. 123, on insured as quasi agent of insurer after unaccepted abandonment.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 21 AM. DEC.

21 AM. DEC. 33, SMITH v. ALLEN, 1 N. J. EQ. 43.

Change in statutory bond.

Cited in reference notes in 37 A. D. 566, on effect of noncompliance with statute in official bonds; 30 A. D. 341, on validity as common-law obligation of bond taken without statutory authority; 56 A. D. 336, on validity of bond taken *colore officii* with conditions unauthorized by statute.

Cited in note in 67 A. D. 771, 772, 774, on effect of adding to or varying statutory bonds.

Equitable jurisdiction to correct mistakes.

Cited in *Hendrickson v. Ivins*, 1 N. J. Eq. 562, holding where a mistake is manifest, equity will correct and hold the party according to his original intention; *Nourse v. Weitz*, 120 Iowa, 708, 95 N. W. 251, holding that a supersedeas bond may be reformed in equity; *Creigh v. Boggs*, 19 W. Va. 240, decreeing a specific performance of a corrected written contract for purchase of land; *Martin v. Righter*, 10 N. J. Eq. 510, denying relief where a party executed a release under a mistaken belief that other party would return it.

Cited in reference notes in 26 A. D. 396; 32 A. D. 134,—on relief in equity against mistake.

Cited in note in 11 L.R.A. 377, on equitable relief from mistake in deed.

Forfeiture in equity.

Cited in *Harper v. Harper*, 45 N. J. Eq. 110, 16 Atl. 918, on nonenforcement of penalties by equity.

Reformation of instruments.

Cited in notes in 65 A. S. R. 494, on reformation of contracts; 65 A. S. R. 505, on reformation of bonds; 65 A. S. R. 502, on effect of statute of frauds on reformation of contract.

Admissions by demurrer.

Cited in reference note in 44 A. D. 723, on admission by demurrer of all allegations well pleaded.

Evidence of mistake.

Cited in reference notes in 30 A. S. R. 648, on evidence to prove mistake; 2 A. S. R. 828, on proof of mistake necessary to justify equitable relief.

21 AM. DEC. 41, SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES v. MORRIS CANAL & BKG. CO. 1 N. J. Eq. 157. Later cases between same parties as to right to use of same waters in 5 N. J. Eq. 203, 30 N. J. Eq. 145, note.

Estoppel to deny corporate existence.

Cited in reference notes in 43 A. D. 465; 79 A. D. 437,—on estoppel of person dealing with corporation to deny corporate existence.

Cited in notes in 33 A. S. R. 184, on estoppel to deny corporate existence; 24 A. D. 60, on estoppel of one dealing with corporation.

Dissolution of corporation.

Cited in reference notes in 42 A. D. 109, on dissolution of corporation; 41 A. D. 120, on nonuser as ground for forfeiture.

Jurisdiction to declare a forfeiture of a franchise.

Cited in New Jersey Southern R. Co. v. Long Branch, 39 N. J. L. 28, holding that government creating a corporation can alone institute proceedings to declare a forfeiture; Doremus v. Dutch Reformed Church, 3 N. J. Eq. 332, holding equity not proper court to try question of forfeiture of office; Conklin v. United States Shipbuilding Co. 140 Fed. 219, holding that equity cannot decree the dissolution of a corporation; Strong v. McCagg, 55 Wis. 624, 13 N. W. 895, holding question of forfeiture of franchise, a question for a court of law.

Cited in reference notes in 96 A. D. 755, on power of equity to dissolve corporation; 63 A. S. R. 398, on jurisdiction of equity to dissolve corporations; 35 A. D. 562, on jurisdiction to declare forfeiture of corporate franchises.

Cited in note in 8 A. S. R. 200, on power of court of equity to decree forfeiture of corporate franchises.

Jurisdiction of court of equity over nuisances and trespass.

Cited in Carlisle v. Cooper, 21 N. J. Eq. 576, holding that courts of equity have concurrent jurisdiction in cases of private nuisances.

Cited in reference notes in 38 A. D. 568, on injunction in cases of equity; 30 A. D. 572; 54 A. D. 351,—on injunction against nuisance; 68 A. D. 117, on injunction against trespass; 29 A. D. 757, on injunction against trespass or nuisance; 26 A. D. 561, on injunction against waste and private nuisance.

Cited in note in 73 A. D. 114, on injunctions against threatened nuisances.

Injunction to restrain repetition of tort.

Cited in Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 52 N. J. Eq. 555, 30 Atl. 580, denying an injunction where there was no reasonable ground to believe that there will be an interference after claim is adjudged unlawful; Hough v. Doylestown, 4 Brewst. (Pa.) 333, holding that an injunction will not be granted if injury is doubtful, eventual, or contingent; Cherry v. Stein, 11 Md. 1, holding that it must be shown that injury could not be compensated for at law before an injunction will be granted; Cox v. Louisville, N. A. & C. R. Co. 48 Ind. 178, holding where right to continue an injury is claimed by an aggressor, an injunction may be granted.

Cited in reference note in 62 A. D. 376, on right to grant injunction to restrain constantly recurring trespasses.

— To protect water rights.

Cited in *Corning v. Troy Iron & Nail Factory*, 6 How. Pr. 89, granting an injunction against the obstruction of a water course; *Shields v. Arndt*, 4 N. J. Eq. 234, holding that an injunction may be granted to restrain the diversion of a water course from its accustomed channel.

Rights of a riparian owner.

Cited in *Society for Establishing Useful Manufactures v. Low*, 17 N. J. Eq. 19, holding a riparian proprietor on a private river is entitled to the use and enjoyment of the stream without diminution or alteration.

Cited in reference notes in 36 A. S. R. 894, on riparian rights; 26 A. D. 390, on rights of riparian proprietor; 37 A. D. 238, on right of riparian owner to natural flow of stream; 38 A. D. 112, on right of riparian proprietor to use of water flowing through his land; 26 A. D. 530, on nature of non-navigable rivers; 57 A. D. 715, on acquisition of prior right to use of stream by prescription or adverse occupancy.

Cited in notes in 24 A. D. 300, on rights in water courses; 79 A. D. 640, on riparian owner's right to reasonable use of water; 54 A. D. 794, on right of riparian owner to natural and uninterrupted flow of stream; 79 A. D. 639, on rule that riparian owner shall not diminish natural flow of stream; 93 A. S. R. 712, on prescriptive title to surface water; 42 L.R.A. 171, on title to land under nontidal rivers; 41 L.R.A. 747, on right as between upper and lower proprietors to water turned into stream.

Distinguished in *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385, holding that flood water as soon as it reaches a natural stream, becomes subject to the right of use by riparian proprietors; *Druley v. Adam*, 102 Ill. 177, holding that water collected by artificial means and allowed to flow into a natural stream becomes subject to rights of lower proprietor after it has passed onto soil of another; *Dyer v. Cranston Print Works Co.* 22 R. I. 506, 48 Atl. 791, holding that party who by reservoirs, collects additional flow of water in certain seasons, is not entitled to its exclusive use.

21 AM. DEC. 52, FRIES v. BRUGLER, 12 N. J. L. 79.

Asking questions for purpose of discrediting a witness.

Cited in *Cloutier v. Grafton & U. R. Co.* 162 Mass. 471, 39 N. E. 110, allowing evidence which tended to contradict statements of a witness on cross-examination.

Cited in reference notes in 36 A. D. 411, on impeachment of witness; 56 A. D. 342, on impeaching witness by evidence of contradictory statements; 75 A. D. 207, on asking questions for purpose of discrediting witness.

Cited in note in 88 A. D. 321, 322, on inquiry on collateral and irrelevant matter for purpose of discrediting witness.

Privilege of witness to refuse to answer question.

Cited in *Re Moser*, 138 Mich. 302, 101 N. W. 588, 5 A. & E. Ann. Cas. 31; *Temple v. Com.* 75 Va. 892,—holding where a witness on oath, declares his belief that the answer would criminate or tend to criminate him, the court cannot compel him to answer unless it is perfectly clear from a careful consideration of all the circumstances that the answer cannot possibly have such tendency; *Ex parte Park*, 37 Tex. Crim. Rep. 590, 66 A. S. R. 835, 40 S. W. 300, holding that the liability must appear reasonable to the court or the witness will be compelled to answer; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, holding that it

must appear from the circumstances of the case and the nature of the expected evidence that there is reasonable ground to apprehend danger to witness; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269, holding that the right of a witness to refuse to give evidence tending to incriminate him is a privilege which he alone can claim.

Cited in reference notes in 22 A. D. 454; 1 A. S. R. 886; 75 A. S. R. 318,—on privilege of witness; 66 A. S. R. 841, on privilege of witness to refuse to answer; 86 A. S. R. 722, on privilege of witness as to incriminating testimony; 36 A. D. 358; 49 A. D. 346; 59 A. D. 153,—on right of witness to refuse to answer incriminating questions; 88 A. D. 320, on question witnesses need not answer; 77 A. S. R. 524, on cross-examination involving incrimination; 24 A. S. R. 874, on right of witness to refuse to answer on ground that answer would expose him to disgrace and infamy; 2 A. S. R. 356, on right of accused offering himself as witness to refuse to answer question because of possible incrimination.

Cited in notes in 21 A. D. 153, on answers tending to criminate witness; 75 A. S. R. 332, on privilege of witness as to incriminating testimony; 75 A. S. R. 324, on privilege of witness as to testimony tending to disgrace him; 75 A. S. R. 339, on personal privilege of witness as to incriminating testimony.

Relevancy of evidence.

Cited in *State v. Prater*, 52 W. Va. 132, 43 S. E. 230, holding that by relevant matter is meant not merely that which is relevant as affecting the credit of the witness alone but that which is material to the facts in issue.

21 AM. DEC. 62, STATE v. ROBERTS, 12 N. J. L. 114.

Duty and liability of sheriff as to levying execution.

Cited in *Steele v. Crabtree*, 40 Neb. 420, 58 N. W. 1022; *Elmore v. Hill*, 51 Wis. 365, 8 N. W. 240,—holding sheriff liable for loss caused by unexplained and unexcused delay in making levy.

Cited in reference notes in 72 A. S. R. 160, on liability for failure of sheriff to levy; 36 A. D. 705, on power and duty of sheriff after expiration of official term; 50 A. S. R. 889, on effect of change in sheriff's office on pending execution sales.

Cited in notes in 95 A. D. 433, as to what constitutes negligence in service of process; 95 A. D. 425, 426, on sheriff's duty as to service of process in absence of directions; 36 A. D. 706, on liability of sheriff for neglect to complete execution after expiration of term; 95 A. S. R. 98, on defenses available to sheriffs, constables, and marshals for failure to levy; 46 A. D. 512, on liability on official bond for sheriff's acts after expiration of term during which execution commenced.

Liability of sheriff's bondsmen for an escape.

Cited in *State v. Leeds*, 31 N. J. L. 185, holding suit on sheriff's official bond for an escape maintainable although sheriff's liability not fixed by judgment.

Completion of levy by ex-sheriff.

Cited in *Ayers v. Casey*, 72 N. J. L. 223, 61 Atl. 452, holding that a sheriff who has begun to execute a writ for the sale of mortgaged property is authorized to complete the execution of it notwithstanding the expiration of his term of office.

Duty to execute a writ unexecuted by predecessor.

Cited in *The Governor v. Robbins*, 7 Ala. 79, holding where a sheriff collects money on a fieri facias and renews his bond before it was demanded of him and he converts the same, the sureties on the latter bond are liable; *Faulkner v.*

State, 9 Ark. 14, holding sureties liable on a constable's bond for his failure to execute an execution delivered to him before he executes his bond; *Phillips v. Brazeal*, 14 Ala. 746, on duty of sheriff on his reappointment to execute an execution remaining in his hands when his term of office expired.

Pleading breach of bond.

Cited in reference note in 40 A. D. 314, on assigning breaches in action on bond.

Collection of delinquent taxes.

Distinguished in State, School Dist. No. 4, *Prosecutors, v. Lewis*, 35 N. J. L. 377, holding tax collector without authority to collect delinquent taxes due in preceding year.

21 AM. DEC. 66, MARSELLIS v. THALHIMER, 2 PAIGE, 35.

Capacity of an unborn child to inherit or take under will.

Cited in *Hone v. Van Schaick*, 3 Barb. Ch. 488; *Harper v. Archer*, 4 Smedes & M. 99, 43 A. D. 472,—holding an infant is *in esse* from the time of conception for the purpose to taking an estate for his benefit, provided the infant is born alive and after such a period foetal existence that its continuance in life might reasonably be expected; *Hawley v. James*, 5 Paige, 318, holding that a posthumous child if born alive is considered as in existence at death of parents for purpose of taking a vested interest for his own benefit; *Aubuchon v. Bender*, 44 Mo. 560, holding that an unborn child will take a vested or contingent remainder as though living when particular estate was determined; *Cooper v. Heatherton*, 65 App. Div. 561, 73 N. Y. Supp. 14, holding a child *en ventre sa mère* is a "life in being" within the statute against perpetuities; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. ed. 869, on rights of an unborn child in a remainder.

Cited in reference note in 33 A. D. 138, on right of posthumous child to inherit or take bequest.

Cited in note in 73 A. S. R. 415, on right of unborn child to take under gifts to "children."

Distinguished in *Evans v. Anderson*, 15 Ohio St. 324, holding under the statute that a subsequent birth of a child avoids a will.

When child *en ventre sa mère* is *in esse*.

Cited in notes in 43 A. D. 474, 475; 68 A. D. 586; 119 A. S. R. 947, 948,—as to when child *en ventre sa mère* is *in esse*.

Rights and liabilities of an unborn child.

Cited in *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Quinlen v. Welch*, 60 Hun, 584, 23 N. Y. Supp. 963,—holding that a child born after death of the father, has the right of action under a statute providing that every "child" who shall be injured in means of support by intoxication of father may sue; *Gillespie v. Nabors*, 59 Ala. 441, 31 A. R. 20, holding an unborn child is not an heir within the meaning of the statute authorizing a sale of land for partition.

Cited in note in 119 A. S. R. 955, on judicial proceedings by or against child *en ventre sa mère*.

Child *en ventre sa mère* not considered *in esse* for another's benefit.

Cited in *Bender v. Terwilliger*, 48 App. Div. 371, 63 N. Y. Supp. 269, holding that one claiming through a child is bound to prove that child was born alive; *Martin's Estate*, 3 Pa. Co. Ct. 212, holding that a child *en ventre sa mère*, and subsequently born dead does not have inheritable blood so as transmit property.

Cited in note in 119 A. S. R. 949, on not benefiting third persons by rule that child *en ventre sa mère* shall be considered person in being.

Requisites to tenancy by the curtesy.

Cited in notes in 7 L.R.A. 693, on tenancy by the curtesy of wife's estate; 15 A. D. 451, on requisites to tenancy by the curtesy; 112 A. S. R. 579, on what constitutes birth of live issue so as to entitle the father to curtesy.

Presumption as to living of prematurely born child.

Cited in reference note in 26 A. D. 600, on presumption as to capability of children born within six months after conception, living.

Rights of or through a prematurely born child.

Cited in *Dietrich v. Northampton*, 138 Mass. 14, 52 A. R. 242, holding that a child whose birth is caused prematurely but who lives only few minutes, is not a "person" for loss of whose life an action will lie; *Re Winne*, 1 Lans. 508, holding that where Cæsarean operation is performed the husband is not tenant by curtesy.

21 AM. DEC. 70, WARING v. CRANE, 2 PAIGE, 79.

Guardian ad litem as party of record.

Cited in *Clay v. Baker*, 41 Hun, 58, 1 N. Y. Civ. Proc. Rep. 1, holding guardian *ad litem* is party to record; *Bowen v. Idley*, 6 Paige, 46, holding where an infant elects to abandon a suit improperly brought the proper course is to dismiss at the cost of the next friend.

Liability for costs.

Cited in reference notes in 81 A. S. R. 24, on liability for costs; 33 A. D. 475, as to when costs are not allowed.

21 AM. DEC. 73, COVENHOVEN v. SHULER, 2 PAIGE, 122.

Misjoinder of parties.

Cited in *Bugbee v. Sargent*, 23 Me. 269, on remedy on misjoinder of parties.

Cited in note in 28 A. D. 424, on joinder of defendants in equity.

Interpretation of written instruments.

Cited in note in 14 E. R. C. 655, on interpretation of written instruments.

— Of wills generally.

Cited in note in 8 L.R.A. 740, on construction of wills.

— Intention of testator generally.

Cited in *Neville v. Dulaney*, 89 Va. 842, 17 S. E. 475; *Tuttle v. Heidermann*, 5 Redf. 199, holding that intention of testator ascertained from whole of will must govern if not inconsistent with rules of law; *Jones v. Jones*, 28 Misc. 421, 59 N. Y. Supp. 974; *Pinckney v. Pinckney*, 1 Bradf. 269,—holding that the whole of a provision of a will must be taken together; *Reid v. Hancock*, 10 Humph. 368, holding that court will carry testator's intention into effect, if incorrectly expressed, by supplying the proper words.

Cited in reference notes in 39 A. D. 582, on ascertainment of testator's intent in construing will; 27 A. D. 607; 45 A. D. 610; 57 A. D. 144,—on intention of testator governing in construction of wills; 32 A. D. 688, on construction of devises in accordance with testator's intention as shown by will; 29 A. D. 350, on seeking testator's intention from entire will; 29 A. D. 274, on seeking testator's intention by taking entire will together; 38 A. S. R. 287, on court's supply-

ing words to effectuate testator's intent; 45 A. D. 719, on admissibility of extrinsic evidence as to intention of testator.

Cited in notes in 3 L.R.A. 847, on rule that intention of testator governs construction of will; 11 L.R.A. (N.S.) 68, on intention of testator as to whether bequest of stocks, bonds, or notes is general or specific.

— Intention where words are capable of a twofold construction.

Cited in *Conover v. Hoffman*, 1 Bosw. 214, holding of will capable of a twofold construction, that construction should be adopted which is most consistent with the intention as ascertained from other provisions of the will.

Cited in reference note in 97 A. S. R. 746, on subsequent irreconcilable provision of will as evidence of subsequent intention.

— Construction of apparently inconsistent parts of a will.

Cited in *Parks v. Parks*, 9 Paige, 107; *Norris v. Beyea*, 13 N. Y. 273; *Theological Seminary v. Kellogg*, 16 N. Y. 83; *Van Nostrand v. Moore*, 52 N. Y. 12; *Bonard's Will*, 16 Abb. Pr. N. S. 128,—holding if two parts or provisions of a will are repugnant so that both cannot stand, the last will prevail unless other parts will forbid it; *Moore v. Moore*, 47 Barb. 257, on same point; *Cox v. Britt*, 22 Ark. 567; *Dickison v. Dickison*, 138 Ill. 541, 32 A. S. R. 163, 28 N. E. 792; *Chace v. Lamphere*, 51 Hun, 524, 4 N. Y. Supp. 288,—holding that foregoing rule is resorted to only when necessary to prevent failure of both provisions; *Smith v. Curry*, 52 Ill. App. 227; *Stevens v. Underhill*, 67 N. H. 68, 36 Atl. 370,—holding that general intent of testator is not to be defeated by an uncertain meaning contained in a single clause; *Roseboom v. Roseboom*, 81 N. Y. 356 (affirming 15 Hun, 315), holding that a will is to be construed if possible to avoid repugnancy; *Price v. Cole*, 83 Va. 343, 2 S. E. 200, to like effect; *Roundtree v. Talbot*, 89 Ill. 246; *Pue v. Pue*, 1 Md. Ch. 382; *Hoge's Estate*, 1 Brewst. (Pa.) 307; *Hooe v. Hooe*, 13 Gratt. 245,—holding same unless the separate provisions are totally irreconcilable and where real intention of testator cannot be ascertained; *Temple v. Sammis*, 16 Jones & S. 324, on construction of apparently conflicting clauses as to estate devised.

Cited in reference note in 27 A. D. 429, on revocation of earlier provision of will by later irreconcilable one.

Cited in note in 8 L.R.A. 745, on construction of will in case of repugnancy.

Distinguished in *Rona v. Meier*, 47 Iowa, 607, 29 A. R. 493, holding that if the first taker has power by the terms of the will to dispose of the property he must be the absolute owner and any limitation over is void for repugnancy.

— Grammatical sense.

Cited in *Cleland v. Waters*, 16 Ga. 496, holding that courts will disregard strict grammatical construction of a will if necessary to effectuate intention; *Jackson v. Hoover*, 26 Ind. 511, holding that the transposition of words, clauses, sentences, or paragraphs is admissible where such gives effect to intention of testator and renders will harmonious; *Kelly v. Kelly*, 5 Lans. 443; *Pickering v. Langdon*, 22 Me. 413,—holding that court may supply words where court is satisfied such was intention of testator; *Ex parte Hornby*, 2 Bradf. 420, holding that words of will may be transposed to effectuate intention; *Hankin's Estate*, 4 Watts & S. 300, holding that words may be transposed to make a limitation sensible; *Adamson v. Ayres*, 5 N. J. Eq. 349, construing word "dower" as being used as equivalent to "thirds"; *Chrystie v. Phyfe*, 19 N. Y. 344, holding of devise in case the testator's daughter "should die unmarried" and "without leaving lawful issue" that this was a double contingency that the daughter should die unmarried and childless.

Protection of interest of remainderman or residuary taker against tenant.

Cited in *Terry v. Allen*, 60 Conn. 530, 23 Atl. 150; *Langworthy v. Chadwick*, 13 Conn. 42,—holding that a court of equity may require security where intention of testator is likely to be defeated by conduct of devisee for life; *Re Fernbacher*, 3 How. Pr. N. S. 81, 4 Dem. 227, 8 N. Y. Civ. Proc. Rep. 308, 17 Abb. N. C. 339, holding that under ordinary circumstances one who has a simple life estate, in property given in remainder to another must give security; *Re Gillespie*, 18 Abb. N. C. 41, holding where widow wishes to have possession of the residuary estate, she must give security to protect the remainderman; *Riddle v. Kellum*, 8 Ga. 374, holding that in equity the legatee in remainder is entitled to have security required of life tenant, upon allegation and proof of waste or danger of waste; *Nance v. Cox*, 16 Ala. 125; *Overton v. Nashville*, 110 Tenn. 50, 72 S. W. 108; *Sutton v. Craddock*, 36 N. C. (1 Ired. Eq.) 134,—holding security is required only in case of danger shown; *Lewis v. Hudson*, 6 Ala. 463; *Emmons v. Cairns*, 2 Sandf. Ch. 369,—holding where there is no proof or danger of waste of property, the court will enforce life tenant to make an inventory of the specific property bequeathed; *Re Campbell*, 21 Misc. 133, 47 N. Y. Supp. 29; *Re Camp*, 126 N. Y. 377, 27 N. E. 799,—holding that a court of equity has power to order a life tenant of personal property, before its delivery to him to give security for its forthcoming or to provide for the investment of the fund and for payment of interest only to him during life; *Mason v. Pate*, 34 Ala. 379, holding that a life tenant of a certain amount of money should be given the option of taking money on execution of a bond or the taking interest on the amount annually; *Roberts v. Ogbourne*, 37 Ala. 174, on same point; *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, holding that proceedings for safety of fund is with remainderman and not with the executor; *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296, on protection of interest of remainderman; *Re McDougall*, 141 N. Y. 21, 35 N. E. 961, holding where bequest is of property the nature of which is such that in order to be physically enjoyed must be possessed, then the proper course is to exact an inventory; *De Peyster v. Clendining*, 8 Paige, 295, holding under a bequest to wife for life of use of certain stock and farming implements that she should give administrator an inventory of the articles.

Cited in reference notes in 86 A. D. 173, on rights of tenant for life and remainderman in personal property; 84 A. D. 173, on right of legatee in remainder to call on legatee for life for inventory; 84 A. D. 173, on necessity that legatee for life give security to legatee in remainder.

Cited in notes in 57 A. D. 588, on rights of life tenant in money and personal property; 14 A. S. R. 629, on mode of determining rights and remedies of reversioners and remaindermen.

—Bequest of chattels for a limited period.

Cited in *Re Smither*, 30 Hun, 532, holding bequest of chattels for limited period with remainder over that where there is no proof of danger that articles will be wasted or otherwise lost, the first taker need not give security.

—Bequest of residue for life with remainder over.

Cited in *Beck v. Montgomery*, 7 How. (Miss.) 39, holding that the tenant for life is a trustee for those in remainder; *Rachels v. Wimbish*, 31 Ga. 214; *Howard v. Howard*, 16 N. J. Eq. 486; *Healey v. Toppan*, 45 N. H. 243, 86 A. D. 159,—holding where a general bequest is made of a residue for life with remainder over, the property should be sold and converted into money and

interest thereof paid to legatee for life; *Rowe v. White*, 16 N. J. Eq. 411, 84 A. D. 169; *Ackerman v. Vreeland*, 14 N. J. Eq. 23,—holding same where personal property is not given specifically; *Brannock v. Stocker*, 76 Ind. 558, holding same where assets consists of money and notes; *Parker v. Moore*, 25 N. J. Eq. 228; *Hull v. Eddy*, 14 N. J. L. 169; *Cairns v. Chaubert*, 9 Paige, 160; *Smith v. Nosstrand*, 3 Hun, 450, 5 Thomp. & C. 664,—holding where a residuary gift is of things consumed in using, that the things must be sold and the interest of the produce paid to the legatee for life; *Marlett v. Marlett*, 14 Hun, 313, on same point; *Theological Seminary v. Cole*, 20 Barb. 321, holding same where the bequest was of the whole of the residue limited as to part upon a contingency to the use thereof for life with a valid gift over of that part upon the contingency and as to the rest absolute of the entire estate; *Spear v. Tinkham*, 2 Barb. Ch. 211, holding rule to be the same as to personal property not necessarily consumed in the using unless a contrary intention is shown; *Williamson v. Williamson*, 6 Paige, 298; *Clark v. Clark*, 8 Paige, 152, 35 A. D. 676; *Calkins v. Calkins*, 1 Redf. 337,—holding where a will bequests to the widow generally all the personal estate for life with remainder over, the whole must be converted into money and income paid over to the widow; *Rapalye v. Rapalye*, 27 Barb. 610, holding same where bequest embraced hay, grain, provisions, horses, cattle, and farming tools; *Re Dow*, 17 N. Y. S. R. 535, 2 N. Y. Supp. 176, sustaining a decree ordering the sale of personal property of testator and directing its investment for benefit of life tenant; *Livingston v. Murray*, 68 N. Y. 485, holding a devise of a life estate to daughter with remainder to lawful issue, gave daughter only right to income; *Re Housman*, 4 Dem. 404, holding where property which ought to be converted is held by executors, a tenant for life is not entitled to the annual produce, but to interest upon the estimated value of the unconverted property; *Re Shipman*, 53 Hun, 511, 6 N. Y. Supp. 276, 6 Abb. N. C. 101, holding that the duty of the executor as such continues until the life estate elapses; *Re Kendall*, 4 Dem. 133, on payment of interest on from residue property to a life beneficiary; *Bundy v. Bundy*, 38 N. Y. 410 (affirming 47 Barb. 135), on payment of income of a fund to holder of life interest.

Cited in reference notes in 35 A. D. 682, on right passing by bequest of residue for life or shorter period; 84 A. D. 174, on effect of general bequest of residue for life including articles consumed in using.

Distinguished in *Crane v. Van Duyne*, 9 N. J. Eq. 259; *Hill v. Hill*, 2 Lans. 43,—holding where there was a general bequest to the wife for life with a remainder over, that the property should not be sold and converted into money by the executor; where such would defeat the expressed intention of testator; *Re Woods*, 35 Hun, 60, holding under a will providing that all the residue of testator's personal estate should go to his wife "to be used and enjoyed by her during her term of natural life," that executors had no authority to retain and invest proceeds of such legacies; *Re Martens*, 16 Misc. 245, 39 N. Y. Supp. 189, 1 Gibbons Sur. Rep. 608, holding where unproductive and unimproved real estate is devised in trust with power of sale and reinvestment, but is held by trustee in exercise of a sound discretion for benefit of the remainderman, that the expense of the carrying it is charged to principal and not to income; *Re Garrity*, 108 Cal. 463, 38 Pac. 628, holding that the probate court is not authorized to direct a conversion of testator's property or to require the legatee for life to give security before receiving his legacy.

Disapproved in *Evans v. Iglehart*, 6 Gill & J. 171, holding that whether such

life tenant is to receive nothing more than interest on value of property is purely a question of intention and not a question of law.

Executor as trustee of funds under will.

Cited in *Edsall v. Waterbury*, 2 Redf. 48, holding under a gift to wife of the interest, to accrue on all testator's estate during life, and at her death to certain named beneficiaries, that the executor is trustee of the fund during life of wife.

Power of court to require indemnity against damages.

Cited in *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060, holding that the complainant before being granted an injunction should give a bond conditioned to pay damages.

21 AM. DEC. 81, SCRIBNER v. CRANE, 2 PAIGE, 147.

Requisite proof of a will.

Cited in *Lansing v. Russell*, 13 Barb. 510, holding proof of fact of signing not sufficient proof of a will.

Cited in notes in 40 A. D. 232, on proof of will by subscribing witnesses; 39 L.R.A. 716, on opinions of subscribing witnesses as to sanity or insanity; 77 A. S. R. 473, 478, on weight and effect of testimony of subscribing witness on probate of will.

Distinguished in *Cheatham v. Hatcher*, 30 Gratt. 56, 32 A. R. 650, holding that a will must be subscribed, but need not be proven by two attesting witnesses.

Legal effect of attestation.

Referred to as a leading case in *Stevens v. Leonard*, 154 Ind. 67, 77 A. S. R. 446, 56 N. E. 27, holding that a testamentary witness impliedly certifies that the testator is of sound mind and competent to make a will.

Cited in *Dickson's Estate*, 20 Pa. Co. Ct. 152, holding that the subscribing witness to a will in effect certifies to his knowledge of mental capacity of the testator; *Brinckerhoof v. Remsen*, 8 Paige, 488, holding that witnesses must clearly understand they are attesting will of testator; *McDaniel v. Crosby*, 19 Ark. 533, holding that attesting witnesses are to ascertain and judge capacity of testator; *Morris v. Kniffin*, 37 Barb. 336, holding presumption of duly executed will arises from being subscribed by testator, and from being declared, acknowledged, signed and attested in the presence of and at the request of the testator; *Farleigh v. Kelley*, 28 Mont. 421, 63 L.R.A. 319, 72 Pac. 756, holding where attesting witness is outside of jurisdiction, that proof of handwriting is evidence of all the facts recited in the attestation clause.

Attesting witnesses' required knowledge of facts.

Cited in *Burke v. Nolan*, 1 Dem. 436, holding that execution of wills shall be complied with in the presence of the attesting witnesses, that they may be able to testify on subject; *Burritt v. Silliman*, 16 Barb. 198, holding that witnesses must have sufficient opportunity to ascertain the real state of testator's mind.

Evidence to overthrow presumption raised by attestation of will.

Cited in *Townshend v. Townshend*, 9 Gill, 506, holding declarations of an attesting witness since dead are admissible to impeach presumption raised by his attesting signature.

Publication of will.

Cited in reference note in 30 A. D. 592, on publication of will.

Necessity of knowledge on part of testator.

Cited in *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650, holding a will executed by an unconscious testator is void; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314, holding that testator should understand what he is doing.

21 AM. DEC. 84, LYNDE v. BUDD, 2 PAIGE, 191.**Validity of infant's contracts.**

Cited in reference note in 34 A. D. 147, as to when infants' contracts are voidable.

Cited in note in 18 A. S. R. 587, on infant's purchase of realty.

What constitutes a ratification of an infant's contracts.

Cited in *Kitchen v. Lee*, 11 Paige, 107, 13 A. D. 101, 3 N. Y. Leg. Obs. 160; *Evans v. Morgan*, 69 Miss. 328, 12 So. 270,—holding that an infant cannot repudiate a contract and retain fruits of it in his possession; *Young v. McKee*, 13 Mich. 552; *Callis v. Day*, 38 Wis. 643; *Henry v. Root*, 33 N. Y. 526,—holding infant's entry upon real estate purchased by him and after becoming of age continuing in possession, exercising acts of ownership amounts to ratification; *American Freehold Land Mortg. Co. v. Dykes*, 111 Ala. 178, 56 A. S. R. 38, 18 So. 292; *Wood v. Gosling*, 1 N. Y. Leg. Obs. 74,—holding same ratified mortgage given for the purchase price;—*Uecker v. Koehn*, 21 Neb. 559, 50 A. R. 849, 32 N. W. 583, holding that an infant on reaching majority by conveying land confirms purchase money mortgage given therefor while an infant; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933, holding recital in a second mortgage executed after majority, recognizing mortgage executed before majority, as a present lien, to be a ratification of such first mortgage; *Aldrich v. Funk*, 48 Hun. 367, 1 N. Y. Supp. 541, holding it ratification of a sale by an infant where he brought an action to recover property nineteen years after coming of age without tendering money received from sale.

Cited in reference notes in 36 A. D. 298, on ratification of infant's contract; 23 A. D. 361, on ratification of infant's sale or purchase of land.

Cited in notes in 18 A. S. R. 718, on infant's ratification by sale or conveyance of property; 26 L.R.A. 179, on effect of parting with property after reaching majority to prevent disaffirmance of infant's contract.

Distinguished in *Walsh v. Powers*, 43 N. Y. 23, 3 A. R. 654, holding where an infant purchases property subject to a mortgage which he covenants to pay and before coming of age sells land for a larger price and retains such surplus after coming of age, that such is no ratification.

Avoidance of contract by infant.

Cited in *Gray v. Lessington*, 2 Bosw. 257, holding that infant cannot repudiate contract and at same time return proceeds; *Flynn v. Powers*, 54 Barb. 550, 35 How. Pr. 279, on avoidance of infants' contracts.

Cited in reference note in 35 A. D. 230, on right of infant to avoid contracts.

Cited in note in 18 A. S. R. 660, on disaffirmance by infant of part of transaction.

Distinguished in *Eagle Fire Co. v. Lent*, 1 Edw. Ch. 301, holding a release by an infant after coming of age, to a party in possession claiming under a prior deed executed by infant, not an avoidance of first deed.

Deed and purchase money mortgage as one contract.

Cited in *McDuffie v. Clark*, 17 N. Y. S. R. 356, 1 N. Y. Supp. 462; *Palmer v. Lawrence*, 5 N. Y. 456,—holding a deed and purchase money mortgage given at the same time are to be construed together as forming one instrument; *Coutant v.*

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Servoss, 3 Barb. 128, holding that a vendee of land cannot hold land and repudiate a purchase money mortgage; *Bradley v. Byran*, 43 N. J. Eq. 396, 13 Atl. 806, holding a purchase money mortgage is a prior lien to a judgment recovered against vendee prior to such purchase.

Cited in reference note in 23 A. D. 364, on construing together two contemporaneous writings between the same parties.

When lien does not attach.

Cited in note in 4 L.R.A. 607, on nonattachment of lien where seisin is transitory or instantaneous.

21 AM. DEC. 86, VANDERHEYDEN v. VANDERHEYDEN, 2 PAIGE, 287.

Right of an executor or guardian to employ an agent.

Cited in *Bohde v. Bruner*, 2 Redf. 333, holding where the assistance of an agent is necessary, the expense of such agent is a proper charge upon the estate; *Van Buren v. Chenango County Mut. Ins. Co.* 12 Barb. 671; *Cairns v. Chaubert*, 9 Paige, 160,—holding that an executor or guardian may employ an agent at the expense of the estate when necessary; *Lent v. Howard*, 89 N. Y. 169, holding that executors cannot employ one of their number as clerk and allow him a salary.

Cited in reference note in 27 A. D. 645, on personal nature of contracts made with executor and administrator.

Cited in note in 78 A. S. R. 204, on powers of executors as to employment of agents.

Distinguished in *Re Ingersoll*, 6 Dem. 184, holding compensation not allowable for the services of an agent where resident executor voluntarily removed from the state before completing his administration and employed an agent to perform duties; *Wilcox v. Smith*, 26 Barb. 316, holding that an executor or administrator is not entitled to charge the estate with counsel fees in making the final settlement of his account; *Re Smith*, 26 Abb. N. C. 56, 12 N. Y. Supp. 88, 33 N. Y. S. R. 929, 2 Connolly, 418, 19 N. Y. Civ. Proc. Rep. 302, holding that to justify counsel fees, it must appear that services beyond the ordinary preparation of the account or for trial were rendered and were necessary.

Compensation of trustees.

Cited in *Morgan v. Morgan*, 39 Barb. 20; *Collier v. Munn*, 41 N. Y. 143, 7 Abb. Pr. N. S. 193,—holding that compensation of a trustee is confined to his commissions under the statute; *Re Bank of Niagara*, 6 Paige, 213, holding receiver not entitled to extra counsel fees where he is not authorized to act in that capacity; *King v. Talbot*, 40 N. Y. 76, holding that trustees are entitled to the commissions provided by statute independent of discretion of court; *Re Livingston*, 9 Paige, 440, holding that the compensation allowed a trustee must be according to a fixed rate; *Booth v. Bradford*, 114 Iowa, 562, 87 N. W. 685, denying compensation to a trustee for permanent improvements and repairs not shown to have been necessary to preservation of the estate; *Re Kellogg*, 7 Paige, 265, holding that a trustee investing funds in his hands upon new securities from time to time, is not entitled to a commission for paying out money, but only on income from investment; *Ward v. Ford*, 4 Redf. 34, allowing commissions as executor and also as trustee where duties are clearly separate; *Drake v. Price*, 5 N. Y. 430 (affirming 7 Barb. 390), holding that executors hold funds in their character of executors and not as trustees and are entitled to commissions as such only.

Cited in note in 17 A. D. 271, on compensation of trustees.

Commissions to trustees on annual rests.

Cited in *Cook v. Lowry*, 29 Hun, 20, holding that the commissions of a trustee should be deducted at each annual rest; *Re Bank of Niagara*, 6 Paige, 213, holding where trustee under direction of court renders an account at annual rests for the purpose of charging him with interest on annual balances in his hands, the commissions may be computed on the aggregate amounts for the whole time of accounting.

Distinguished in *Hancox v. Meeker*, 95 N. Y. 528, holding where a settlement is made annually by the trustee, with the *cestus que trust* with the assent of the parties interested, the trustee may retain commissions on the annual income.

Modified in *Tucker v. McDermott*, 2 Redf. 312; *Cram v. Cram*, 2 Redf. 244,—holding that annual rests and full commissions thereon are allowed in all cases where an annual accounting before the surrogate is had under requirements of rule of court or a statute.

Compensation to an executor or guardian.

Cited in *Fisher v. Fisher*, 1 Bradf. 335, holding where executor himself has collected rents, he cannot be allowed any other compensation than those directed; *Re Popp*, 123 App. Div. 2, 107 N. Y. Supp. 277, holding executor not entitled to extra compensation for continuing testator's business and working therein.

Cited in reference notes in 64 A. D. 323, on compensation of executor or guardian; 60 A. D. 478, on commissions of executor or administrator.

Cited in notes in 5 L.R.A. 73, as to when executor's commissions chargeable; 29 L.R.A. 657, on effect of allowance of compound interest on compensation of executors, trustees, etc.

Rate of interest to be exacted of trustees.

Cited in *Morgan v. Morgan*, 4 Dem. 353, holding that rate of interest upon funds, which they have failed to invest within a reasonable time, depend on circumstances of each case.

Cited in note in 99 A. D. 298, as to when executor or administrator should be charged with interest.

21 AM. DEC. 89, LANSING v. SMITH, 4 WEND. 9.**Riparian rights in public streams.**

Cited in *Young v. Harrison*, 6 Ga. 130, holding owner of land on banks of river has not, as a matter of right, and merely because he is the owner, the privilege of keeping a public ferry; *Van Dolsen v. New York*, 21 Blatchf. 454, 17 Fed. 817, on right of city to fill into water and make new water front before landing place which belonged to private owners; *Morrill v. St. Anthony's Falls Water-Power Co.* 26 Minn. 222, 37 A. R. 399, 2 N. W. 842, on question of riparian rights in navigable waters being subordinate to those of state; *Gould v. Hudson River R. Co.* 6 N. Y. 559 (dissenting opinion), on right of railroad company to build along shore between high and low water mark and cut off communication between riparian owner and river.

Cited in reference notes in 34 A. D. 489, on law relating to navigable streams; 30 A. D. 286, on water course as a boundary.

Cited in notes in 40 L.R.A. 599, on right of owner of upland to access to navigable water; 40 L.R.A. 640, on right to erect wharf under grant or license.

Title to lands underneath water in navigable streams.

Cited in *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Post v. Kreischer*, 14 Abb. N. C. 38; *Crill v. Rome*, 47 How. Pr. 398; *Post v.*

Kreischer, 32 Hun. 49; *Furman v. New York*, 10 N. Y. 567; *Langdon v. New York*, 93 N. Y. 129; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; *Stevens v. Patterson & N. R. Co.* 34 N. J. L. 532, 3 A. R. 269,—holding state is absolute owner of the land in all navigable water within its territorial limits, and such can be granted to anyone, either public or private, without making compensation to owner of shore; *Turner v. People's Ferry Co.* 22 Blatchf. 272, 21 Fed. 90, holding riparian rights do not attach to grant of lands under tide water; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71; *Gough v. Bell*, 21 N. J. L. 156,—holding lands under navigable rivers, bays, and arms of the sea are part of the public domain and the legislature has a right to grant and alien them; *Rumsey v. New York & N. E. R. Co.* 63 Hun. 200, 17 N. Y. Supp. 672, holding people of state own soil under Hudson river below high-water mark, as far as tide ebbs and flows; *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 53 A. S. R. 277, 45 N. E. 830, holding state holds title to submerged lands in trust for people, *Hoelt v. Seaman*, 46 How. Pr. 24, 38 N. Y. S. R. 62, 6 Jones & S. 62, holding legislature may grant privileges in navigable streams if public use is not interfered with; *Sage v. New York*, 154 N. Y. 61, 61 A. S. R. 592, 38 L.R.A. 606, 47 N. E. 1096, holding as against the general public riparian owners have no right to prevent public improvements upon tide water; *People ex rel. Tracy v. Woodruff*, 54 App. Div. 1, 66 N. Y. Supp. 209, holding the commissioners of Land Office have absolute discretion to make or not make a grant of land under navigable waters of the state of New York; *Rumsey v. New York & N. E. R. Co.* 114 N. Y. 423, 15 L.R.A. 618, 21 N. E. 1066, on question of validity of grant by state of land under water; *Case v. Loftus*, 5 L.R.A. 684, 14 Sawy. 273, 39 Fed. 730, on right of United States or state to dispose of tide lands; *New York v. Hart*, 95 N. Y. 443, on right of riparian owner as against the public; *Rumsey v. New York & N. E. R. Co.* 22 N. Y. S. R. 820, 4 N. Y. Supp. 293, as showing that land under Hudson river belonged to state; *Stevens v. Rhinelanders*. 5 Robt. 285 (dissenting opinion), on right of adverse possession of land under water as against state; *Nott v. Thayer*, 2 Bosw. 10, on question of ownership of tideway separate from ownership of shore; *Re Staten Island Transit Co.* 103 N. Y. 251, 8 N. E. 548, on amenability of public riparian property to eminent domain.

Cited in reference note in 28 A. D. 281, on ownership of soil under navigable rivers.

Cited in notes in 42 L.R.A. 164, on title to grants of land under water; 23 A. D. 682, on ownership of soil under navigable rivers and arms of the sea.

— State as successor to King's prerogatives.

Cited in *Rockefeller v. Lamora*, 85 App. Div. 254, 83 N. Y. Supp. 289, holding state succeeded to all rights of both Crown and Parliament over navigable waters and soil under them.

Public rights in stream.

Cited in reference notes in 37 A. D. 58, 59, on public rights in navigable streams; 25 A. D. 42, as to right of public in navigable streams; 66 A. D. 165, on right of public to use of navigable stream; 38 A. D. 727, on right of public to fish in navigable waters; 54 A. D. 769, on public right of fishery in navigable waters; 100 A. D. 609, as to several and exclusive fishery in navigable waters; 42 A. D. 160, on common right of fishing in navigable stream; 7 A. S. R. 798, on fishing rights of public in uninclosed flats between high and low water mark at sea.

Powers of legislature generally.

Cited in reference notes in 47 A. D. 599, on power of legislature; 48 A. D. 269, on power of legislature as to enacting laws; 62 A. D. 638, on extent of legislative power of state legislatures.

State control over waters.

Cited in *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 28 A. S. R. 600, 15 L.R.A. 618, 30 N. E. 654, on question of power to state to grant private individual, the right to cut off of riparian owner entirely from communication with stream; *People v. State*, 32 Barb. 102, on question of government control of navigable waters; *Savannah v. State*, 4 Ga. 26, holding it competent for a state government to authorize the construction of wharves on navigable streams, within its territorial limits even below low-water mark.

Cited in reference notes in 44 A. D. 620, on power of state over navigable rivers; 37 A. D. 59, on legislative regulation of public rights in navigable streams; 42 A. D. 314, on legislative control over navigation on public rivers; 48 A. D. 348, on vesting in sovereign power of regulation of navigable waters in state; 85 A. D. 658, on right of state to regulate rights and privileges of fishing.

Cited in note in 81 A. D. 585, on state's power to regulate use of navigable streams.

Right to collect wharfage.

Cited in *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408, holding right to collect wharfage may exist as a franchise conferred by legislative grant; *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408, holding city cannot maintain injunction to prevent collection of wharfage by person who claims under original proprietor without showing that user of street abutting river is obstructed or that right to collect wharfage was dedicated to city with street or otherwise negating contention of the proprietors.

Cited in reference note in 56 A. D. 355, on taking of wharfage or toll as franchise.

Cited in note in 70 L.R.A. 195, on how far a franchise is basis of right to wharfage.

Exercise of public right as *damnum absque injuria*.

Cited in *State ex rel. Savannah v. Dews*, R. M. Charl. (Ga.) 397, holding law taking away from sheriff power to appoint jailer *damnum absque injuria*; *Newcomb v. Smith*, 2 Pinney (Wis.) 131, holding erection of works for public convenience though it may interfere with or injure private rights is within power of legislature and party aggrieved can only have such remedy as the statute prescribes; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 A. D. 357, holding an act done under lawful authority, if done in a proper manner will not subject the party doing it to an action for the consequences, whatever they may be; *Story v. New York Elev. R. Co.* 3 Abb. N. C. 478, holding abutting owner is not entitled to compensation of an authorized use of the street in front of his premises for an elevated railway; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 544, 42 Fed. 273, holding telephone company cannot maintain a bill for injunction against operation of electric railway to prevent damages incidentally sustained by escape of electricity from its rails; *Wager v. Troy Union R. Co.* 25 N. Y. 526, on question of liability of railroad for remote or consequential damage caused by operating road through certain street.

Cited in notes in 4 A. S. R. 404, on damage from overflowing land, diverting

stream, etc.; 1 L.R.A.(N.S.) 54, on effect of legislative authority to render private nuisance *damnum absque injuria*.

Recovery by person specially injured by public wrong or nuisance.

Cited in *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding that he can recover; *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Wylie v. Elwood*, 134 Ill. 281, 23 A. S. R. 673, 9 L.R.A. 726, 25 N. E. 570; *Smart v. Aroostook Lumber Co.* 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527; *Roessler & H. Chemical Co. v. Doyle*, 73 N. J. L. 521, 64 Atl. 156; *Hughes v. Auburn*, 21 App. Div. 311, 47 N. Y. Supp. 235; *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79; *Moshier v. Utica & S. R. Co.* 8 Barb. 427; *Gillespie v. Forrest*, 18 Hun, 110; *Kavanagh v. Barber*, 59 Hun, 60, 12 N. Y. Supp. 603; *Myers v. Malcolm*, 6 Hill, 292, 41 A. D. 744; *Francis v. Schoellkopf*, 53 N. Y. 152; *Adams v. Popham*, 76 N. Y. 410; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *New York Cement Co. v. Consolidated Rosendale Cement Co.* 178 N. Y. 167, 70 N. E. 451; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *Morris v. Graham*, 16 Wash. 343, 58 A. S. R. 33, 47 Pac. 752; *Kuhm v. Illinois C. R. Co.* 111 Ill. App. 323,—holding public nuisance confers right of action to an individual suffering special damage thereby; *Wylie v. Elwood*, 34 Ill. App. 244, holding owner of private residence may have action against parties who erect and operate a coal shed adjacent to his premises for his individual damage, although the acts of defendants may amount to a public nuisance; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Milhau v. Sharp*, 27 N. Y. 611, 84 A. D. 314,—holding party specially injured entitled to injunction to abate public nuisance; *Dougherty v. Bunting*, 1 Sandf. 1, holding individual cannot maintain a private action for a public nuisance unless the injury to him is direct or special or such as is not common to others affected by nuisance; *Charles H. Heer Dry-Goods Co. v. Citizens R. Co.* 41 Me. App. 63, holding private person has a right of action for the illegal obstruction of a public highway if he is damaged differently than the public at large, not merely in degree, but in kind; *Mills v. Hall*, 9 Wend. 315, 24 A. D. 160, holding continuance of nuisance for twenty years, no defense to action of part of public to abate it or by individual for special damages; *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313, holding it must be a very special case in which real estate can be injured by mere noise so as to sustain an action for the injury; *Fire Department v. Harrison*, 17 How. Pr. 273, 2 Hilt. 455, 9 Abb. Pr. 1; *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021,—on question of necessity of special injury to sustain private action for injury to public rights; *Abendroth v. Manhattan*, 122 N. Y. 1, 19 A. S. R. 461, 11 L.R.A. 634, 25 N. E. 496, on question of necessity of special damages to sustain action by private individual to abate a public nuisance; *McKeon v. See*, 4 Robt. 449, on question of indictment or joint action to abate a common nuisance.

Cited in reference notes in 26 A. D. 102, on remedies for public nuisances; 24 A. D. 161; 27 A. D. 258,—on private action for public nuisance; 23 A. D. 230, on private action for public nuisance by one suffering special injury; 49 A. D. 586, on right of private action by one specially injured by public nuisance; 4 L.R.A. 212, on necessity to recovery, of plaintiff's showing special injury from public nuisance.

Cited in notes in 1 A. D. 58; 31 A. D. 132, 134, 135,—on private action for public nuisance; 107 A. S. R. 205, on distinction between public and private nuisances; 1 E. R. C. 599, on right of action by individual against person causing public nuisance; 13 L.R.A. 322, on private action for particular injury from public nuisance; 4 L.R.A. 211, on right of private individual to redress for injury

from public nuisance; 1 L.R.A. 604, on remedy of riparian owner for obstructions in navigable waters; 7 L.R.A. 676, on private person's right of action for obstruction of navigable stream; 25 A. R. 534, on liability of person obstructing highway to private individual injured thereby.

What constitutes a public nuisance.

Cited in *Com. v. Cassidy*, 6 Phila. 82, 22 Phila. Leg. Int. 405, holding publication of an advertisement calculated to alarm the public mind unnecessarily is a public nuisance; *People v. New York*, 19 How. Pr. 289, on question of filling in of harbor beyond outer line by city being nuisance.

Damages for injury to lands by public authorities and corporations.

Cited in *People v. Kerr*, 37 Barb. 357; *Re New York C. & H. R. R. Co.* 15 Hun, 63; *Re New York, W. S. & B. R. Co.* 29 Hun, 646,—holding mere consequential damages do not confer right to compensation; *Coster v. Albany*, 43 N. Y. 399, as being a case where plaintiff obtained damages for only direct injury to lands; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278, on question of access to water by riparian owner being shut off by legislative authority without compensation; *Duyckinck v. New York Elev. R. Co.* 3 Silv. Ct. App. 317, 26 N. E. 278, on right of legislature to deprive abutting owners of streets in front of their premises or to convert them to inconsistent uses.

Construction of legislative grant.

Cited in reference notes in 32 A. S. R. 554, on construction of grants; 96 A. D. 411, on construction of grants in derogation of rights of public.

Cited in note in 2 E. R. C. 767, on construction of legislative grant.

Grant of franchises by government.

Cited in *Re Hamilton Avenue*, 14 Barb. 405, holding when public good calls for new grants, they should be made, although they may become rivals to pre-existing establishments under legislative authority.

Rights of abutting owners.

Cited in *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.* 11 Jones & S. 292, 3 Abb. N. C. 372, on question of their rights in street other than those enjoyed by public at large.

Distinguished in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 A. R. 146, holding property owner may maintain action to enjoin construction of elevated railroad in front of his premises.

Liability of commissioners of highways for damages for neglect to repair.

Cited in *Hutson v. New York*, 5 Sandf. 289 (dissenting opinion), on question of their liability.

Preference of debts due state.

Cited in reference note in 26 A. D. 575, on preference of debts due state in settlement of decedent's estates.

Cited in note in 29 L.R.A. 243, as to what priority of states in payment from assets of debtor is based on.

21 AM. DEC. 102, KING v. ROOT, 4 WEND. 113.

Libelous publications.

Cited in *Byrnes v. Mathews*, 12 N. Y. S. R. 74, 11 N. Y. Supp. 729, holding if words published tend to injure the character of plaintiff or to degrade him in public estimation, or to bring him into disrepute or ridicule, they are libelous; *Trimble v. Anderson*, 79 Ala. 514, holding published warning against trading

for two notes alleging that plaintiff had obtained them, without consideration, from a person at the time incapacitated for business is not libelous *per se*; Gaither v. Advertiser Co. 102 Ala. 458, 14 So. 788, holding publication libelous which tended to injure plaintiff in his business; Sheibley v. Ashton, 130 Iowa, 195, 106 N. W. 618, holding question of whether publication is libelous *per se* depends upon meaning to be given to the language as a whole.

Cited in reference note in 27 A. D. 273, on what is libelous publication.

Liability for libel.

Cited in reference note in 45 A. D. 218, on liability of proprietor of newspaper for libel.

Punitive damages.

Cited in Crane v. Bennett, 177 N. Y. 106, 101 A. S. R. 722, 69 N. E. 274, holding proprietor of newspaper who when apprised of the groundlessness of charges published by employee and who refuses to retract them, but republishes the libel, liable for primitive damages; Rawlins v. Vidvard, 34 Hun, 205; Voltz v. Blackmar, 64 N. Y. 440; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169,—as to when they are allowable; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485, on compensatory element in primitive damages.

Cited in notes in 101 A. S. R. 733, on nature of exemplary damages; 50 A. D. 768, on allowance of exemplary damages.

Legal meaning of malice.

Cited in Re Maples, 3 N. B. N. Rep. 539, 105 Fed. 919, on question of meaning of "malice;" Wrege v. Jones, 13 N. D. 267, 112 A. S. R. 679, 100 N. W. 705, 3 A. & E. Ann. Cas. 48, on question of distinction between legal and actual malice.

Cited in reference note in 91 A. D. 680, on malice in law as intentionally doing wrong without legal excuse.

Necessity of proving actual malice.

Cited in Hartman v. Morning Journal Asso. 46 N. Y. S. R. 181, 19 N. Y. Supp. 398; Ullrich v. New York Press Co. 23 Miss. 168, 50 N. Y. Supp. 788; Times Pub. Co. v. Carlisle, 36 C. C. A. 475, 94 Fed. 752, holding the unprivileged publication of matter that is false and libelous *per se* warrants the recovery of compensatory damages without allegation or proof of actual malice; Nicholson v. Merritt, 109 Ky. 369, 59 S. W. 25, holding where words spoken are actionable *per se* it is error to require the jury to believe that they were spoken "maliciously" in order to find for plaintiff; Hosmer v. Loveland, 19 Barb. 111, on question of law implying malice when libelous matter is false.

Cited in reference notes in 37 A. D. 36, on malice in libel; 35 A. D. 185, on implied malice where publication is false; 38 A. S. R. 606, as to when malice is inferred in libel; 66 A. D. 202; 76 A. D. 52,—on implication of malice where publication is false.

Cited in notes in 15 A. S. R. 338, on malice as an element of newspaper libel; 3 L.R.A.(N.S.) 697, on burden of proving actual malice in case of privileged communications; 72 A. D. 427, on implying malice in law or want of legal excuse, where words are actionable *per se* in slander or libel.

Justification of libel.

Cited in Collis v. Press Pub. Co. 68 App. Div. 38, 74 N. Y. Supp. 78, holding justification must be as broad as libel; Mix v. Woodward, 12 Conn. 262, holding to make out a justification of a libelous charge, the evidence must show that

the strict legal offense was committed and must be such as would be necessary to convict the plaintiff if he were on trial for that specific offense.

Cited in reference notes in 39 A. S. R. 864, on justification of libel; 18 A. S. R. 816, on belief in truth as justification in libel; 37 A. S. R. 78, on good faith as defense to or mitigation of libel.

Truth of libelous charge as a defense.

Cited in *Joannes v. Jennings*, 6 Thomp. & C. 138, holding in civil action for libel, truth of the alleged libel is complete bar to action; *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding if person publish defamatory matter, without any lawful occasion for making the publication, an indictment may be sustained, whether the allegations are true or false; *Castle v. Houston*, 19 Kan. 417, 27 A. R. 127, holding in criminal prosecutions for libel, the truth of the matter charged is not a full and complete defense unless it appears that the matters charged were published for public benefit.

Cited in reference notes in 31 A. D. 224, on truth as justification and in mitigation; 66 A. D. 486, on plea that libelous publication is true as complete defense if proved.

Cited in note in 9 E. R. C. 193, on admissibility in action for libel of proof of truth of criminal charge.

Privileged publications.

Cited in *Salisbury v. Union & Advertiser Co.* 45 Hun, 120, holding publication of an indictment and proceedings upon it privileged as a substantially fair account thereof.

Cited in notes in 31 A. D. 224, on privileged communications; 27 A. D. 158, on privileged communications; 2 A. D. 433, on statements before judicial bodies as privileged; 7 E. R. C. 731, on liability of counsel for defamatory words published in course of judicial proceeding.

— Comments on candidates or officers.

Cited in *Bronson v. Bruce*, 59 Mich. 467, 60 A. R. 307, 26 N. W. 671; *Eikhoff v. Gilbert*, 124 Mich. 353, 51 L.R.A. 451, 83 N. W. 110; *Hunt v. Bennett*, 4 E. D. Smith, 647; *Hamilton v. Eno*, 81 N. Y. 116 (affirming 16 Hun, 590); *Upton v. Hume*, 24 Or. 420, 41 A. S. R. 863, 21 L.R.A. 493, 33 Pac. 810; *Sweeney v. Baker*, 13 W. Va. 158, 31 A. R. 757; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216,—holding charges against a candidate for office not privileged; *Ullrich v. New York Press Co.* 23 Misc. 168, 50 N. Y. Supp. 788, holding same of one in official employment.

Cited in reference note in 37 A. D. 36, on libel by publications concerning public officials.

Cited in notes in 86 A. D. 88, as to what publications libelous to candidates are justifiable; 57 A. R. 226, on criticism of public officer as privileged; 104 A. S. R. 135, on application of doctrine of privilege to statements concerning candidates for political or official positions.

Measure of damages for libel or slander.

Cited in reference note in 47 A. S. R. 348, on damages recoverable in actions for libel.

Cited in notes in 72 A. D. 429, 430, on malice as element of damages in slander or libel; 15 A. S. R. 356, 357, on elements increasing or mitigating damages for newspaper libel; 72 A. D. 435, on illness caused by imputations of unchastity as element of damages in slander or libel.

Probable cause as a defense to libel or slander.

Cited in *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165; *Morse v. Times-Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867,—holding it will not justify the publication of matter which is libelous *per se*, but may be pleaded in mitigation; *Howard v. Thompson*, 21 Wend. 319, 34 A. D. 238, on question of probable cause as a defense or mitigating circumstance.

Common report as evidence in libel or slander.

Cited in *Dame v. Kenny*, 25 N. H. 318, holding it not evidence in action for slander even in mitigation of damages.

Liberty of the press.

Cited in *Bigney v. Van Benthuyssen*, 36 La. Ann. 38; *Fitzpatrick v. Daily States Pub. Co.* 48 La. Ann. 1116, 20 So. 173,—holding editor of newspaper is equally responsible with any other person who makes injurious communications; *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 99 A. S. R. 624, 76 S. W. 79; *State v. Bee Pub. Co.* 60 Neb. 282, 83 A. S. R. 531, 50 L.R.A. 195, 83 N. W. 204; *People ex rel. Atty. Gen. v. News-Times Pub. Co.* 35 Colo. 253, 84 Pac. 912,—on liability of proprietor of newspaper for libel.

Plaintiff's previous reputation as evidence in mitigation of damages.

Cited in *Maxwell v. Kennedy*, 50 Wis. 645, 7 N. W. 657, holding it may be considered in mitigation of primitive as well as compensatory damages; *Sayre v. Sayre*, 25 N. J. L. 235; *Hamer v. McFarlin*, 4 Denio, 509,—holding in action for slander, defendant entitled to give evidence of previous bad character of plaintiff in mitigation of damages; *Corning v. Dollmeyer*, 123 Ill. App. 188, holding in action for slander, it is competent to show the general bad reputation of plaintiff prior to the utterance of the slanderous words, but not particular acts of misconduct; *Bennett v. Matthews*, 64 Barb. 410, as to whether in an action for libel brought since the Code, testimony of general character of plaintiff can be received without being specially set up in the answer; *Ayres v. Covill*, 18 Barb. 260, on question of admissibility of plaintiff's previous character.

Cited in reference notes in 29 A. D. 266, on admissibility of character of plaintiff in action of slander; 24 A. D. 105, on evidence of plaintiff's character, rank, and condition; 71 A. D. 274; 47 A. S. R. 348,—on admissibility of evidence of plaintiff's general bad character in mitigation of damages for libel.

Meaning of word "character."

Cited in *Safford v. People*, 1 Park. Cr. Rep. 474, on character as meaning reputation or common report.

Proof of express malice to increase damages.

Cited in *True v. Plumley*, 36 Me. 466, holding repetition of slander after action is brought may be proven as showing express malice; *Klinck v. Colby*, 46 N. Y. 427, 7 A. R. 360, holding under Code allegations in justification although unsustained by the proof, are not evidence of malice to be considered by jury and taken as enhancing plaintiff's damages; *Fry v. Bennett*, 1 Abb. Pr. 289, 4 Duer, 247, holding in action for libel where actual malice has been proved, the jury are at liberty to give vindictive damages; *Viele v. Gray*, 10 Abb. Pr. 1, on question of effect of malice on damages.

Pleading of matter in justification and in mitigation of damages.

Cited in *Kinyon v. Palmer*, 18 Iowa, 377, holding under statute, defendant may plead both; *Fero v. Ruscoe*, 4 N. Y. 162, holding under plea of truth cannot prove that the communication was privileged or introduce evidence in mitigation of damages; *Follett v. Jewitt*, 11 N. Y. Leg. Obs. 193, on question of allowing

evidence in mitigation after plea of justification had failed; *Bush v. Prosser*, 13 Barb. 221, on admissibility of evidence in mitigation which tends to prove truth of words charged.

21 AM. DEC. 115, LEGG v. OVERBAGH, 4 WEND. 188.

Jurisdiction of appellate court after remittitur.

Cited in *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388, 22 So. 685; *Zorn v. Lamar*, 71 Ga. 85; *Knox v. State*, 113 Ga. 929, 39 S. E. 330; *Seaboard Air-Line R. Co. v. Jones*, 119 Ga. 907, 47 S. E. 320; *King v. Ruckman*, 22 N. J. Eq. 551; *Putnam v. Clark*, 35 N. J. Eq. 145; *Delaplaine v. Bergen*, 7 Hill, 591; *Underhill v. Jericho*, 66 Vt. 183, 28 Atl. 879; *Hopkins v. Gilman*, 23 Wis. 512; *Trowbridge v. Sickler*, 48 Wis. 424, 4 N. W. 563; *Ott v. Boring*, 131 Wis. 472, 111 N. W. 833, 11 A. & E. Ann. Cas. 857; *Rud v. Pope County*, 66 Minn. 358, 69 N. W. 886,—holding after the appellate court has rendered judgment and remitted it to the court below and the remittitur has been filed, the jurisdiction of the supreme court is devested; *Judson v. Gray*, 17 How. Pr. 289, holding after remittitur has issued from court of appeals under seal of that court and has been delivered to the prevailing party, with a view to have it remitted to court below, the latter court have jurisdiction of cause, although remittitur is not actually filed; *Hurd v. McClellan*, 13 Colo. 7, 21 Pac. 903, on question of loss of jurisdiction of supreme court upon filing remittitur; *Union India Rubber Co. v. Babcock*, 4 Duer, 620, 1 Abb. Pr. 262, on question of taxing costs in appellate court after record had gone down; *State v. Jacobs*, 11 Or. 314, 8 Pac. 332, on jurisdiction of appellate court after remittitur.

Cited in reference notes in 35 A. D. 675, on power of appellate court over its own judgments; 52 A. D. 141, on right of appellate court to grant rehearing; 23 A. D. 255, on power of appellate court after issuance of remittitur.

—Erroneous or irregular remittitur.

Cited in *Lovett v. State*, 29 Fla. 384, 16 L.R.A. 313, 11 So. 176, holding *contra* where record upon which court acted was incorrect; *Cushman v. Hadfield*, 15 Abb. Pr. N. S. 109, on question of appellate court losing jurisdiction when there is an irregularity in its order or in remitting proceedings to court below.

21 AM. DEC. 122, PEOPLE v. MATHER, 4 WEND. 229.

Mode of trying challenge of juror.

Cited in *O'Brien v. People*, 36 N. Y. 276, 3 Abb. Pr. N. S. 368, holding it competent for the court to act as triers upon challenge to favor, and the assent of parties thereto is to be presumed, where no objections are raised and there is no request to submit question to triers; *People v. Doe*, 1 Mich. 451, holding when juror is challenged for favor, and challenging party when asked by court how he will have the challenge tried refuses to indicate mode of trial, it may be tried by court.

Cited in reference notes in 24 A. D. 695; 47 A. D. 238,—on challenging juror.

—Evidence of favor.

Cited in *Stewart v. State*, 13 Ark. 720, holding statutory mode is upon oath of juror alone if by court by other evidence to exclusion of oath if by triers; *People v. Evans*, 72 Mich. 367, 40 N. W. 473, holding witnesses may be called to testify to any fact tending to show incompetency of juror.

Necessity of entering challenge on record.

Cited in *People v. Bodine*, 1 Denio, 281, on necessity of entering challenges to the polls on record.

Challenge to favor after challenge to cause.

Cited in *Carmal v. People*, 1 Park. Crim. Rep. 272, holding juror may be challenged to the favor after a challenge to same juror for principal cause has been tried and overruled and form of challenge to favor will be sufficient without specifically stating the grounds.

Reviewableness of challenge.

Cited in *Clark v. Van Vrancken*, 20 Barb. 278; *Hayes v. Thompson*, 15 Abb. Pr. N. S. 220,—on question of challenge to poll being in nature of pleading and the decision thereon being reviewed.

— Of challenge for favor.

Cited in *People v. Tweed*, 11 Hun, 195; *United States v. McHenry*, 6 Blatchf. 503, Fed. Cas. No 15,681,—holding it is not reviewable.

Disqualification of juror by formed opinion.

Cited in *People v. McCauley*, 1 Cal. 379, holding to exclude juror on ground of bias under Code, he must have formed or expressed an unqualified opinion or belief that prisoner is guilty of offense charged; *State v. Potter*, 18 Conn. 166; *State v. Barton*, 71 Mo. 288; *State v. Bryant*, 93 Mo. 273, 6 S. W. 102 (dissenting opinion); *Readington v. Dilley*, 24 N. J. L. 209; *People v. Bodine*, 1 E. Im. Sel. Cas. 36; *Lindsley v. People*, 6 Park. Crim. Rep. 233 (dissenting opinion); *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831,—on question of disqualification of juror for having formed an opinion.

Cited in reference notes in 76 A. D. 65, as to when juror is disqualified; 53 A. D. 101, on competency of jurors; 36 A. D. 516, on competency of juror having formed opinion; 37 A. D. 638, on juror's formation or expression of opinion as ground of challenge.

Cited in notes in 36 A. D. 522, on prior opinion disqualifying juror; 20 L. ed. U. S. 660, on causes of challenge of jurors and their qualifications; 9 A. S. R. 745, on actual or presumed bias.

— Basis of opinion.

Cited in *State v. Gillick*, 7 Iowa, 287, holding it is the preconceived opinion of a juror that renders him incompetent and not the source from which that opinion is formed or derived; *State v. Davis*, 14 Nev. 439, 33 A. R. 563, holding law does not look beyond opinion of juror to examine occasion or weigh the evidence on which the opinion is founded; *Rothschild v. State*, 7 Tex. App. 519, holding a disqualifying opinion may be formed from mere hearsay; *Curry v. State*, 4 Neb. 545, holding juror who formed an opinion based on general rumor and newspaper reports, incompetent; *Nelms v. State*, 13 Smedes & M. 500, 53 A. D. 94, holding juror who has formed or expressed an opinion from what he has heard one say some of the witnesses had told him, is disqualified, though he himself had not heard any of the witnesses say anything on the subject and though he stated that his opinions would not influence his verdict; *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1, 2 Cow. Crim. Rep. 479, holding one who has formed an opinion, from the reading or report of the testimony against a prisoner on a former trial, however strong his belief that he will decide the case on the evidence adduced, cannot be readily received as a juror indifferent to prisoner and wholly uncommitted.

Cited in notes in 36 A. D. 525, on nature of opinion disqualifying juror; 36 A. D. 523, on necessity of fixed opinion to disqualify juror; 36 A. D. 528, on opinion from hearing testimony, conversing with witnesses or those familiar with facts, as disqualifying juror.

Disapproved in *State v. Brown*, 4 La. Ann. 505, holding where opinion of juror is founded upon rumors and reports, such opinion does not disqualify him if his mind is free from prejudice.

— Positive or hypothetical opinion.

Cited in *Stout v. People*, 4 Park. Crim. Rep. 71, holding that opinion of juror must be absolute, unconditional, definite, and settled; *Freeman v. People*, 4 Denio, 9, 47 A. D. 216; *State v. Johnson*, Walk. (Miss.) 392,—holding if juror has formed a fixed opinion, he should be excluded; *State v. Kingsbury*, 58 Me. 238, holding to be a sufficient ground for disqualifying a juror in criminal prosecution, the opinion formed by him must be fixed and unconditional; *Mann v. Glover*, 14 N. J. L. 195, holding formation or expression of a mere hypothetical opinion no ground of challenge to juror; *Rogers v. Rogers*, 14 Wend. 131, on necessity that opinion be positive and not hypothetical; *Balbo v. People*, 80 N. Y. 484, holding under statute, if juror in criminal case, on being challenged for principal cause, discloses on his examination that he has a fixed and definite opinion on the merits and nothing else is shown, the court is bound as a matter of law to reject juror as incompetent; *Halsted v. Manhattan R. Co.* 26 Jones & S. 270, 11 N. Y. Supp. 44, holding juror who has made up his mind against a party to the action and whose opinion against the party is so strong that it would require evidence to remove it, is incompetent; *Smith v. Eames*, 4 Ill. 76, 36 A. D. 515, holding if juror has a decided opinion on the merits of the case, either from personal knowledge of the facts or from any other source and that opinion is positive and not hypothetical, a challenge should be allowed.

Cited in reference note in 24 A. D. 695, as to when hypothetical opinion does not disqualify juror.

Disapproved in *Morgan v. Stevenson*, 6 Ind. 169, holding where juror had formed opinion as to some of the matters in controversy but whose mind was free to decide the case according to the evidence, a challenge for cause would not lie.

Waiver of challenge.

Cited in *Greer v. State*, 14 Tex. App. 179, holding parties may waive challenge for cause and court cannot deprive them of this right of waiver.

When question is leading.

Cited in *Steer v. Little*, 44 N. H. 613; *Able v. Sparks*, 6 Tex. 349; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *Turney v. State*, 8 Smedes & M. 104, 47 A. D. 74,—holding question is leading when it suggests answer desired; *Page v. Parker*, 40 N. H. 47, holding question suggesting answer desired is leading whether put in alternative form or not; *Fleming v. Hollenback*, 7 Barb. 271, holding interrogatory in question leading; *Parsons v. Huff*, 38 Me. 137, as to when question is leading.

Cited in reference note in 56 A. S. R. 177, on leading questions.

Cited in note in 47 A. D. 82, on definition of "leading question."

— Affirmative or negative test.

Cited in *Coogler v. Rhodes*, 38 Fla. 240, 56 A. S. R. 170, 21 So. 109, holding a leading question is one that points out the desired answer and not merely one that calls for a simple affirmative or negative.

When leading questions allowed.

Cited in *People v. Genet*, 19 Hun, 91, holding on cross-examination, leading questions tending to elicit new matter are not allowed as a matter of right; *McPherson v. Rockwell*, 37 Wis. 159; *Weber v. Kingsland*, 8 Bosw. 415,—holding

it in the discretion of court to permit leading question when necessary; *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617, holding if it clearly appears that departure from general rule against leading questions was unwarranted and prejudicial, a new trial will be granted.

Cited in notes in 47 A. D. 83, on leading questions on direct examination: 47 A. D. 84; on leading questions to unwilling witness; 47 A. D. 85 on discretion of judge as to leading questions.

Cross-examination of own witness.

Cited in *Wells v. Jackson Iron Mfg. Co.* 48 N. H. 491, holding its allowance is within discretion of court; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575, as to when allowable.

Questions assuming facts in issue.

Cited in *Haish v. Munday*, 12 Ill. App. 539, holding in examination of witness, counsel are prohibited, even upon cross-examination, from assuming any material facts in issue and which are to be formed by the jury, or from assuming that particular answers have been given contrary to facts; *Fellows v. Northrup*, 39 N. Y. 117 (dissenting opinion), on admissibility of question which assumes a fact true which is not.

Re-examination of witness and additional evidence.

Cited in *Coker v. Hayes*, 16 Fla. 368, holding a party, after closing the examination of a witness, and after closing his testimony, has no absolute right to recall a witness before examined by him, to establish matters not in rebuttal, or to simply repeat his testimony; *Burr v. Daugherty*, 21 Ark. 559; *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Thomasson v. State*, 22 Ga. 499; *Dunkle v. Koecker*, 11 Barb. 387; *Hopkins v. Clark*, 20 Tex. 64; *Smith v. Childress*, 27 Ark. 328,—holding permission to recall a witness is within discretion of trial court and appellate court will not interfere unless its exercise has been clearly to prejudice of the party; *Taylor v. Com.* 77 Va. 692; *People v. Cook*, 8 N. Y. 67, 59 A. D. 451,—on same point; *Gayle v. Bishop*, 14 Ala. 552, holding it a matter within discretion of court and not reviewable; *Burroughs v. State*, 17 Fla. 643, holding court may permit, in its discretion, new witness to testify in criminal case after evidence is closed on both sides; *Godbe v. Young*, 1 Utah, 55, holding question whether plaintiff, after defendant has rested, may again introduce evidence in chief or shall be confined to rebutting evidence, is entirely in the discretion of the court; *Lee v. Hargrave*, 3 Mich. 77, holding it was in sound discretion of court whether he would receive additional evidence or not.

Cited in reference notes in 60 A. D. 63 on permitting re-examination of witness as exercise of discretion not reviewable on appeal; 85 A. D. 151, on re-examination of witness upon new matter within discretion of court; 30 A. S. R. 47, on recalling and re-examining witnesses.

Eliciting full disclosure on examination.

Cited in *Towns v. Alford*, 2 Ala. 378, holding examination of witness may be controlled by court so as to elicit full disclosure.

Privilege of witness.

Cited in *Wheeler v. Dixon*, 14 How. Pr. 151, holding witness is not bound to speak when the answer may subject him to a prosecution for a crime or misdemeanor or to any penalty or forfeiture or has a tendency to degrade his character; *People v. Larsen*, 10 Utah, 143, 37 Pac. 258; *State v. Shockley*, 29 Utah, 25, 110 A. S. R. 639, 80 Pac. 865,—holding privilege of refusing to answer incriminating questions is personal to witness and may be waived; *People v.*

Sharp, 45 Hun, 460, 5 N. Y. Crim. Rep. 388, 9 N. Y. S. R. 155, holding that as defendant appeared before legislative committee and voluntarily answered questions put to him, the answers given by him were admissible against him upon his trial upon the indictment.

Cited in notes in 21 A. D. 55, on privilege of witness; 13 L.R.A. 66, on effect of refusal to testify or to answer particular questions.

Self-incriminating evidence.

Cited in *Foot v. Buchanan*, 113 Fed. 156; *Printz v. Cheeney*, 11 Iowa, 469; *Emery's Case*, 107 Mass. 172, 9 A. R. 22; *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540; *Re Tappan*, 9 How. Pr. 394; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Minters v. People*, 139 Ill. 363, 29 N. E. 45,—holding witness is not bound to criminate himself or give testimony which may furnish a link in the chain of evidence of his amenability to a conviction; *Phoenix v. Dupuy*, 7 Daly, 238, 2 Abb. N. C. 146, 53 How. Pr. 158, holding under Code permitting examination of party before trial, defendant could not be examined as to whether he published an alleged libel against plaintiff; *Bellinger v. People*, 8 Wend. 595, holding witness was not bound to answer question as to what she had sworn to on examination before magistrate; *Burns v. Kempshall*, 24 Wend. 360, holding payee of note excused for testifying in action by assignee of same against the maker who had avowed that the defense would be usury which would subject payee to penalty or indictment for misdemeanor; *Henry v. Bank of Salina*, 5 Hill, 523 (dissenting opinion); *Re Moser*, 138 Mich. 302, 101 N. W. 588, 5 A. & E. Ann. Cas. 31 (dissenting opinion),—on question of self-incriminating evidence; *People v. Sharp*, 45 Hun, 460, 9 N. Y. S. R. 155, 5 N. Y. Crim. Rep. 388, holding constitutional protection against compelling a witness to testify against himself applied to hearing before legislative committee.

Cited in reference note in 49 A. D. 346, on privilege of witness to refuse to answer incriminating questions.

Cited in note in 75 A. S. R. 319, on privilege of witness as to incriminating testimony.

—As to crimes barred by limitation.

Cited in *Weldon v. Burch*, 12 Ill. 374; *Prussing v. Jackson*, 85 Ill. App. 324; *McCreery v. Ghormley*, 6 App. Div. 170, 39 N. Y. Supp. 1036; *Wolfe v. Goulard*, 15 Abb. Pr. 336; *Calhoun v. Thompson*, 56 Ala. 166, 28 A. R. 454,—holding witness not protected when criminal prosecution for imputed offense is barred by statute of limitations; *Moloney v. Dows*, 2 Hilt. 247, on question of witness being compelled to answer when criminal prosecution is barred by statute of limitations.

—Under statutes prohibiting use of testimony against witness.

Cited in *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, 24 How. Pr. 369 (affirming 12 Abb. Pr. 151, 21 How. Pr. 54), holding Constitution does not protect a witness in criminal proceeding from being compelled to give testimony which implicates him in a crime when he has been protected by statute against use of such testimony; *Ex parte Irvine*, 74 Fed. 954, holding provision in statutes forbidding the use of admissions of witnesses against them in Federal courts, does not neutralize or modify the right of privilege; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, holding same where a person is under examination before a grand jury in an investigation into certain violations of Interstate Commerce Act; *United States*

v. 3 Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515, holding if legislative protection against a witness's evidence being used against himself is as broad as the constitutional provision against compelling a person to criminate himself, he can be compelled to answer; *State v. Quarles*, 13 Ark. 307, holding provision of statute that testimony given by one person concerned in commission of crime shall in no instance be used against him in any criminal prosecution for same offense, is sufficient protection to compel him to testify; *Re Atty. Gen.* 21 Misc. 101, 47 N. Y. Supp. 20; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353,—holding protection given by statute must be coextensive with constitutional provision; *Steinhart v. Farrell*, 3 N. Y. S. R. 292; *Kendrick v. Com.* 78 Va. 490,—holding statute provided sufficient protection to witness to compel him to answer.

— **Inquiry as to criminating tendency.**

Cited in *State v. Duffy*, 15 Iowa, 425; *Youngs v. Youngs*, 5 Redf. 505; *Curtis v. Knox*, 2 Denio, 341; *Re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500; *Floyd v. State*, 7 Tex. 215; *Ex parte Park*, 37 Tex. Crim. Rep. 590, 66 A. S. R. 835, 40 S. W. 300; *Miskimmins v. Shaver* (*Ex parte Miskimins*) 8 Wyo. 392, 40 L.R.A. 831, 58 Pac. 411; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652,—holding court must determine from questions asked whether answer will have tendency to incriminate witness; *Temple v. Com.* 75 Va. 892, holding wherever party on oath declares that the answer to the question propounded to him will criminate himself, the court must accept that answer as true, and as making a *prima facie* case in which the witness must be excused; *State v. Thaden*, 43 Minn. 253. 45 N. W. 447, holding to entitle a person called as a witness to the privilege of silence, the court must see from all the circumstances of the case that there is reasonable ground to apprehend that the evidence may tend to criminate him if he is compelled to answer.

Cited in notes in 75 A. S. R. 341, on who determines tendency of answer to incriminate witness; 21 A. D. 56, 57, 58, on question for court as to tendency of question to criminate witness.

Nondisclosure of particular tendency to criminate.

Cited in *Friess v. New York C. & H. R. R. Co.* 67 Hun, 205, 22 N. Y. Supp. 104, holding refusal of trial court to compel a witness to specify the ground upon which he claims the privilege to decline to answer question on ground that it may tend to incriminate him, harmless error; *Warner v. Lucas*, 10 Ohio, 336, holding although witness is his own judge as to whether question might tend to criminate him, he is liable to an action by party injured if his refusal to testify be wilful and his excuse false; *Re Lewis*, 4 Ben. 67, Fed. Cas. No. 8,312. 39 How. Pr. 155, on compelling witness to state how his answer might criminate him.

Self-penalizing testimony.

Cited in *Anable v. Anable*, 24 How. Pr. 92, holding under statute, one cannot be compelled to be a witness in any case where he would be exposed to a penalty or forfeiture.

Self-degrading testimony.

Cited in *Re Lewis*, 39 How. Pr. 155, holding witness not compelled to answer question which would degrade him especially where such question did not relate to the matter in issue; *Donaldson v. State*, 10 Tex. App. 307, holding witness might be compelled to answer question tending to subject her to humiliation when it bore directly on the issue; *People v. Blakeley*, 4 Park. Crim. Rep. 176,

holding it competent on cross-examination to ask witness question which might degrade him; *Re Falvey*, 7 Wis. 630, holding witness not excused from answering question because answer might degrade him; *Boles v. State*, 46 Ala. 204, holding witness may be compelled to testify as to her ill fame in order to impeach her veracity; *State v. Bilansky*, 3 Minn. 246, Gil. 169, holding where question put to the witness has a tendency, not to criminate, but only to degrade or disgrace him, it rests under the sound discretion of the court to allow or disallow it; *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127, 88 A. D. 311, holding exclusion of inquiries irrelevant to issue made for purpose of degrading witness, not reviewable; *Lohman v. People*, 1 N. Y. 379, 49 A. D. 340; *State v. Staples*, 47 N. H. 113, 90 A. D. 565,—on question as to whether witness need answer question which would tend to disgrace or degrade.

Cited in reference note in 40 A. S. R. 791, on examination of witness on question tending to degrade.

Cited in notes in 75 A. S. R. 324, on privilege of witness as to testimony tending to disgrace him; 21 A. D. 59, 60, on privilege of witness where answer has direct tendency to degrade him.

Impeachment of witness.

Cited in *Gilbert v. Sheldon*, 13 Barb. 623; *Frye v. Bank of Illinois*, 11 Ill. 367,—holding it is only the general character of witness for truth and veracity, that should be inquired into upon an impeachment of his testimony; *Spira v. Holoschutz*, 38 Misc. 754, 78 N. Y. Supp. 1138, holding evidence of witness's general character for truth and veracity admissible to impeach his testimony; *People v. Rector*, 19 Wend. 569, holding general character of witness may be impeached in order to impeach his veracity; *People v. Yslas*, 27 Cal. 630, on question of allowing introduction of general bad character of witness to impeach veracity; *Bakeman v. Rose*, 18 Wend. 146 (dissenting opinion), on admissibility of evidence of general character of witness to impeach his veracity.

Cited in reference notes in 21 A. D. 361; 39 A. D. 530,—on impeachment of witness; 36 A. D. 765, on questions allowable on impeachment of witness; 73 A. D. 162, on form of interrogations to impeach witnesses; 34 A. D. 557, on admissibility of evidence of contradictory statements by witness without first interrogating witness in regard thereto.

—By proof of character.

Cited in reference notes in 82 A. S. R. 26, on impeachment of witness by proof of character; 50 A. D. 253, on right to ask impeaching witness on cross-examination from whom he heard of general character of impeached witness; 45 A. D. 230, on impeachment of witness by evidence of general bad character.

Cited in note in 73 A. D. 771, on laying foundation for proof of character of witness for veracity.

—Impeachment of one's own witness.

Cited in note in 15 A. D. 100, as to when and how one may impeach his own witnesses.

Cross-examination and rebuttal of impeaching witness.

Cited in *State v. Parker*, 7 La. Ann. 83; *People v. Abbot*, 19 Wend. 192; *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430; *Com. v. McClain*, 4 Clark (Pa.) 462; *Ward v. State*, 28 Ala. 53,—holding in impeaching a witness, the inquiry is not limited to his general character for truth but the impeaching witness may be asked as to his general character; *Phillips v. Kingfield*, 19 Mc. 375, 36 A. D. 760, holding witness who is introduced to prove that another witness is truthful, may be asked as to his general character; *Am. Dec. Vol. III.*—63.

ness is unworthy of credit, should be examined as to the general character of such witness for truth and veracity; *Holbert v. State*, 9 Tex. App. 219, 35 A. R. 738, holding an impeaching witness is amenable to cross-examination and the reputation and credibility of the assailed witness may be vindicated by independent proof; *Weeks v. Hull*, 19 Conn. 376, 50 A. D. 249, holding impeaching witness may be required to give source of his information; *Wood v. State*, 31 Fla. 221, 12 So. 539, holding the usual practice is to leave it to the cross-examination to enter primarily upon a test of the knowledge from which the impeaching witness has spoken; *Gaines v. Relf*, 12 How. 472, 13 L. ed. 1071, as to usual method employed in impeaching credibility; *State v. Meadows*, 18 W. Va. 658, on range of cross-examination of impeaching witness.

Cited in note in 73 A. D. 774, on cross-examination of impeaching witness.

— **Inquiry as to willingness to believe sworn testimony.**

Cited in *Hamilton v. People*, 29 Mich. 173, holding where a sustaining witness testifies to the good repute of an impeached witness, he may be asked on cross-examination whether he would believe the latter under oath; *State v. Johnson*, 40 Kan. 266, 19 Pac. 749; *Eason v. Chapman*, 21 Ill. 33,—holding where it is shown that the general character of a witness, among his neighbors, for truthfulness, is bad, it is error to refuse to let the impeaching witness answer whether he would believe such witness upon oath.

Cited in note in 73 A. D. 772, on right to ask impeaching witness whether from his knowledge of general reputation of other witness he would believe him under oath.

— **Collateral inquiries.**

Cited in *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660; *Hofacre v. Monticello*, 128 Iowa, 239, 103 N. W. 488,—holding where a witness testifies to the immoral character of a party and on cross-examination states that a certain person made a specific charge of immorality, such person will not be permitted to deny that he made the charge as the whole matter is collateral and his evidence cannot be used for impeachment purposes; *Hagadorn v. Kearney*, 13 Hun, 236, holding when rebutting testimony to evidence given by impeaching witness introduces collateral issues, it will not be admitted.

Venue in criminal case.

Cited in reference notes in 41 A. D. 305, on venue; 58 A. D. 681, on indictment and venue in case of homicide; 30 A. S. R. 134, on necessity of laying venue for allegations in indictment; 58 A. D. 628, on necessity that venue be laid in county wherein offense was committed; 35 A. D. 248, on necessity of laying venue in indictment in county in which offense was committed; 32 A. S. R. 841, on jurisdiction of criminal offense as dependent on place where committed.

Cited in notes in 3 A. S. R. 482, on propriety of venue in indictment for conspiracy; 8 E. R. C. 147, on venue in criminal actions.

Jurisdiction of conspiracy formed and carried into different places.

Cited in *Pearce v. Territory*, 11 Okla. 438, 68 Pac. 504; *Com. v. Corlies*, 8 Phila. 450, 26 Phila. Leg. Int. 397, 27 Phila. Leg. Int. 397; *Com. v. Bartilson*, 85 Pac. 482; *People v. Summerfield*, 48 Misc. 242, 96 N. Y. Supp. 502, 19 N. Y. Crim. Rep. 503,—holding it indictable in any county where overt act is committed; *Fire Ins. Cos. v. State*, 75 Miss. 24, 22 So. 99, holding it indictable either in county of unlawful confederation or in that wherein any overt act pursuant thereto transpired; *Arnold v. Weil*, 157 Fed. 429, holding where conspiracy to defraud the United States of public lands was originally formed in

one Federal district, but was carried out in another district, with knowledge and consent of all the conspirators, each of such overt acts constituted a renewal of the conspiracy in latter district, and offense may be prosecuted in either district; *Ex parte Rogers*, 10 Tex. App. 655, 38 A. R. 654, holding where conspiracy to fabricate title to lands in Texas was entered into in Texas and most of overt acts were there, Texas had jurisdiction, although actual fabrication took place outside the state; *Noyes v. State*, 41 N. J. L. 418, holding when conspiracy occurs in a foreign jurisdiction and one of the conspirators comes in person into another state and there in pursuance of the conspiracy takes possession of certain property and the innocent agents of another of such conspirators are present assisting, the courts of the latter state have jurisdiction; *People v. Rathbun*, 21 Wend. 509, on question as to where conspiracy is triable; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760, as to whether indictment will lie within jurisdiction where overt act was committed when conspiracy was perfected in another.

Elements of conspiracy.

Cited in *Com. v. Bartilson*, 85 Pa. 482, 5 W. N. C. 177, 35 Phila. Leg. Int. 91; *State v. Bacon*, 27 R. I. 252, 61 Atl. 653; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *People v. Richards*, 1 Mich. 216, 51 A. D. 75,—holding it consists in the unlawful agreement and not in the acts to be accomplished; *United States v. Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165, holding express or implied agreement between parties to commit illegal act constitutes conspiracy; *Patmode v. Westenhaber*, 114 Wis. 460, 90 N. W. 467, holding it enough if there is a tacit concurrence in mental intent to effect the common purpose; *Com. v. Kurtz*, 14 Pa. Dist. R. 741, holding offense is complete the moment the combination is formed; *United States v. Stevens*, 44 Fed. 132, holding one may be indicted for conspiracy to commit crime which he is incapable of committing; *People v. Rathbun*, 44 Misc. 88, 89 N. Y. Supp. 746, on question of unlawful combination being gist of crime of conspiracy; *State v. Bishop*, 131 N. C. 733, 42 S. E. 836 (dissenting opinion), in question of necessity of conspiring being proved if parties concur in doing act.

Cited in reference note in 40 A. D. 531, as to what constitutes conspiracy.

Cited in notes in 51 A. D. 82, on nature of conspiracy; 3 A. S. R. 480, on possibility of conspiracy between persons not previously acquainted with one another.

New parties as principals in conspiracy.

Cited in *Wolfe v. Pugh*, 101 Ind. 293; *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349; *People v. Bassford*, 3 N. Y. Crim. Rep. 219; *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 1 A. M. 77 Vt. 294, 107 A. S. R. 765, 60 Atl. 74; *Spies v. People*, 122 Ill. 1, 3 A. S. R. 320, 12 N. E. 865,—holding every person entering into a conspiracy already formed is deemed in law a party to all acts done by any of the parties before or afterwards, in furtherance of the common design; *Kellogg v. Sowerby*, 32 Misc. 327, 66 N. Y. Supp. 542, as to when one is guilty of a conspiracy; *Warshauer v. Webb*, 9 N. Y. S. R. 529; *United States v. Standard Oil Co.* 152 Fed. 290,—holding one who aids in conspiracy is as much liable as those who first formed plans of conspiracy.

Cited in note in 3 A. S. R. 477, on new party to previously formed conspiracy as fellow conspirator.

Acquittal as preventing retrial or review.

Cited in *State v. Carter*, 5 La. Ann. 438, holding a party who has been tried and acquitted cannot be tried again for same offense; *United States v. Salter*,

Burnett (Wis.) 119, 1 Pinney (Wis.) 278, holding where accused has been tried upon an indictment or information and acquitted, a writ of error will not lie at instance of prosecution to reverse the judgment; *Com. v. Steimling*, 156 Pa. 400, 33 W. N. C. 67, 27 Atl. 297, on question as to whether a new trial can be ordered where a defendant has been acquitted upon an indictment charging a felony.

Grounds for reversal or new trial.

Cited in reference note in 69 A. S. R. 375, on new trial in criminal case.

Cited in notes in 27 A. D. 475, on sufficiency of error to set aside acquittal; 99 A. D. 130, on erroneous instructions as ground for reversal or new trial.

Merger of conspiracy into purposed crime.

Cited in *Anthony v. Com.* 88 Va. 847, 14 S. E. 834, holding conspiracy to commit felony merged in the felony when committed; *People v. Richards*, 1 Mich. 216, 51 A. D. 75, holding conspiracy to commit felony when executed is merged in the felony; but conspiracy to commit misdemeanor does not merge; *Graff v. People*, 208 Ill. 312, 70 N. E. 299 (affirming 108 Ill. App. 168), holding rule of merger in conspiracy does not apply where the conspiracy charged and the completed offense are both misdemeanors or both felonies; *Com. v. McGowan*, 2 Pars. Sel. Eq. Cas. 341; *Com. v. Delany*, 1 Grants, Cas. 224; *State v. Murphy*, 6 Ala. 765, 41 A. D. 79,—holding they are not merged when conspiracy and act done are misdemeanors of same grade; *People v. McKane*, 7 Misc. 478, 31 Abb. N. C. 176, 9 N. Y. Crim. Rep. 140, 28 N. Y. Supp. 397, holding conspiracy to commit a felony, being a misdemeanor, merged in the felony when committed; *Scott v. People*, 62 Barb. 62 (dissenting opinion); *People v. Willis*, 24 Misc. 537, 54 N. Y. Supp. 129, 13 N. Y. Crim. Rep. 346,—on same point; *Rose v. State*, 33 Ind. 167, on question of merger of crimes; *State v. Setter*, 57 Conn. 461, 14 A. S. R. 121, 18 Atl. 782, holding conspiracy to commit theft is not merged in the theft when actually committed and may be punished as a distinct offense; *Fitzgerald v. State*, 14 Mo. 413, on question of merger of crime of conspiracy to cheat with crime of cheating; *State v. Noyes*, 25 Vt. 415, holding offense of conspiracy to impede an officer in discharge of his official duty will not merge in the offense of impeding an officer; *People v. Rathbun*, 44 Misc. 88, 89 N. Y. Supp. 746, 18 N. Y. Crim. Rep. 454, holding under statute, where in order to constitute conspiracy some act must be done to constitute conspiracy, the conspiracy is not merged in the executed crime.

Cited in notes in 3 A. S. R. 491, on merger of conspiracy with the crime to commit which the conspiracy was formed; 5 A. S. R. 901, on merger of crimes of equal degree; 5 A. S. R. 900, on merger of conspiracy in felony.

—Averments of names of co-conspirators.

Cited in *People v. Richards*, 67 Cal. 412, 56 A. R. 716, 7 Pac. 828, holding in a prosecution for conspiracy, one conspirator may be separately informed against, tried and convicted, and naming the co-conspirator does not render the information bad; *United States v. Miller*, 3 Hughes, 553, Fed. Cas. No. 15,774, holding if an indictment upon § 5440 of Revised statutes of United States charges conspiracy by two or more persons but is an indictment of only one, it is good on demurrer; *State v. Gardner*, 84 N. C. 732, on question of one man being indicted for conspiracy together with others unknown; *Cohen v. United States*, 85 C. C. A. 113, 157 Fed. 651, on effect of failure to prosecute all of the conspirators.

Sufficiency of indictment.

Cited in reference note in 34 A. D. 121, on what caption of indictment should show.

Cited in note in 3 A. S. R. 481, on general averments in indictment for conspiracy.

Admissibility against co-conspirators of acts of conspirator.

Cited in *Matthews v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123, holding proof of acts of each conspirator admissible against all the parties to the conspiracy.

Conspiracy as crime.

Cited in *Scott v. Eldridge* 154 Mass. 25, 12 L.R.A. 379, 27 N. E. 677, holding conspiracy to commit an abortion not a felony at common law.

Cited in reference notes in 41 A. D. 84, on indictable acts of conspiracy; 27 A. D. 376, on what acts of conspiracy are indictable.

When statute of limitations begins to run against prosecution for conspiracy.

Cited in *United States v. Bradford*, 148 Fed. 413, holding that because an overt act is necessary under statutes of United States, the statute does not begin to run against prosecution until commission of such overt act; *Ware v. United States*, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, holding where conspiracy has been formed and an overt act has been done in execution of it more than three years before filing of an indictment, a prosecution for that conspiracy and overt act is barred; *Perot's Appeal*, 35 Phila. Leg. Int. 91, 85 Pa. 482, holding overt acts committed in pursuance of conspiracy do not extend time within which prosecution for conspiracy must be instituted; *Lorenz v. United States*, 24 App. D. C. 337; *United States v. Greene*, 115 Fed. 343,—holding when conspiracy is continuous in operation and overt acts have been committed thereunder within period of statute, the prosecution is not barred; *United States v. Greene*, 14 N. Y. Crim. Rep. 499, 100 Fed. 941, as to when statute begins to run against prosecution for conspiracy.

Principal and accessory.

Cited in *Carlisle v. State*, 31 Tex. Crim. Rep. 537, 21 S. W. 358, on question of difference between principal and accessory.

—Necessity of first trying principal.

Cited in *Powers v. Com.* 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735 (dissenting opinion), as to the necessity thereof; *People v. O'Connell*, 60 Hun, 109, 14 N. Y. Supp. 485; *Pierson v. People*, 79 N. Y. 424, 35 A. R. 524 (affirming 18 Hun, 239),—on question of accessory waiving necessity of principal being tried first by going to trial.

21 AM. DEC. 155, THALLHIMER v. BRINCKERHOFF, 4 WEND. 394.**Admissions by agent against principal.**

Cited in *Campbell v. Hastings*, 29 Ark. 512; *Converse v. Blumrich*, 14 Mich. 108, 90 A. D. 230; *Coyle v. Baltimore & O. R. Co.* 11 W. Va. 94,—holding admission, not a part of *res gestæ*, inadmissible; *Byers v. Fowler*, 14 Ark. 86, holding same of prior or subsequent declarations or acts; *Truesdell v. Chumar*, 75 Hun, 416, 27 N. Y. Supp. 87, holding same of admission of president, of corporation; *Bowen v. National Bank*, 11 Hun, 226, holding same of declarations of cashier several months after a deposit; *Franklin Bank v. Steward*, 37 Me. 519, holding same of declaration by cashier to surety after pay day; *Decker v. Sexton*, 19 Misc.

59, 43 N. Y. Supp. 167, holding admissions of either general or special agent at subsequent time, inadmissible; *Haven v. Brown*, 7 Me. 421, 22 A. D. 208, holding same of declarations of general agent to stranger as to closed contract; *Woods v. Clark*, 24 Pick. 35, holding declarations pending and as a part of negotiations for sale, competent; *Butterfield v. Blanchard*, 2 Code Rep. 31, holding *contra* as to declarations after completion of sale; *White v. Miller*, 71 N. Y. 118, 27 A. R. 13; *Horner v. Fellows*, 1 Dougl. (Mich.) 515,—holding same of later admission of defect in article sold; *Latham v. Pledger*, 11 Tex. 439, holding declarations, not made at time of purchase of goods, inadmissible; *Stewart v. Wells*, 6 Barb. 79, holding declarations of deputy within scope of authority and while process is in course of execution, binding on sheriff; *Koltz v. Butler*, 56 Miss. 333, on admissibility of acts or admissions forming a part of *res gestæ*; *Stone v. Poland*, 58 Hun, 21, 11 N. Y. Supp. 498 (dissenting opinion), on inadmissibility of declarations of highway commissioner on day after accident as to notice of defect; *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421, 19 A. R. 517 (dissenting opinion), on competency of acts or declarations done pending, in pursuance, and within apparent scope of agency.

Cited in reference notes in 23 A. D. 522; 13 A. S. R. 22,—on admissions of agent as evidence against principal; 41 A. D. 487, on admissibility against principal of declarations of agent; 95 A. D. 73, on admissibility of agent's declarations as part of *res gestæ*; 39 A. D. 656, on declarations after transaction to which agency extends as evidence against principal.

Cited in note in 53 A. D. 775, on necessity that agent's declarations be part of *res gestæ* to bind principal.

—By agents or servants of carriers.

Cited in *Strong v. Union Transfer & S. Co.* 11 Misc. 430, 32 N. Y. Supp. 124, holding admission as to delivery of trunk nine months after time in question, inadmissible; *Baltimore & O. R. Co. v. Christie*, 5 W. Va. 325, holding same of admissions of clerk after loss of trunk with which he was not connected; *Luby v. Hudson River R. Co.* 17 N. Y. 131, holding same of declarations of horse-car driver after accident; *Moore v. Chicago, St. L. & N. O. R. Co.* 59 Miss. 243, holding admission of conductor, subsequent to occurrence, that he kicked passenger from train, not binding on company; *Michigan C. R. Co. v. Gougar*, 55 Ill. 503; *Chicago B. & Q. R. Co. v. Lee*, 60 Ill. 501; *Wheeler v. New York & H. R. Co.* 24 Barb. 414,—holding declarations of engineer after injury, inadmissible; *Innis v. The Senator*, 1 Cal. 459, 54 A. D. 305, inadmissibility of declarations of master of ship after accident.

Acts of agent chargeable against principal.

Cited in *Mount Morris Electric Light Co. v. United States Horse & C. Show Soc.* 9 Misc. 180, 29 N. Y. Supp. 584, holding *ex parte* verification of claim in insolvency proceeding in one state inadmissible as admission by agent in action on contract in another; *Runk v. Ten Eyck*, 24 N. J. L. 756, holding act of surveyor after employment ceased and outside of it, not binding; *Nowack v. Metropolitan Street R. Co.* 54 App. Div. 302, 66 N. Y. Supp. 533, holding proof that subordinate agent of corporation attempted to suborn a witness incompetent without proof of his authority; *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 A. S. R. 839, 27 N. E. 942, holding prejudicial certificate by guardian of infant beneficiary, not required by policy, not binding.

21 AM. DEC. 158, GAY v. BALLOU, 4 WEND. 403.**Rights and duties of stepfather.**

Cited in *Brush v. Blanchard*, 18 Ill. 46, denying liability to child for its services where the relation of parent and child existed; *Williams v. Hutchinson*, 5 Barb. 122, holding same in absence of an express promise; *McCormick Estate*, 18 Phila. 60, 43 Phila. Leg. Int. 140, 1 Pa. Co. Ct. 517, sustaining right to compensation for maintenance, where such was the understanding; *Whitehead v. St. Louis*, 1 M. & S. R. Co. 22 Mo. App. 60, holding right to services coextensive with expenses incurred in the maintenance of the child; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 A. D. 338, holding seduction of stepchild, not actionable by father; *McGoon v. Irvin*, 1 Pinney (Wis.) 526, 44 A. D. 409, holding natural father who was entitled to custody of children liable for support by stepfather without objection.

Cited in reference note in 57 A. D. 593, on liability for stepchild's support.

Cited in notes in 53 A. D. 306, on rights and liabilities of stepfathers; 53 A. D. 346, on stepparents' right to compensation for support, etc., of stepchildren. — Of father.

Cited in reference note in 44 A. D. 715, on father's liability for maintenance of child.

Liability of infant for necessities.

Cited in *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761, holding liability not dependent on express promise of payment; *Murphy v. Holmes*, 87 App. Div. 366, 84 N. Y. Supp. 806, denying liability where necessities were furnished under contract with parent or guardian; *Crafts v. Carr*, 24 R. I. 397, 96 A. S. R. 721, 60 L.R.A. 128, 53 Atl. 275, holding implied promise will sustain liability for necessary legal services.

Cited in reference note in 24 A. D. 359, on infant's liability for necessities.

Cited in notes in 18 A. S. R. 646, on infant's implied contracts for necessities; 5 L.R.A. 176, on liability of infant for necessities supplied.

Cited as overruled in *Sharp v. Cropsey*, 11 Barb. 224, denying liability of child for its maintenance in absence of express promise, where relation of parent and child existed.

What are necessities.

Cited in reference note in 40 A. D. 625, as to what are necessities.

Necessity of ratification of infant's contract.

Cited in *Wilcox v. Roath*, 12 Conn. 550; *Benham v. Bishop*, 9 Conn. 330, 23 A. D. 358,—holding express promise after reaching majority necessary to ratify a note; *Millard v. Hewlett*, 19 Wend. 301, holding same as to an usurious loan by an infant.

Sufficiency of ratification of voidable contract.

Cited in *Bank of Silver Creek v. Browning*, 16 Abb. Pr. 272, holding explicit acknowledgment of debt after reaching majority insufficient unless evidence shows new promise; *Fetrow v. Wiseman*, 40 Ind. 148, holding express promise after reaching majority with notice of nonliability, necessary to ratify contract of suretyship; *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. 791, holding acts and declaration with notice after reaching majority may furnish evidence of ratification of a debt.

Distinguished in *Bronson v. Wiman*, 10 Barb. 406, holding fraudulent contract affirmable by an adult without an express promise.

Admissions during infancy.

Cited in *Ackerman v. Runyon*, 1 Hilt. 169, 3 Abb. Pr. 111, holding admissions as to money received competent on question as to sum loaned.

Rights of infants.

Cited in *Turner v. Esselman*, 15 Ala. 690, construing an insolvency act as withholding from discharge, debts or obligations for benefit of infants.

21 AM. DEC. 161, SHELDON v. SKINNER, 4 WEND. 525.**Duty to tender payments due in specific articles.**

Cited in *Counsel v. Ulture Min. Co.* 5 Daly, 74, holding demand unnecessary before suit for wages payable in gold "bullion."

Distinguished in *Moore v. Hudson River R. Co.* 12 Barb. 156, holding undertaking to pay contractors in depreciated stocks, not an agreement to pay in specific property so as to require tender.

Tender of chattels.

Cited in *Lamb v. Lathrop*, 13 Wend. 95, 27 A. D. 174, holding plea that specific articles due on a certain day were tendered, need not aver continued readiness to deliver.

Cited in reference notes in 27 A. D. 178, as to when tender of personalty is valid; 26 A. D. 546, on time and place of tender of specific articles.

Cited in notes in 77 A. D. 481, on tender of goods, chattels, etc.; 77 A. D. 479, on place of tender.

Effect of tender on original obligation.

Cited in *Mitchell v. Roberts*, 5 McCrary, 425, 17 Fed. 776, holding it does not discharge a debt payable in money, though otherwise if payable in specific chattels; *Games v. Manning*, 2 G. Greene, 251, holding it discharges debt payable in specific articles and passes right of property to the creditor.

Cited in reference note in 26 A. D. 546, on effect of tender.

Cited in notes in 77 A. D. 489, on effect of tender and refusal of chattels; 77 A. D. 488, on effect of tender as payment and discharge.

Effect of rejected tender to create bailment.

Cited in *Smith v. Sherwood*, 2 Tex. 460, holding bailment created by refusal of offer to deliver corn due under contract; *Des Arts v. Leggett*, 16 N. Y. 582, holding tender of third person's note pursuant to contract makes the tenderer a bailee for the other party; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 A. D. 569, on creation of bailment by tender and refusal of payment, due in chattels.

Creation of cotenancy.

Cited in *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. Supp. 565, on cotenancy between owner and occupant of farm on shares.

Cited in reference notes in 67 A. S. R. 659, as to when cotenancy exists; 52 A. D. 180, on tenancy in common in hogs.

Severance of cotenancy in chattels.

Cited in *Benedict v. Howard*, 31 Barb. 569, holding tenancy in common in mill and machinery therein destroyed by removal of everything except frame to another town; *Leonard v. Scarborough*, 2 Ga. 73, holding it not destroyed by sale on execution of one's interest.

Liability of cotenants to each other.

Cited in *Herrin v. Eaton*, 13 Me. 193, 29 A. D. 499, holding one cotenant, receiving chattel as carrier, liable for negligence or carelessness resulting in its de-

struction; *Fobes v. Shattuck*, 22 Barb. 568, holding one cotenant, harvesting and dividing ripe crop without consent of other, not suable in conversion.

Cited in reference notes in 24 A. D. 36; 52 A. D. 77,—on trover against cotenant; 24 A. D. 164, as to when tenant in common may maintain trover against cotenant; 27 A. D. 574, on destruction of common chattel by cotenant as conversion.

Cited in notes in 29 A. D. 484, on trespass by one cotenant against another; 12 L.R.A. 262, on liability of tenant in common in action of trover on destruction of the property; 5 E. R. C. 631, on liability of part owner navigating vessel to his co-owners.

Distinguished in *Williams v. Hays*, 143 N. Y. 442, 42 A. S. R. 743, 26 L.R.A. 153, 38 N. E. 449, holding co-owner in exclusive possession and control of vessel pursuant to contract, liable for negligence resulting in loss.

21 AM. DEC. 166, PACKARD v. GETMAN, 4 WEND. 613.

Conversion by refusal or failure to deliver.

Cited in *Sager v. Blain*, 44 N. Y. 445, holding proof of conversion or refusal to deliver essential in trover; *Bolling v. Kirby*, 90 Ala. 215, 24 A. S. R. 789, 7 So. 914, holding positive, tortious act and not mere nonfeasance or neglect of legal duty, essential to conversion; *Wamsley v. Atlas S. S. Co.* 37 App. Div. 553, 56 N. Y. Supp. 284, holding refusal to deliver on rightful demand is conversion of goods in possession.

Cited in note in 24 A. S. R. 808, on negligence or nonfeasance as supporting charge of conversion.

—Loss of bailed chattels as conversion.

Cited in *Simmons v. Sikes*, 24 N. C. (1red. L.) 98, holding bailee not liable in trover unless he was an agent in destruction or wrongful conversion; *Alabama & T. Rivers R. Co. v. Kidd*, 35 Ala. 209, holding warehouseman not liable in trover for loss or theft of goods, though otherwise in case of a delivery by mistake; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 A. R. 334, holding railroad, carrying mail as a bailee for hire, not liable in trover for loss or theft of letter by negligence; *Dearbourn v. Union Nat. Bank*, 58 Me. 273, holding bank not liable in trover for loss or theft of bonds on deposit; *Sternberg v. Schein*, 63 App. Div. 417, 71 N. Y. Supp. 511, holding conversion not maintainable for article sold on instalment plan and stolen before default and refusal to deliver; *McMorris v. Simpson*, 21 Wend. 610, on inability to maintain trover for omission of agent resulting in loss of property; *Ferrera v. Parke*, 19 Or. 141, 23 Pac. 883 (dissenting opinion), on nonliability of a bailee in trover for loss or theft; *Croze v. St. Mary's Canal Mineral Land Co.* 143 Mich. 514, 114 A. S. R. 677, 107 N. W. 92, holding mortgagee not liable in conversion for unreasonable delay or negligence in sale of property.

—Loss by innkeepers and carriers.

Cited in *Wamsley v. Atlas S. S. Co.* 168 N. Y. 533, 85 A. S. R. 699, 61 N. E. 896, holding carrier not liable as a general rule in conversion for mere nonfeasance, though it may amount to negligence; *Hallenbake v. Fish*, 8 Wend. 517, 24 A. D. 88, holding innkeeper not liable in trover without proof of actual conversion; *Needles v. Howard*, 1 E. D. Smith, 54, on whether an innkeeper is liable in trover or replevin for loss of a guest's goods; *People ex rel. Burroughs v. Willett*, 26 Barb. 78, holding innkeeper's customary liability for loss of baggage sounds in tort.

Cited in notes in 85 A. S. R. 704; 2 L.R.A. 80,—on conversion by carrier; 24 A. S. R. 815, 816, as to when carrier is guilty of conversion.

Liability of carrier.

Cited in *Scovill v. Griffith*, 12 N. Y. 509, holding omission to deliver within reasonable time does not necessarily create liability for value of property.

Liability of bailee for delivery to wrong person.

Cited in *Esmay v. Fanning*, 5 How. Pr. 228, 9 Barb. 176, holding bailee, delivering carriage to an unauthorized person, liable in trover; *Morris v. Third Ave. R. Co.* 1 Daly, 202, 23 How. Pr. 45, holding street railway exercising ordinary care not liable for delivery to wrong person of article found in one of its cars.

Cited in notes in 37 L.R.A. 178, on delivery to impostor by carrier; 24 A. D. 157, on liability of warehouseman for delivery of goods to third person by mistake or negligence.

21 AM. DEC. 168, CALKING v. BALDWIN, 4 WEND. 667.

Necessity of payment before appropriation for public use.

Cited in *Smith v. Helmer*, 7 Barb. 416, holding it unnecessary in act allowing appropriation for highways provided provision is made for compensation.

Cited in reference note in 34 A. D. 194, on compensation for damages occasioned by act authorized by private statute.

Cited in note in 42 L. ed. U. S. 272, on compensation for laying out highway.

Distinguished in *Dusenbury v. Mutual U. Teleg. Co.* 64 How. Pr. 206, 11 Abb. N. C. 440, holding it necessary under act authorizing telegraph company to stretch wire over lands and highways.

Remedies to enforce rights created by statute.

Cited in *Lowry v. Inman*, 37 How. Pr. 153, 6 Abb. Pr. N. S. 394, holding that if statute created a shareholder's liability, it must be enforced in manner prescribed.

Cited in reference note in 54 A. D. 607, on effect upon common-law remedy, of statute giving special remedy.

Cited in notes in 15 A. D. 464; 48 A. D. 73,—on cumulative remedies.

— Statutory remedy as exclusive.

Cited in *Heiser v. New York*, 29 Hun, 446; *Johnston v. Louisville*, 11 Bush, 527,—holding the providing of an adequate remedy in a statute creating a new right impliedly excludes all others; *Rheinstrom v. Green*, 7 Legal Gaz. 254, 4 Luzerne Leg. Reg. 219, holding remedies cumulative where statute giving remedy does not expressly exclude common-law remedy; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 A. D. 177, holding partial statutory remedy for authorized acts not exclusive of common-law action as to residue; *Davidson v. New York*, 27 How. Pr. 342, 2 Robt. 230, holding remedy provided in statute creating liability on city for destruction of property by rioters, exclusive; *Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239, holding statutory right of debtor to discharge from arrest in civil action enforceable only in the prescribed manner; *Tallant v. Burlington Gas-light Co.* 38 Iowa, 262, holding statutory remedy on bond for wrongful suing out of attachment exclusive in absence of proof of malice; *Camden v. Allen*, 26 N. J. L. 398, holding debt not maintainable for taxes under statute providing another remedy; *State v. Bittinger*, 55 Mo. 596, holding statute providing for creation of fund for asylum and a remedy both civil and criminal for its abuse, bars an indictment for embezzlement.

Cited in reference notes in 28 A. D. 527, on cumulative nature of statutes affirmative of common law; 63 A. D. 113, on exclusive nature of statutory remedy for impairment of statutory right.

Cited in note in 1 E. R. C. 685, on statutory remedy as superseding common-law remedy.

Distinguished in *Smith v. Albany*, 7 Lans. 14, holding defense of invalidity permissible under statute prohibiting contracts between city and alderman and providing for avoidance at instance of city.

• — **Exclusiveness of statutory proceedings in eminent domain.**

Cited in *Fuller v. Edings*, 11 Rich. L. 239, holding remedy afforded by statute authorizing the taking of land for a public wharf, exclusive; *Moffitt v. Medsker Draining Asso.* 48 Ind. 107, holding same of remedy by statute allowing appropriation of land for a drainage system; *Heiser v. New York*, 104 N. Y. 68, 9 N. E. 866, holding same of remedy afforded by statute allowing city to change grade of street; *Smith v. Tripp*, 14 R. I. 112, holding same of remedy afforded by statute allowing appropriation of land for waterworks in absence of express agreement; *Brown v. Beatty*, 34 Miss. 227; *Henniker v. Contoocook Valley R. Co.* 29 N. H. 146; *Sams v. Port Royal & A. R. Co.* 15 L. C. 484; *Mason v. Kennebec & P. R. Co.* 31 Me. 215,—holding statutory remedy to recover damages for building railroad on land, exclusive; *Baker v. Hannibal & St. J. R. Co.* 36 Mo. 543, holding same of statutory remedy to recover damages for taking of materials from land by railroad; *Kimble v. White Water Valley Canal Co.* 1 Ind. 285, *Smith (Ind.)* 93, holding same of remedy afforded by statute allowing appropriation of land for purposes of canal; *Farnham v. Delaware & H. Canal Co.* 61 Pa. 265, holding same upon enlargement of canal as well as at first taking; *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634, on exclusiveness of remedy provided in charter, though lands were taken without plaintiff's consent; *Baldwin v. Calkins*, 10 Wend. 167, on exclusiveness of remedy offered by public statute allowing erection of dam and overflow of lands.

Cited in notes in 5 L.R.A. 183, on exclusiveness of statutory remedy of owner for land taken for public use; 53 A. D. 215, as to whether injured party is confined to statutory remedy for damages for taking of his property.

Distinguished in *Denslow v. New Haven & N. Co.* 16 Conn. 98, holding remedy afforded by statute authorizing obstruction of private river, not exclusive; *Daniels v. Chicago & N. W. R. Co.* 35 Iowa, 129, 14 A. R. 490, holding statutory remedy for assessment of damages not exclusive of ejectment if property is taken without tender of compensation.

Acts done under public license.

Cited in *Harris v. Thompson*, 9 Barb. 350, on validity of acts, otherwise a nuisance, when done under legislative license.

Cited in note in 59 L.R.A. 829, on legislative authority to dam back water of stream for improvement of navigation.

Common-law remedy for recovery of value of property taken for public use.

Cited in *Sinnickson v. Johnson*, 17 N. J. L. 129, 34 A. D. 184, holding action for damages maintainable for overflow of land under statute authorizing erection of dam and failing to provide remedy; *Hooker v. New Haven & N. Co.* 15 Conn. 312, holding appropriation actionable in trespass in absence of remedy afforded by charter; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335, holding failure to make compensation under act allowing interference with private property allows

redress by damages or injunction; *Moore v. Ewbanks*, 66 S. C. 374, 44 S. E. 971, holding claim and delivery maintainable for liquor seized under dispensary law failing to provide a remedy.

—Effect of failure to follow statutory procedure.

Cited in *Seeley v. Amsterdam*, 54 Ap. Div. 9, 66 N. Y. Supp. 221 (modifying 31 Misc. 123, 64 N. Y. Supp. 1036), holding exclusive statutory method inapplicable where water commissioners took property in disregard of the statute; *Hays v. Texas & P. R. Co.* 62 Tex. 397, holding statutory remedy for assessment of damages does not prevent trespass to try title where railroad failed to follow provisions of statute.

21 AM. DEC. 172, *STARBUCK v. MURRAY*, 5 WEND. 148.

Faith and credit given to judgments of other states.

Cited in *Rape v. Heaton*, 9 Wis. 328, 76 A. D. 269; *Wood v. Watkinson*, 17 Conn. 500, 44 A. D. 562,—refusing to recognize such a judgment where record showed lack of personal jurisdiction; *Kittredge v. Emerson*, 15 N. H. 227, holding judgment binding though erroneous if jurisdiction existed; *Re Bruyn*, 17 Misc. 481, 41 N. Y. Supp. 414, holding divorce decree against nonresident upon appearance, not subject to collateral attack; *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104, holding divorce decree based on personal service of husband outside state where rendered, not binding; *Holcomb v. Phelps*, 16 Conn. 127, holding decree appointing administrator binding everywhere provided court had jurisdiction; *National Exch. Bank v. Wiley*, 3 Neb. (Unof.) 716, 92 N. W. 582, holding it permissible to contradict record and show lack of a “day in court;” *Bimeler v. Dawson*, 5 Ill. 536, 39 A. D. 430, holding it permissible to show fraud or lack of jurisdiction, either of person or subject-matter, the judgment being *in personam*; *Welch v. Sykes*, 8 Ill. 197, 44 A. D. 689, holding it permissible to admit the existence of record and plead fraud or lack of jurisdiction either of person or subject-matter, the judgment being *in personam*.

Cited in reference notes in 35 A. D. 155, on full faith and credit due judgments of sister states; 48 A. D. 589, on judgments of sister state; 11 A. R. 439, on conclusiveness of foreign judgment.

Cited in notes in 15 A. D. 378, on conclusiveness of judgment of other state; 2 A. D. 44; 25 A. D. 322; 44 A. D. 343; 26 A. R. 28, 30,—on effect given to judgments of other states.

—In action on judgment.

Cited in *Shumway v. Stillman*, 6 Wend. 447, holding it equally as conclusive as in state where rendered if record recites due service or appearance and is not proved false; *Pelton v. Platner*, 13 Ohio, 209, 42 A. D. 197, holding such judgments whether in *rem* or in *personam* have same effect as where rendered; *Westerwelt v. Lewis*, 2 McLean, 511, Fed. Cas. No. 17,446, holding record of such a judgment, when duly authenticated, imports absolute verity to same extent as in state where rendered; *Haggerty v. Amory*, 7 Allen, 458, holding discharge in bankruptcy available as a defense in state rendering judgment may also be pleaded in suit on judgment in another state.

—As to jurisdictional facts.

Cited in *Long v. Long*, 1 Hill, 597; *Thompson v. Whitman*, 31 Phila. Leg. Int. 157, 6 Legal Gaz. 177; *Rathbone v. Terry*, 1 R. I. 73; *Gleason v. Dodd*, 4 Met. 333,—holding it permissible to show lack of jurisdiction of person; *Pritchett v. Jehu*, 3 Harr. (Del.) 517; *Moulin v. Trenton Mut. Life & F. Ins. Co.* 24 N. J. L.

222,—holding it permissible to show lack of service or nonappearance; *Vischer v. Vischer*, 12 Barb. 640, holding want of personal jurisdiction in divorce decree may be shown; *Brown v. Nichols*, 9 Abb. Pr. N. S. 1, on right to prove nonservice of process or that appearance by attorney was unauthorized; *Eaton v. Pennywit*, 25 Ark. 144; *Prichard v. Sigafus*, 103 App. Div. 535, 93 N. Y. Supp. 152,—holding it permissible to show that appearance by attorney was unauthorized; *Harshy v. Blackmarr*, 20 Iowa, 161, 89 A. D. 520, on right to contradict authority of attorney who entered an appearance; *Dobson v. Pearce*, 1 Duer, 142, 10 N. Y. Leg. Obs. 170 (dissenting opinion), on inability to prove that judgment was fraudulent; *Litchfield's Appeal*, 28 Conn. 127, 73 A. D. 662, holding it permissible for administrator of judgment debtor to show lack of jurisdiction by reason of insanity of his intestate; *Weller Mfg. Co. v. Eaton*, 81 Mo. App. 657, holding it permissible to show death of party before the judgment was rendered; *Davis v. Headley*, 22 N. J. Eq. 115, holding it permissible to show that judgment in suit related to lands outside jurisdiction where rendered.

Cited in reference notes in 41 A. S. R. 879, on right to inquire into jurisdiction of sister state to render judgment; 36 A. D. 334, on attack on judgment for want of jurisdiction; 65 A. D. 704, on right to attack foreign judgments by inquiring into jurisdiction of court and its power over parties and things in controversy.

Cited in notes in 7 A. R. 136, on foreign judgment where jurisdiction was obtained by fraud; 75 A. D. 149, as to whether foreign judgment on unauthorized appearance by attorney is void, voidable, or conclusive; 21 L.R.A. 857, 858, 859, on effect of judgment of foreign country or sister state obtained on unauthorized appearance by attorney.

Distinguished in *Kinnier v. Kinnier*, 45 N. Y. 535, 6 A. R. 132, holding divorce decree not impeachable for lack of bona fide residence in action to annul subsequent marriage; *Hentz v. Ward*, 1 Cin. Sup. Rep. 387, holding return of sheriff to summons not subject to collateral attack; *Cox v. Boyce*, 152 Mo. 576, 75 A. S. R. 483, 54 S. W. 467, holding appointment of guardian cannot be collaterally attacked for nonresidence of minor unless it is shown on face of the record; *Doe ex dem. Haine v. Smith*, *Smith* (Ind.) 381, holding judgments of domestic courts of record with jurisdiction of subject-matter not impeachable collaterally for lack of personal jurisdiction.

— Contradiction of recitals of jurisdiction.

Cited in *Greenzweig v. Strelinger*, 103 Cal. 278, 37 Pac. 398; *Pollard v. Baldwin*, 22 Iowa, 328,—holding it permissible to contradict recital as to service of defendant; *Pritchett v. Clark*, 3 Harr. (Del.) 241, holding it permissible to contradict recitals as to jurisdiction of parties or subject-matter; *Bowler v. Huston*, 30 Gratt. 266, 32 A. R. 673; *Kahn v. Lesser*, 28 Abb. N. C. 77; *Wilson v. Bank of Mount Pleasant*, 6 Leigh, 570; *Norwood v. Cobb*, 24 Tex. 551,—holding same as to recitals as to service and appearance by attorney; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897, holding same of recitals as to jurisdiction in proceeding *in rem*; *Re James*, 99 Cal. 374, 37 A. S. R. 60, 33 Pac. 1122; *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 A. R. 209; *Jones v. Jones*, 108 N. Y. 415, 2 A. S. R. 447, 15 N. E. 707,—holding same of recitals as to jurisdiction in divorce decree; *Re Culp*, 2 Cal. App. 70, 83 Pac. 89, holding same of recital of due service in divorce decree; *Kerr v. Kerr*, 41 N. Y. 272; *Bradshaw v. Heath*, 13 Wend. 407,—holding same of recitals as to appearance in record of divorce decree; *Litowich v. Litowich*, 19 Kan. 451, 27 A. R. 145, holding same of recitals as to personal jurisdiction in divorce decree; *Marx v. Fore*, 57 Mo. 69, 11 A. R. 432, holding it permissible to show want of jurisdiction and fraudulent

simulated appearance, in equity; *Baltzell v. Nosler*, 1 Iowa, 588, 63 A. D. 466, holding it permissible to deny authority of attorney who appeared and confessed judgment under a warrant; *Howard v. Smith*, 42 How. Pr. 300, 1 Jones & S. 124, holding recital of appearance by attorney prima facie evidence of the fact, though subject to rebuttal; *Wilson v. Jackson*, 10 Mo. 329, holding it prima facie evidence of jurisdiction of person, where writ was returned "executed," though in an informal manner.

Disapproved in *Wilcox v. Kassick*, 2 Mich. 165, holding it not permissible to contradict record recitals as to facts showing personal jurisdiction; *May v. Jameson*, 11 Ark. 308, holding recital as to personal service and appearance not contradictable by parol.

— **Burden of proof of falsity of recitals.**

Cited in *Henderson v. Staniford*, 105 Mass. 504, 7 A. R. 551, holding burden of proving want of jurisdiction on party attacking judgment.

Effect of "full faith and credit" clause.

Cited in *Wilbur v. Abbot*, 60 N. H. 40, holding it does not require the recognition of a sister state judgment contrary to the laws where enforcement is sought; *Mahurin v. Bickford*, 6 N. H. 567, holding since judgment of justices of peace are not within the clause, that they must be authenticated same as a foreign judgment.

Conclusiveness of foreign judgment in collateral action.

Cited in *Monroe v. Douglas*, 4 Sandf. Ch. 126, holding judgment *in rem* upon regular proceedings and notice to parties interested, binding in other countries; *St. Sure v. Lindsfelt*, 82 Wis. 346, 33 A. S. R. 50, 19 L.R.A. 515, 52 N. W. 308, holding divorce decree shown to be without jurisdiction not binding in controversy as to letters of administration.

Cited in reference note in 57 A. D. 574, on collateral attacks on judgments.

— **Of foreign judgment in suit thereon.**

Cited in *Shepard v. Wright*, 35 Hun, 444 (affirming 59 How. Pr. 512), holding it permissible to show want of jurisdiction either as to person or subject-matter; *Noyes v. Butler*, 6 Barb. 613, holding lack of recitals showing jurisdiction or proof of their falsity renders judgment a nullity; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding judgment for debt in country, not recognizing our judgments as conclusive, only prima facie evidence, though there was jurisdiction.

— **Judgment of United States court in suit thereon in state court.**

Cited in *McCauley v. Hargroves*, 48 Ga. 50, 15 A. R. 660, holding return of marshal without formal venue impeachable where record showed no appearance; *Gardner v. Tyler*, 25 How. Pr. 215, 16 Abb. Pr. 17, holding it permissible to prove lack of personal jurisdiction in judgment *in rem*.

— **Judgment of state court in suit thereon in United States court.**

Cited in *First Nat Bank v. Cunningham*, 48 Fed. 510, holding it permissible to show fraud and lack of jurisdiction; *Tenney v. Townsend*, 9 Blatchf. 274, Fed. Cas. No. 13,832, holding averment of personal jurisdiction, unnecessary where judgment in suit was rendered by a court of general jurisdiction.

Distinguished in *Logansport Gaslight & Coke Co. v. Knowles*, 2 Dill. 421, Fed. Cas. No. 8,467, holding recitals of jurisdiction conclusive when incapable of contradiction in state where made.

Disapproved in *Lincoln v. Tower*, 2 McLean, 473, Fed. Cas. No. 8,355, holding

recitals in record as to service of process or appearance of defendant not deniable by plea.

Conclusiveness of record in general.

Cited in *King v. Robinson*, 33 Me. 114, 54 A. D. 614, holding nothing which contradicts record can be assigned for error; *Carleton v. Jarcy*, 14 Jones & S. 484, holding it permissible to attack jurisdiction of condemnation proceedings under which defendant in ejectment claimed title.

— As dependent on jurisdiction.

Referred to as a leading case in *Newcomb v. Newcomb*, 13 Bush, 544, 26 A. R. 222, holding general rule of nonimpeachment of domestic judgment collaterally inapplicable to divorce decree against insane wife without right to appeal, vacation or new trial.

Cited in *Pollard v. Wegener*, 13 Wis. 570, holding divorce decree reciting facts showing lack of jurisdiction not recognizable even in a collateral action; *Tarleton v. Cox*, 45 Miss. 430, holding judgment of revival and dismissal at instance of other party, not available for any purpose where record showed lack of personal jurisdiction; *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, holding lack of personal jurisdiction can be shown in action in equity to set aside a judgment.

Impeachment of jurisdiction.

Cited in *Hard v. Shipman*, 6 Barb. 621, holding transcript of justice's docket conclusive in suit on his judgment provided there was jurisdiction of person and subject-matter; *Harrington v. People*, 6 Barb. 610, holding jurisdiction in proceedings to lay out highway collaterally impeachable; *Mulligan v. Smith*, 59 Cal. 206, holding certificate by mayor as to sufficiency of petition for improvements contradictable in ejectment by purchaser under the proceedings; *Atchison v. Rosalip*, 4 Chand. (Wis.) 12, 3 Pinney (Wis.) 288, holding want of jurisdiction in justice may be shown in collateral action, notwithstanding docketing of judgment in record of district court; *Baldwin v. Kimmel*, 1 Robt. 109, 16 Abb. Pr. 353, holding it permissible in suit on judgment in same court for defendant to show that he was not served; *Sears v. Terry*, 26 Conn. 273, on the right to impeach a record for jurisdictional defect.

Impeachment of recitals of jurisdictions.

Cited in *Oakley v. Aspinwall*, 4 N. Y. 513, holding judgment reciting "due notice" contradictable upon motion to vacate; *Newcomb v. Dewey*, 27 Iowa, 381, holding record recital as to due service contradicted in direct proceeding in same court to set aside judgment; *Mullins v. Rieger*, 169 Mo. 521, 92 A. S. R. 651, 70 S. W. 4, holding same as to a record recital as to appearance; *Atkins v. Atkins*, 9 Neb. 191, 2 N. W. 466, holding same as to recital of due notice of petition in divorce proceedings; *Wright v. Douglass*, 10 Barb. 97, holding same where there was no trial of the issue on jurisdiction; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 A. D. 273, holding recital of jurisdictional fact in an order appointing receiver is prima facie evidence in collateral action; *Reinach v. Atlantic & G. W. R. Co.* 58 Fed. 33, holding recital in foreclosure decree that a committee of bondholders had authority in the premises, not impeachable; *Ferguson v. Crawford*, 70 N. Y. 253, 26 A. R. 589, holding foreclosure of judgment roll reciting service and appearance of defendant, contradictable in action by him to foreclose junior mortgage; *Mastin v. Gray*, 19 Kan. 458, 27 A. R. 149, holding return as to service contradictable in collateral ejectment for real estate sold under execution upon the judgment rendered; *Adams v. Saratoga & W. R. Co.* 10 N. Y. 328, holding record recitals as to jurisdiction in condemnation proceedings contradictable

in ejectment by owner; *Smalley v. Lightall*, 37 Mich. 348, holding it permissible to contradict justice's docket as to personal service, in replevin for property seized on his execution; *Russell v. Lewis*, 3 Or. 380, holding regular order of probate court reciting necessary facts to authorize sale, *prima facie* evidence of jurisdiction in collateral action, though subject to rebuttal; *Bolton v. Jacks*, 6 Robt. 166, holding recitals as to jurisdictional facts in surrogates decree admitting will to probate, contradictable in collateral action; *Gould v. Glass*, 19 Barb. 179, holding jurisdiction of highway commissioners in laying out of road contradictable in action by them to recover penalty; *Owens v. Ranstead*, 22 Ill. 161, holding it permissible in equity to contradict return of officer to summons in suit at law; *Re McKibben*, Fed. Cas. No. 8,859, on parol contradiction of record recitals as to jurisdiction of parties or subject-matter in collateral action; *Jordan v. Chicago & N. W. R. Co.* 125 Wis. 581, 110 A. S. R. 865, 1 L.R.A.(N.S.) 885, 104 N. W. 803, 4 A & E. Ann. Cas. 1113, on right in collateral action to investigate jurisdiction of county court appointing administrator; *Hunt v. Ellison*, 32 Ala. 173, on recital that "parties came" in chancery decree as *prima facie* evidence in collateral action, as to jurisdiction of resident defendant not served.

Distinguished in *Pendleton v. Weed*, 17 N. Y. 72, where there was a mere irregularity and not a defect of jurisdiction.

Explained in *O'Connor v. Felix*, 87 Hun. 179, 33 N. Y. Supp. 1074, holding judgment of court of general jurisdiction not impeachable in collateral action as a general rule for nonservice or lack of appearance.

Criticized in *Wandling v. Straw*, 25 W. Va. 692, holding recital of "appearance by attorney" by a court of record cannot be shown to have been unauthorized, in a collateral action.

Jurisdiction as to nonresidents.

Cited in *Savin v. Bond*, 57 Ind. 228, holding personal jurisdiction acquired by service within jurisdiction; *Middlebrooks v. Springfield F. Ins. Co.* 14 Conn. 301, holding foreign corporation with resident stockholders not liable to suit *in personam* at common law; *Whittier v. Wendell*, 7 N. H. 257, holding judgment without service or appearance does not bar action on original demand at residence of debtor; *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609; *Burnham v. Webster*, 1 Woodb. & M. 172, Fed. Cas. No. 2,179,—on nullity of such a judgment without personal notice or appearance of record; *Mervin v. Kumbel*, 23 Wend. 293, holding one of two joint debtors, not notified or served, cannot be held on the judgment recovered without evidence other than the judgment against plea of *nul tiel record*.

— Judgment on foreign attachment or in rem.

Cited in *Darrach v. Wilson*, 2 Miles (Pa.) 116, holding debt not maintainable upon judgment against a defendant in foreign attachment without notice; *De Witt v. Burnett*, 3 Barb. 89, holding sister state judgment against ship to which owner was not a party not evidence in personal action for damages.

Mode of pleading invalidity of judgment.

Cited in *Brown v. Balde*, 3 Lans. 283, holding it necessary to set forth the facts specially in a collateral attack on judgment of domestic court of record.

— In suit on foreign judgment.

Cited in *Hindeman v. Mackall*, 3 G. Greene, 170, holding want of jurisdiction or fraud may be shown under a plea of *nil debet* to such judgment; *Boston India Rubber Factory v. Hoit*, 14 Vt. 92, on whether a plea under *nul tiel record* can be interposed to debt on a sister state judgment; *Sammis v. Wightman*. 31

Fla. 10, 12 So. 526, holding plea of want of jurisdiction in sister state court to render judgment in suit must negative every fact which might sustain the jurisdiction; *Hoffheimer v. Stiefel*, 17 Misc. 236, 39 N. Y. Supp. 714; *Rice v. Contant*, 38 App. Div. 543, 56 N. Y. Supp. 351,—holding want of jurisdiction in sister state court to render judgment sued on must be specially pleaded; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616, holding *nul tiel record* improper plea in Federal court in action on state judgment falsely reciting appearance by attorney; *Bennett v. Morley*, 10 Ohio, 100, holding same as to record recital as to service; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 A. R. 132, holding allegation that judgment of another state is void by its laws, a conclusion of law; *Holbrook v. Murray*, 5 Wend. 161, holding plea that defendant was not served with process and had not notice of pendency or prosecution of suit, sufficient; *Mackay v. Gordon*, 34 N. J. L. 286, holding plea that party “was not summoned to appear and answer in said court, and did not appear” and “was not within jurisdiction,” bad.

Necessity of notice to confer jurisdiction.

Cited in *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 A. D. 248, holding notice, actual or constructive, essential to a valid judgment in absence of positive law; *Wright v. Douglass*, 3 Barb. 554, holding attachment of trust property of foreign corporation invalid without statutory notice to trustee; *Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444, holding default, based on improper service of *capias* will be set aside on motion; *Martin v. Central Vermont R. Co.* 50 Hun, 347, 3 N. Y. Supp. 82, on hearing or opportunity to be heard as an element in due process of law.

Cited in notes in 48 A. D. 270, on necessity of notice in judicial proceedings; 50 A. S. R. 737, on obtaining jurisdiction over new parties.

Waiver of defect of jurisdiction.

Cited in *State v. Richmond*, 26 N. H. 232, holding exceptions to judgment by court with jurisdiction of subject-matter but not of the person, waivable.

Effect of appearing.

Cited in *Campbell v. Wilson*, 6 Tex. 379, holding appearance and answer on merits waives objection to nonresidence of parties; *Smith v. Jackson*, 1 N. Y. Supp. 13, holding mere interloper appearing cannot authorize trial and judgment against defaulting defendant served and sued in his proper name.

Presumption as to jurisdiction.

Cited in *Chemung Canal Bank v. Judson*, 8 N. Y. 254, holding jurisdiction of United States district court, though not shown by judgment, presumed in collateral proceedings; *Pringle v. Woolworth*, 90 N. Y. 502, holding courts of common pleas of sister states presumed to be of general jurisdiction.

Judgment as merger of defenses.

Cited in *Sternbergh v. Schoolcraft*, 2 Barb. 153, holding it not permissible in action on judgment to show defenses existing anterior to its recovery.

Vacation of judgment because of unauthorized appearance for nonresident.

Cited in *Vilas v. Plattsburgh & M. R. Co.* (*Vilas v. Butler*), 123 N. Y. 440, 20 A. S. R. 771, 9 L.R.A. 844, 25 N. E. 941, 19 N. Y. Civ. Proc. Rep. 333, 26 Abb. N. C. 100, holding remedy by motion in the absence of special circumstances necessitating a resort to equity; *Norlinger v. De Mier*, 54 Hun, 276, 7 N. Y. Supp. 463, 18 N. Y. Civ. Proc. Rep. 47, holding such an appearance for nonresident special partners by direction of general partner will be set aside on motion.

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Verity of records and recitals.

Cited in *Herring v. Lee*, 22 W. Va. 661, holding it permissible to show that recording of deed was unauthorized and record not one in law; *Morse v. United States*, 29 App. D. C. 433, holding recital in bond of due appointment of trustees to sell real estate not conclusive of such fact when directly in issue.

21 AM. DEC. 181, SAVACOOOL v. BOUGHTON, 5 WEND. 170.**Liability of officer for acts done under process of court.**

Cited in *Re Anderson*, 94 Fed. 487, holding United States Marshal not protected in executing writ outside his district; *Coats v. Darby*, 2 N. Y. 517, on protection of officer by execution.

Cited in reference notes in 21 A. D. 217; 60 A. D. 146; 28 A. S. R. 441; 60 A. S. R. 387; 82 A. S. R. 948; 95 A. S. R. 157,—on protection of process to officer serving same; 53 A. D. 202; 57 A. D. 81,—as to when officer is protected by process; 22 A. D. 550; 23 A. D. 333, 396, 698; 24 A. D. 116, 117, 121, 324; 26 A. D. 579; 27 A. D. 126, 699; 28 A. D. 44; 29 A. D. 510; 30 A. D. 129, 491; 31 A. D. 156, 667; 34 A. D. 228; 51 A. D. 231; 62 A. D. 332; 65 A. D. 94; 86 A. D. 291; 13 A. S. R. 525; 25 A. S. R. 256; 57 A. S. R. 740; 74 A. S. R. 27,—on justification of officers under process; 41 A. S. R. 104; 56 A. S. R. 741,—on process as justification to sheriffs; 43 A. D. 765, on justification for acts of officer under void process; 46 A. D. 253, on officer not protected by process not fair on face.

Cited in notes in 19 A. D. 492, on liability of officer executing warrant, of arrest; 51 L.R.A. 200, on liability of officer for making an arrest under warrant in case where court has no jurisdiction; 51 L.R.A. 198, on liability of officer for making an arrest under invalid or void warrant; 61 A. D. 409, as to when process is justification for acts done under it; 26 A. D. 41, on necessity that defect in judgment or process be such as to render proceeding void to prevent its protecting officer; 30 A. R. 750, on effect of administration on estate of living person.

—When process is valid on its face.

Cited in *Horan v. Wahrenberger*, 9 Tex. 313, 58 A. D. 145, on protection of officers enforcing process under a void judgment; *Brown v. State*, 109 Ala. 70, 20 So. 103, holding officer should look alone to warrant for his authority; *Cleveland v. Rogers*, 6 Wend. 438, on justification by process fair on its face.

Cited in reference notes in 43 A. D. 765, on process regular on face as justification of acts of officer under it; 96 A. S. R. 820, on protection of ministerial officer obeying mandate of process fair upon its face.

Cited in notes in 40 A. D. 50, on process valid on its face as protection to officer serving it; 20 A. D. 688, on protection to justice acting on papers apparently sufficient.

—Fair process from inferior courts.

Cited in *Jennings v. Thompson*, 54 N. J. L. 55, 22 Atl. 1008, holding in courts of both general and limited jurisdiction, officer justifies under writ and not upon irregularity of proceeding under which writ was issued; *Imbert v. Hallock*, 23 How. Pr. 456; *State v. McNally*, 34 Me. 221, 56 A. D. 650,—holding process through voidable for irregularity or mistake, is a protection to the officer who serves it if the magistrate, by whom it was issued, had jurisdiction of the subject-matter; *Weeks v. Ellis*, 2 Barb. 320, holding overseers protected in executing regular warrant from a *de facto* magistrate.

—Warrants of arrest fair on face.

Referred to as leading case in *Smith v. Warden*, 4 Hun, 787, holding officer

protected under warrant, showing case within jurisdiction of justice but not reciting a legal offense.

Cited in *Ortman v. Greeman*, 4 Mich. 291; *Atwood v. Atwater*, 43 Neb. 147, 61 N. W. 574; *Henry v. Lowell*, 16 Barb. 268,—holding officer protected in arrest without evidence other than process of court, fair on its face; *Hutchinson v. Brand*, 6 How. Pr. 73; *State v. McNally*, 34 Me. 210, 56 A. D. 650,—holding officer protected and bound to execute warrant regular on its face where court had jurisdiction of subject-matter; *State v. Williams*, 45 Or. 314, 67 L.R.A. 166, 77 Pac. 965, on protection of officer executing warrant fair on its face and from competent authority; *French v. Willet*, 4 Bosw. 649, holding sheriff bound to proceed under execution against debtor's body, regular on its face, provided there was jurisdiction; *State v. Weed*, 21 N. H. 262, 53 A. D. 188, holding officer protected by warrant fair on its face and issued by magistrate with jurisdiction, though foundation of complaint was baseless; *Douglass v. Stahl*, 71 Ark. 236, 72 S. W. 568, protecting officer arresting wrong person pursuant to description in warrant fair on its face; *Carpenter v. Willet*, 1 Keyes, 510, on justification of officer by execution against person fair on its face.

Cited in note in 51 L.R.A. 193, 194, on liability of officer for making an arrest under warrant or writ valid on its face.

—Executions and attachments fair on face.

Referred to as leading case in *Young v. Stone*, 33 App. Div. 261, 53 N. Y. Supp. 656, holding sheriff protected by writ notwithstanding secret agreement between execution creditor and buyer of property levied on.

Cited in *Munis v. Herrera*, 1 N. M. 362, holding officer liable for serving writ signed only by himself and citing annotation also on this point; *Van Camp v. Searle*, 79 Hun, 134, 29 N. Y. Supp. 757, 24 N. Y. Civ. Proc. Rep. 16, holding sheriff justified in proceeding under execution regular on its face; *Bovee v. King*, 11 Hun, 250, holding valid judgment and execution a perfect protection to officers making levy; *Whitmarsh v. Angle*, 3 Code Rep. 53; *Camp v. Moseley*, 2 Fla. 171,—holding execution from court of general jurisdiction, showing jurisdiction of subject-matter on its face, protects officer without proof of a judgment; *Bodine v. Thurwachter*, 34 Hun, 6, on same question; *Barr v. Boyles*, 96 Pa. 31, 10 W. N. C. 253, 11 Pittsb. L. J. N. S. 121; *Shaw v. Davis*, 55 Barb. 389,—holding seizure under execution, justifiable by constable without proof of a judgment; *Gall v. Fryberger*, 75 Ind. 98, holding officer protected by execution, regular on its face and reciting judgment rendered in court having jurisdiction; *Shepherd v. Nabors*, 6 Ala. 631, holding where sheriff justifies seizure of property under a *feri facias*, he need not allege that a judgment was rendered in the case although the production of the judgment may become necessary where plaintiff proves his title is paramount to the lien of the execution; *Hill v. Haynes*, 54 N. Y. 153, holding sheriff justified in levying and holding property under execution not appearing to be void on its face; *Heath v. Halfhill*, 106 Iowa, 131, 76 N. W. 522; *Merchant v. Bothwell*, 60 Mo. App. 341; *Averett v. Thompson*, 15 Ala. 678,—holding officer protected under execution regular on its face where court which rendered judgment had jurisdiction of subject-matter; *Coon v. Congden*, 12 Wend. 496, holding officer protected regardless of justice's jurisdiction in the particular case; *Orr v. Box*, 22 Minn. 485, holding it sufficient if there was jurisdiction of the subject-matter though none had been acquired of the person; *Bergin v. Hayward*, 102 Mass. 414, holding same where improper notice was given to garnishee; *Barnes v. Barber*, 6 Ill. 401;

Parker v. Smith, 6 Ill. 411,—holding same of process of inferior court showing jurisdiction of subject-matter and not apparently lacking jurisdiction of person; *Norcross v. Nunan*, 61 Cal. 640, holding irregularities do not prevent justification under execution valid on its face though from an inferior court; *Boren v. M'Gehee*, 6 Port. (Ala.) 432, 31 A. D. 695, on justification of sheriff executing *feri facias* on judgment, satisfied in fact but not of record; *Lewis v. Palmer*, 6 Wend. 367, where a former execution had been satisfied; *Parker v. Walrod*, 16 Wend. 514, 30 A. D. 124, holding officer protected in bona fide execution of erroneous attachment, regular on its face and from a court with jurisdiction of subject-matter; *Winchester v. Everett*, 80 Me. 535, 6 A. S. R. 228, 1 L.R.A. 425, 15 Atl. 596, on protection of officer by execution regular on its face and from court with jurisdiction of subject-matter and parties; *Melburn v. Gilman*, 11 Mo. 64, holding ministerial officer is not liable in trespass for executing writ issued under judgment of court having jurisdiction of persons and subject-matter, although judgment be erroneous; *Hoose v. Sherrill*, 16 Wend. 33, on question of protection afforded to magistrate and officers by execution issued by court having jurisdiction; *Sanders v. Rains*, 10 Mo. 770, on nonliability of officer proceeding under execution not showing want of jurisdiction on its face; *Brown v. Thomas*, 26 Miss. 335, on justification of officer under execution not specifying a return day; *People v. Cooper*, 13 Wend. 379, holding officer protected by attachment writ regular on face and within general jurisdiction of the magistrate, though there was no jurisdiction in the particular case; *Brickman v. Ross*, 67 Cal. 601, 8 Pac. 316, holding attachment regular on face and from court with jurisdiction of subject-matter, a *prima facie* justification of officer for levying on property in possession of defendant therein, in action for possession by the true owner; *Fulton v. Heaton*, 1 Barb. 552, holding same of attachment regular on its face and within jurisdiction of justice though based on a defective affidavit; *Bogert v. Phelps*, 14 Wis. 89, holding officer without knowledge of irregularities protected by attachment regular on its face and from court of competent jurisdiction; *Wilson v. Sawyer*, 37 Ala. 631, holding sheriff not entitled to commissions for execution of process regular on its face, but issued on a void judgment, although the statute protects him in the execution of such process.

Distinguished in *Howard v. Clark*, 43 Mo. 344, holding officer liable where though the writ justified the levy he proceeded irregularly to decide between conflicting claims; *Pryne v. Westfall*, 3 Barb. 496, holding officer suing in trespass for goods levied on execution but not reduced to actual possession must show judgment as well as execution; *Earl v. Camp*, 16 Wend. 562, holding attaching officer suing party for taking goods out of his possession, must show not only apparent regularity but a valid affidavit.

— Possessory writs fair on face.

Cited in *Foster v. Pettibone*, 20 Barb. 350, holding officer taking goods from possession of defendant by writ of replevin, not liable in trespass to true owner; *Bullis v. Montgomery*, 50 N. Y. 352, holding judicial requisition protects sheriff in taking property from actual possession of defendant though his title had been transferred; *Allen v. Corlew*, 10 Kan. 70, holding officer protected by writ of restitution regular on its face from court with jurisdiction of subject-matter, though plaintiff must show a valid judgment; *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755, holding same of similar writ from limited court having jurisdiction of subject-matter; *Field v. Parker*, 4 Hun. 342, holding officer protected unless want of jurisdiction in particular case was shown on its face; *Beach v.*

Botsford, 1 Dougl. (Mich.) 199, 40 A. D. 45, holding officer cannot defend replevin for property seized by process regular on its face but defective in fact.

— Process void on face.

Referred to as leading case in *Bulymore v. Cooper*, 2 Lans. 71, holding sheriff not justified in his charging debtor under an order void on its face.

Cited in *Bowler v. Eldredge*, 18 Conn. 1, holding attachment void on its face, no protection even if from a court of general jurisdiction; *Barrett v. Crane*, 16 Vt. 246, holding where court of limited jurisdiction exceeds its powers, not having jurisdiction of subject-matter or person of defendant, its warrant is not protection to officer executing same; *Fisher v. McGirr*, 1 Gray, 1, 61 A. D. 381, holding officer cannot justify under process issued pursuant to an unconstitutional law; *Kidd v. Reynolds*, 20 Tex. Civ. App. 355, 50 S. W. 600, same and citing annotation on this point; *Patrick v. Solinger*, 9 Daly, 149, holding officer executing attachment void on its face equally liable with party causing its issuance; *Campbell v. Webb*, 11 Md. 471, holding officer responsible when he executes process by a tribunal of inferior or limited jurisdiction when such process shows that it was void; *Cassellini v. Booth*, 77 Vt. 255, 59 Atl. 833, holding officer not justified in executing search warrant void on its face; *Poulk v. Slocum*, 3 Blackf. 421, holding constable in his justification of an imprisonment under a magistrate's warrant must show that the magistrate had jurisdiction of subject-matter and that warrant was legal on its face; *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336, holding deputy liable who knew from face of writ that issuing court had no jurisdiction; *Barhydt v. Valk*, 12 Wend. 145, 27 A. D. 124, holding officer cannot justify under execution against person, void on its face; *Goodell v. Tower*, 77 Vt. 61, 107 A. S. R. 745, 58 Atl. 790, holding officer not protected in execution of warrant void on its face; *Duckworth v. Johnston*, 7 Ala. 578, holding person causing issuance and officer executing warrant, void on its face, liable as trespassers.

Independent knowledge of invalidity of process fair on face.

Cited in *Leachman v. Dougherty*, 81 Ill. 324 (dissenting opinion), on liability of officer with knowledge of invalidity of process; *Thomas v. Clapp*, 20 Barb. 163, holding warrant fair on its face protects tax collector, though he had outside knowledge of its nullity; *Tellefsen v. Fee*, 168 Mass. 188, 60 A. S. R. 379, 45 L.R.A. 481, 46 N. E. 562, holding knowledge of lack of jurisdiction, not appearing on face of writ renders officer liable for an arrest in civil action; *Marks v. Sullivan*, 9 Utah, 12, 20 L.R.A. 590, 33 Pac. 224, holding constable protected in execution of process regular on its face though he has knowledge of facts rendering it void for want of jurisdiction.

Annotation cited in *Dean v. Renville County*, 50 Minn. 232, 52 N. W. 650, holding service proper though officer had extraneous knowledge of invalidity.

What necessary to constitute process fair on its face.

Cited in *Dominick v. Eacker*, 3 Barb. 17, holding it fair unless there is intimation as to defects in jurisdiction either of the person or subject-matter; *United States v. Stowell*, 2 Curt. C. C. 153, Fed. Cas. No. 16,409, on requisites or process fair on its face from an inferior court.

Cited in reference notes in 24 A. D. 324, on requisites of process which will protect officer; 25 A. D. 600, as to when process is a justification for acts done under it.

Cited in note in 43 A. D. 52, on sufficiency of process to justify acts under it.

Obligation to execute process fair on face.

Cited in *Paton v. Westervelt*, 12 N. Y. Leg. Obs. 7, 2 Duer, 362, holding sheriff bound to execute process regular on its face and from a court of general jurisdiction; *Parmelee v. Hitchcock*, 12 Wend. 96, holding sheriff bound to proceed under execution regular on its face and from court of general jurisdiction; *Alexander v. Eberhardt*, 35 Mo. 475, holding same where there was no showing of invalidity on its face.

— Fair process known to be voidable.

Cited in *Clearwater v. Brill*, 4 Hun, 728, holding officer having execution valid on its face and issuing from a competent authority is bound to execute it even if he have knowledge of facts rendering the execution void.

Annotation cited in *Harris v. Snyder*, 113 Wis. 451, 89 N. W. 660, holding sheriff justified in refusing to proceed under execution upon acquiring knowledge that appeal had been perfected.

Immunity for acts done under authority.

Cited in *Wood v. Adams*, 35 N. H. 32, holding clergyman justified in performing marriage under certificate proper in form but false as to some particulars.

Distinguished in *Roderigas v. East River Sav. Inst.* 76 N. Y. 316, 32 A. R. 309 (affirming 11 Jones & S. 217), holding void letters of administration no protection to person paying money in good faith to administrator named therein.

— Authority wanting in jurisdiction.

Cited in *Bush v. Pettibone*, 5 Barb. 273, holding discharge of insane under order from judge lacking jurisdiction of such matters not protected; *Welles v. Thornton*, 45 Barb. 390, holding bailee not justified in delivering property to receiver for bailor appointed in voidable proceeding to which he was not a party; *Bennett v. Burch*, 1 Denio, 141, holding retention of money pursuant to order of superintendent of schools without any general power over the matter, not justified.

— Potential jurisdiction lacking in particular case.

Cited in *Levy v. Melody*, 50 Misc. 509, 99 N. Y. Supp. 153, holding sheriff protected in discharge of debtor on order of supreme court, regular on its face, though jurisdiction in the particular case was lacking; *Sturbridge v. Winslow*, 21 Pick. 83, holding officer can justify removal of indigent person to another town by order of overseers without proof of their jurisdiction in the particular case; *Conner v. Long*, 104 U. S. 228, 26 L. ed 723, holding sheriff protected in executing order of state court to sell goods already attached, without notice of bankruptcy proceedings; *Hill v. Rasicot*, 34 Minn. 270, 25 N. W. 604, holding judgment of foreclosure protects sheriff from liability to another asserting superior right; *State ex rel. Holliday v. King*, 30 Ind. App. 389, 66 N. E. 85, holding officer protected by foreclosure decree, regular on its face from court with jurisdiction of subject-matter; *State v. Miller*, 110 Mo. App. 542, 85 S. W. 912, holding official protected in closing road under warrant, fair on its face and from court with jurisdiction of subject-matter; *Porter v. Purdy*, 29 N. Y. 106, 86 A. D. 283, holding sewer assessment not assailable for want of jurisdiction in assessors because one of them was not a freeholder.

— Authority from limited or special body.

Cited in *Perrine v. Farr*, 22 N. J. L. 356, holding party relying on proceedings before freeholders to justify use of land as a road must prove that subject arose within its jurisdiction; *Chamblee v. Holcomb*, 7 Ga. 419, holding officer

protected by erroneous judgment of inferior court with jurisdiction ordering release of prisoner; *Hardwick v. Brookover*, 48 Kan. 609, 30 Pac. 21, holding sheriff prima facie justified in holding cattle upon production of quarantine order from sanitary board.

Distinguished in *Jermaine v. Waggener*, 1 Hill, 279, holding order of canal commissioners whose authority was limited to a single act already performed, cannot justify enlargement of dam.

—Tax warrants fair on face.

Referred to as a leading case in *Sheldon v. Van Buskirk*, 2 N. Y. 473, holding proof other than regular warrant from proper authority unnecessary to justify acts of tax collector; *Nowell v. Tripp*, 61 Me. 426, 14 A. R. 572, holding tax collector's warrant a justification for acts done in obedience to it, though assessors were without jurisdiction.

Cited in *Bennett v. Robinson*, 42 App. Div. 412, 59 N. Y. Supp. 197, holding regular warrant and roll affords full protection to tax collector; *Finch v. Cleveland*, 10 Barb. 290, holding where trustees had jurisdiction of subject-matter and persons assessed and warrant was regular on its face, tax collector protected; *Johnson v. Learn*, 30 Barb. 616, holding collector protected by process, sufficient in form to justify the assessment in question; *Chegaray v. Jenkins*, 5 N. Y. 376; *Woolsey v. Morris*, 96 N. Y. 311,—holding regular warrant from proper authority protects officer, though assessment was illegal; *Moore v. Allegheny City*, 18 Pa. 55, holding collector bound to execute warrant regular on its face and from proper authority notwithstanding illegalities; *Bradley v. Ward*, 58 N. Y. 401, holding collector justified and bound to execute regular tax warrant and roll, though no affidavit was attached thereto; *Alexander v. Hoyt*, 7 Wend. 89, holding regular warrant protects tax collector though assessors may be liable as trespassers for adopting erroneous basis of assessment; *Patchin v. Ritter*, 27 Barb. 34, holding collector protected by regular warrant though party claimed nonresidence in ward where assessed; *Delaware R. Co. v. Prettyman*, Fed. Cas. No. 3,767, holding regular warrant protects collector, notwithstanding mistake of assessor, provided he had jurisdiction of subject-matter; *Abbot v. Yost*, 2 Denio, 86, holding regular warrant protects tax collector notwithstanding illegality in meeting voting tax; *Reynolds v. Moore*, 9 Wend. 35, 24 A. D. 116, holding regular warrant protects tax collector though there were defects in organization and subsequent proceedings of the district; *Woods v. Davis*, 34 N. H. 328, holding officer protected in arresting exempt person under tax warrant, fair on its face and from competent authority; *Sanders v. Simmons*, 30 Ark. 274, holding officer protected in executing tax warrant, valid on its face and from competent authority; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843, holding fraud or irregularity in tax assessment cannot be shown in suit against officer enforcing it under process fair on its face; *Bird v. Perkins*, 33 Mich. 28, holding tax collector protected by process fair on its face against any illegalities except his own; *Wall v. Trumbull*, 16 Mich. 228, holding officer protected in executing tax warrant from competent authority where illegality was not apparent on its face; *Gilbert v. Havemeyer*, 2 Sandf. 506, holding officer protected by tax warrant from proper authority reciting a legal charge and nonpayment; *Erschine v. Hohnbach*, 14 Wall. 613, 20 L. ed. 745, holding United States collector of taxes protected by regular order from proper official, though assessment was erroneous; *Pullan v. Kinsinger*, 2 Abb. U. S. 94, Fed. Cas. No. 11,463; *Chemung Nat. Bank v. Elmira*, 53 N. Y. 49,—on regular tax warrant as a protection to officer; *Easton v. Calendar*, 11 Wend. 90, on question of lia-

bility of trustees who apportion an illegal tax and nonliability of collector under warrant valid on its face; *Champaign County Bank v. Smith*, 7 Ohio St. 42; *Tyler v. Cass County*, 1 N. D. 369, 48 N. W. 232,—holding treasurer without outside knowledge of defects protected in execution of regular warrant from proper authority.

Cited in reference notes in 100 A. D. 165, on sufficiency of tax warrant regular on its face to protect officer; 23 A. D. 521, on protection of tax collectors and other ministerial officers by process regular on its face.

— Void tax warrants.

Cited in *Sprague v. Birchard*, 1 Wis. 457, 60 A. D. 393, holding tax collector cannot justify under warrant substantially different than that provided by statute; *Philadelphia & R. R. Co. v. Kenney*, 9 Phila. 403, 30 Phila. Leg. Int. 281, Fed. Cas. No. 11,088, holding United States collector of taxes not protected by order where tax was unauthorized by law.

Liability for acts done under invalid statute.

Cited in reference note in 30 A. S. R. 709, on liability for acts done under unconstitutional statutes.

Liability of parties for execution of void process.

Cited in *Ex parte Thompson*, 1 Flipp, 507, Fed. Cas. No. 13,934, holding officer justified though party could not be; *Ailstock v. Moore Lime Co.* 104 Va. 565, 113 A. S. R. 1060, 2 L.R.A. (N.S.) 1100, 52 S. E. 213, 7 A. & E. Ann. Cas. 545; *Kerr v. Mount*, 28 N. Y. 659,—holding protection afforded officers does not extend to parties; *Shannon v. Simms*, 146 Ala. 673, 40 So. 574, holding person authorizing or ratifying an arrest based on a void affidavit liable for malicious prosecution, and citing annotation on this point; *Croft v. King*, 8 Daly, 265, 1 N. Y. City Ct. Rep. 157, holding landlord liable for summary proceedings to oust tenant, if there was lack of jurisdiction of person or subject-matter.

Burden of showing existence of jurisdiction.

Cited in *Rice v. Travis*, 117 Ill. App. 644, holding one not an officer claiming justification under process of justice of the peace must affirmatively show existence of jurisdiction.

Liability for judicial or discretionary acts.

Cited in *Miller v. Grice*, 1 Rich. L. 147 (dissenting opinion), on liability of justice for issuing warrant for offense not within his jurisdiction; *Lange v. Benedict*, 73 N. Y. 12, 29 A. R. 80, holding judge of United States circuit court not liable for judicial act in a matter within his jurisdiction, though the act is in excess thereof; *Prosser v. Secor*, 5 Barb. 607, holding assessors liable for exceeding jurisdiction in assessing exempt minister; *Lester v. Governor*, 12 Ala. 624, holding justice taking insufficient security on appeal bond not liable if at all without proof of corrupt motives; *Marks v. Sullivan*, 9 Utah, 12, 20 L.R.A. 590, 33 Pac. 224, holding justice acting in good faith within jurisdiction, not liable for error in judgment; *Russell v. Perry*, 14 N. H. 152, holding justice can derive no protection from judgment rendered without jurisdiction of subject-matter; *Shadbolt v. Bronson*, 1 Mich. 85, holding justice, issuing execution in plain excess of jurisdiction, liable as trespasser; *Ex parte Hill*, 38 Ala. 429, on nonliability of state judge discharging conscripts upon decision as to their nonamenability to service; *Fitch v. Devlin*, 15 Barb. 47, on protection of justice rendering judgment on false return of constable; *Colton v. Bigelow*, 38

Barb. 29 (dissenting opinion), on nonjustification by trustees for erroneous exercise of judicial power without proof a *de jure* existence.

Cited in reference note in 64 A. D. 53, on liability of ministerial officers.

Cited in note in 15 E. R. C. 52, on civil liability of judge for his judicial acts.

Trespass as remedy for false imprisonment.

Cited in *Stanton v. Seymour*, 5 McLean, 267, Fed. Cas. No. 13,298, holding trespass is proper action for false imprisonment under color of process.

Statutes in derogation of common law.

Cited in *Paine v. Trinity Church*, 7 Hun, 89, holding statutory summary proceedings to oust tenant are strictly construed.

Acts of justice outside of his jurisdiction.

Cited in *Reed v. Warth*, 2 Hilt. 281, holding them void.

Who may take advantage of irregularity in execution.

Cited in *Pierce v. Alsop*, 3 Barb. Ch. 184, 4 N. Y. Leg. Obs. 52, on question of defendant being only person who can take advantage in irregularities in execution.

Collateral inquiry into jurisdiction.

Cited in *Ex parte Albany*, 23 Wend. 277, on the range of jurisdictional inquiry.

21 AM. DEC. 209, LA FARGE v. RICKERT, 5 WEND. 187.

Place of delivery.

Cited in *Miles v. Roberts*, 34 N. H. 245, holding debtor must seek creditor and learn where bulky articles are to be delivered; *Morel v. Stearns*, 43 Misc. 639, 88 N. Y. Supp. 416, holding goods easily handled must be delivered at vendee's place of business, or place designated by him; *Dustan v. McAndrew*, 10 Bosw. 130, holding notice of readiness to deliver goods from warehouse, sufficient tender of same; *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 Ind. 502, holding subscription to stock gave right to certificate on demand at company's office.

Cited in reference notes in 27 A. D. 178, as to when tender of personalty is valid; 26 A. D. 546, on time and place of tender of specific articles.

Cited in notes in 12 A. D. 574, as to where tender of personalty must be made where time, but not place, is ascertainable by terms of contract; 2 L.R.A.(N.S.) 385, on effect of seller's statement on C. O. D. order.

Distinguished in *West v. Newton*, 1 Duer, 277, holding where by contract vendee was to designate place of delivery, such designation is condition precedent; *Moore v. Hudson River R. Co.* 12 Barb. 156, holding railroad company not bound to make tender of stock payable to contractor on certain day.

Place of payment of money.

Cited in *Stoker v. Cogswell*, 25 How. Pr. 267, holding law makes domicile of creditor place of payment when none is fixed by parties.

Cited in note in 45 A. D. 467, on place of demand of payment of note when no place is specified in note.

Time of performance of contract.

Cited in *Morowsky v. Rohrig*, 4 Misc. 167, 23 N. Y. Supp. 880, holding law implies reasonable time if contract is silent; *Stange v. Wilson*, 17 Mich. 342, holding parol testimony inadmissible to show agreement as to time of performance of written contract.

Parol evidence to vary terms of written instrument.

Cited in *Fitts v. Hoitt*, 17 N. H. 530, holding parol evidence inadmissible to give words in contract different meaning than they convey; *Bush v. Bradford*, 15 Ala. 317, holding same inadmissible to add simultaneous verbal warranty to bill of sale; *Cohen v. Jackoboice*, 101 Mich. 409, 59 N. W. 665, holding same as to terms of written order for insertion of advertising; *Davis v. Talcott*, 14 Barb. 611, holding parol subsequent agreement as to time of performance of contract, admissible; *Niles v. Culver*, 8 Barb. 205, holding receipt in nature of contract not variable by parol evidence; *McCotter v. Hooker*, 8 N. Y. 497 (dissenting opinion), on parol evidence to vary receipt in nature of contract; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, holding all prior negotiations merged in written lease and covenant of parties.

Cited in reference notes in 24 A. D. 129, on parol evidence to vary or contradict written contract; 42 A. D. 395, on parol evidence to contradict, vary, or materially affect written instruments; 36 A. S. R. 899, on parol evidence of prior negotiations.

Cited in note in 13 L.R.A. 622, on parol evidence to vary terms of written instrument.

Distinguished in *Barry v. Ransom*, 12 N. Y. 462, holding agreement among sureties as to eventual liability did not contradict terms of bond.

—To change legal import of instrument.

Cited in *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1, holding parol inadmissible to change language importing complete legal obligation; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88, holding parol evidence inadmissible to vary construction to be legally implied from written contract; *Woodward, B. & Co. v. Foster*, 18 Gratt. 200, holding parol evidence inadmissible to vary legal liability of indorser; *Renard v. Sampson*, 2 Duer, 285, holding voyage, by legal import of charter party was to commence within reasonable time; *Litchfield v. Falconer*, 2 Ala. 280; *King v. Enterprise Ins. Co.* 45 Ind. 43; *Blake Mfg. Co. v. Jaeger*, 81 Mo. App. 239; *Union Selling Co. v. Jones*, 63 C. C. A. 224, 128 Fed. 672,—holding legal import of contract cannot be varied by parol; *Isett v. Lucas*, 17 Iowa, 503, 85 A. D. 572, holding legal effect of mortgage cannot be varied by parol testimony.

21 AM. DEC. 213, WILCOX v. SMITH, 5 WEND. 231.**Validity of acts of de facto officers.**

Cited in *Heath v. State*, 36 Ala. 273; *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139,—holding acts of *de facto* officer valid as respects the public and persons interested therein; *Tappan v. Brown*, 9 Wend. 175, holding acts of officers disabled to serve valid as to public and third parties; *Oliver v. Jersey City*, 63 N. J. L. 634, 76 A. S. R. 228, 48 L.R.A. 412, 44 Atl. 709, holding acts of officers *de facto* as effectual as to the public or third parties as if they were *de jure*; *Cary v. State*, 76 Ala. 78, holding acts of *de facto* notary public valid as to public; *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190, same as applied to acts of lieutenant governor; *Carleton v. People*, 10 Mich. 250, holding official acts of *de facto* county officers recognized as valid on ground of public policy; *Thompson v. State*, 21 Ala. 48, holding acts of *de facto* overseer in opening road, valid; *Hutchings v. Van Bokkelen*, 34 Me. 126, holding official acts of *de facto* officers prima facie evidence of his authority; *Hussey v. Smith*, 99 U. S. 20, 25 L. ed. 314, holding service of process by *de facto* officers gave court

jurisdiction of person; *Thompson v. People*, 6 Hun, 135, holding panel of jurors selected by *de facto* commissioners, cannot be challenged therefor; *Sherrill v. O'Brien*, 188 N. Y. 185, 117 A. S. R. 841, 81 N. E. 124, holding acts of legislature elected under invalid apportionment act, valid as those of *de facto* body; *Hammondsport Law, Loan & Collection Asso. v. Kinzell*, 43 Misc. 505, 89 N. Y. Supp. 534; *Snyder v. Schram*, 59 How. Pr. 404,—holding service of summons by *de facto* constable valid; *Trueheart v. Addicks*, 2 Tex. 217, holding certificate of county commissioners having no jurisdiction could not give color of title; *Meyer v. Patterson*, 28 N. J. Eq. 239, holding sale on foreclosure made by deputy illegally appointed, good in collateral proceeding; *People ex rel. Griffing v. Lister*, 106 App. Div. 61, 93 N. Y. Supp. 830, holding town liable for services of attorney employed by trustees *de facto*; *People ex rel. Morton v. Tieman*, 8 Abb. Pr. 359, holding rights of officer *de facto* will not avail to sustain claim to salary or fees; *Warden v. Bayfield County*, 87 Wis. 181, 58 N. W. 248; *People ex rel. Dennis v. Brennan*, 30 How. Pr. 417, 45 Barb. 457,—holding payment of salary to *de facto* officer no defense to claim for salary by *de jure* officer.

Cited in reference notes in 39 A. D. 234; 42 A. D. 224; 76 A. S. R. 237; 84 A. S. R. 385,—on validity of facts of *de facto* officers; 38 A. D. 106, on extent of validity of acts of officer *de facto*; 58 A. D. 54 on acts of *de facto* officers being effectual as to third persons.

Cited in note in 25 L. ed. U. S. 314, on validity of acts of officer *de facto*.

—Of *de facto* judges and justices of the peace.

Cited in *Prescott v. Hayes*, 42 N. H. 56, holding acts of justice of the peace performed under color of title, valid as to third persons; *Hinton v. Lindsay*, 20 Ga. 746, on same point; *State v. Carroll*, 38 Conn. 449, 9 A. R. 409, holding judgments by justice of peace taking place of city judge, valid; *Washington, A. & G. R. Co. v. Alexandria & W. R. Co.* 20 Gratt. 31, holding judgments of judges holding over, valid and binding; *Cromer v. Boinest*, 27 S. C. 436, 3 S. E. 849, holding judge who did not file decree until term expired filed it as *de facto* officer; *People ex rel. Devlin v. Peabody*, 6 Abb. Pr. 228, 15 How. Pr. 470, holding officer whose term has expired may make return on certiorari.

Who are *de facto* officers.

Cited in *Hamlin v. Kassafer*, 15 Or. 456, 3 A. S. R. 176, 15 Pac. 778; *People v. Cook*, 8 N. Y. 67, 59 A. D. 451 (affirming 14 Barb. 259),—on what constitutes individual officer *de facto*; *Cary v. State*, 76 Ala. 78, or definition of *de facto* officer; *Mallett v. Uncle Sam Gold & S. Min. Co.* 1 Nev. 188, 90 A. D. 484, holding justice of peace illegally appointed, who discharged duties of office, a *de facto* officer; *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286, holding deputy constable who failed to take oath, an officer *de facto*; *Plymouth v. Painter*, 17 Conn. 585, 44 A. D. 574, on same point as to grand juror; *Monson v. Hunt*, 17 Conn. 566, holding colonel exercising authority under presumptive commission *de facto* officer; *Sprowl v. Lawrence*, 33 Ala. 674; *Crawford v. Howard*, 9 Ga. 314; *Harbaugh v. Winsor*, 38 Mo. 327; *Monteith v. Com.* 15 Gratt. 172,—holding sheriff who discharged duties without giving required bond, officer *de facto*; *Board of Auditors v. Benoit*, 20 Mich. 176, 4 A. R. 382, holding one obtaining office, with legal indicia of title, legal officer until ousted; *Woodside v. Wagg*, 71 Me. 207, holding judge of municipal court, whose authority *de jure* ceased, *de facto* officer while acting under commission; *Brown v. Lunt*, 37 Me. 423, on what constitutes justice of the peace *de facto*; *Buck v. Hawley*, 129

Iowa, 406, 105 N. W. 688, holding deputy sheriff did not exercise sufficient official functions to be *de facto* officer; Trumbo v. People, 75 Ill. 561, holding school directors, officers *de facto* by color of election; Pritchett v. People, 6 Ill. 525, holding exercise of duties of office by judge of probate made him *de facto* officer; Heard v. Elliott, 116 Tenn. 150, 92 S. W. 764, holding long exercise of duties of office affords strong presumption of colorable election; Morford v. Territory, 10 Okla. 741, 54 L.R.A. 513, 63 Pac. 958, holding probate judge, not a licensed lawyer as required by statute, *de facto* officer; Colton v. Beardsley, 38 Barb. 29, holding proof that individual has acted notoriously as public officer prima facie evidence of official character; People ex rel. Morton v. Tieman, 30 Barb. 193, holding officer *de facto* presumed to be officer *de jure* only where rights of public or third party are concerned; People ex rel. Sinkler v. Terry, 42 Hun, 273, holding there can be no officer *de facto* without actually existing office; People v. Cook, 14 Barb. 259, holding public officers may establish their official character by proving they are reputed and have acted as such officers; McCoy v. Curtice, 9 Wend. 17, 24 A. D. 113; Ring v. Grout, 7 Wend. 341,—holding general reputation of certain men being trustees of school district, prima facie sufficient; Dolan v. People, 64 N. Y. 485, 2 Cowen Crim. Rep. 294, holding grand jury drawn by *de facto* commissioner, regular; Dolan v. New York, 68 N. Y. 274, 23 A. R. 168, holding disbursing officer paying official salaries may rely on apparent title of officer *de facto*; Morris v. People, 3 Denio, 381, holding judges appointed under unconstitutional provisions who entered upon their duties, *de facto* officers; Bailey v. Fisher, 38 Iowa, 229 (dissenting opinion), on assessor constituted *de facto* officer by continued acquiescence; Hawver v. Seldenridge, 2 W. Va. 274, holding acts of clerk of court of state in rebellion not acts of *de facto* officer.

Cited in reference notes in 42 A. D. 148; 44 A. D. 321,—on officers *de facto*; 90 A. D. 497; 3 A. S. R. 183,—on what is officer *de facto*.

Cited in notes in 19 A. D. 65, on who are officers *de facto*; 13 L.R.A. 177, on distinction between officers *de facto* and *de jure*; 19 A. D. 68, on claim to office as essential to *de facto* officer; 58 A. R. 442, as to when notary is *de facto* officer and on validity of his acts.

Distinguished in Lambert v. People, 76 N. Y. 220, 32 A. R. 293, 6 Abb. N. C. 181 (reversing 14 Hun, 512), holding notary not shown to have been duly appointed and nonresident could not administer valid oath on which to predicate perjury.

— Color of right to office.

Cited in People ex rel. Devlin v. Peabody, 6 Abb. Pr. 236; Rochester & G. Valley R. Co. v. Clarke Nat. Bank, 60 Barb. 234,—holding to constitute *de facto* officer, there must be color for claim and colorable title to office; Petersilea v. Stone, 119 Mass. 465, 20 A. R. 335, holding one notoriously acting as constable by color of title officer *de facto*; Steinback v. State, 38 Ind. 483, on difference between officers *de jure*, or *de facto* and mere usurpers; Benoit v. Wayne County, 1 Mich. Supp. N. P. 61, on distinction between exercise of office under color of right and mere usurpation; Re Ah Lee, 6 Sawy. 410, 5 Fed. 899, holding person in office by color of right, officer *de facto*.

Authority and title of *de facto* officers, how questioned.

Cited in Re Wakker, 3 Barb. 162, holding habeas corpus would not lie to determine confinement of prisoner arrested on warrant issued by justice *de facto*; Hand v. Deady, 79 Hun, 75, 29 N. Y. Supp. 633; Sullivan v. State, 66 Ill. 75,—

holding title of officers *de facto* to office cannot be questioned collaterally; *Read v. Buffalo*, 4 Abb. App. Dec. 22, 3 Keyes, 447, holding judgment by justice of the peace holding over after term, cannot be impeached collaterally; *Desmond v. McCarthy*, 17 Iowa, 525, holding right to office can be determined only by quo warranto proceedings; *Lask v. United States*, 1 Pinney (Wis.) 77, holding validity of title of district attorney to office cannot be questioned on motion to quash indictment; *Tolle v. Stone*, 1 Pinney (Wis.) 230, *Burnett (Wis.)* 68, holding qualifications of justice of the peace cannot be inquired into on appeal from his judgment; *Reynolds v. McWilliams*, 49 Ala. 552, holding right to office of sheriff performing duties of office cannot be questioned by auditor; *Pack v. State*, 23 Ark. 235, holding right of justice of the peace to office cannot be questioned in *scire facias* proceedings; *Grim v. Adkins*, 21 Ind. App. 106, 51 N. E. 494, holding authority of justice of the peace cannot be questioned in action of replevin; *Spegal v. Krag-Reynolds Co.* 21 Ind. App. 205, 51 N. E. 959, holding authority of notary public cannot be questioned in action in replevin; *Crawford v. State*, 155 Ind. 692, 57 N. E. 931, holding authority of deputy attorney general could not be questioned in prosecution for embezzlement; *Reynolds v. Moore*, 9 Wend. 35, 24 A. D. 116, holding legality of formation of school district cannot be questioned in action to collect taxes; *People v. White*, 24 Wend. 520, holding right of aldermen to sit in court could not be questioned on writ of error; *Kottman v. Ayer*, 3 Strobb. L. 92, holding strict legal title of officer before whom perjury was committed, may be inquired into; *People ex rel. Hodgkinson v. Stevens*, 5 Hill, 618, holding court would not determine question of title to office on *mandamus*.

Protection of officers executing writs.

Cited in *Coon v. Congden*, 12 Wend. 496, holding justice's execution regular on its face, sufficient to protect officer executing process; *Short v. Symmes*, 150 Mass. 298, 15 A. S. R. 204, 22 N. E. 42, holding one who attempts to justify arrest as police officer, must show he was duly and legally qualified to act.

Cited in reference notes in 23 A. D. 698; 24 A. D. 116; 27 A. D. 126; 28 A. D. 44,—on justification of officers by their process; 25 A. D. 600, as to when process is a justification for acts done under it; 43 A. D. 765, on process regular on face as justification of acts of officer under it.

Cited in note in 21 A. D. 199, on process from *de facto* courts or officer as protection to officers executing it.

Distinguished in *Beach v. Botsford*, 1 Dougl. (Mich.) 199, 40 A. D. 45, holding ministerial officer not protected by his process unless he shows valid judgment; *Earl v. Camp*, 16 Wend. 562, holding rule protecting ministerial officer executing process regular on face, cannot shelter wrongdoer.

21 AM. DEC. 217, EVERTSON v. SUTTON, 5 WEND. 281.

Summary process to recover land from tenant.

Cited in *Sperling v. Isaacs*, 13 Daly, 275; *People ex rel. Williams v. Bigelow*, 11 How. Pr. 83; *Burnett v. Scribner*, 16 Barb. 621; *Benjamin v. Benjamin*, 5 N. Y. 383; *Willis v. Eastern Trust & Bkg. Co.* 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347,—holding summary process to recover land applicable only when conventional relation of landlord and tenant exists; *Mason v. Delancy*, 44 Ark. 444, holding unlawful detainer would not lie against one in possession of land under contract of purchase; *Roach v. Cosine*, 9 Wend. 227, holding tenant at sufferance could be dispossessed under statute allowing summary proceedings; *Birdsall v. Phillips*, 17 Wend. 464, holding possession of land might

be obtained by summary proceedings where tenancy at will had not terminated; *Sims v. Humphrey*, 4 Denio, 185; *Coatsworth v. Thompson*, 5 N. Y. S. R. 809,—holding statute must be strictly complied with in summary proceedings for possession of land; *Russell v. Russell*, 32 How. Pr. 400, holding affidavit in unlawful detainer proceedings must show conventional relation of landlord and tenant; *Carlisle v. McCall*, 1 Hilt. 399 (dissenting opinion), on summary proceedings where relation of landlord and tenant exists; *Dreyfus v. Carroll*, 28 Misc. 222, 58 N. Y. Supp. 1116, holding affidavit in unlawful detainer proceedings must show relation of landlord and tenant; *Chase v. Dearborn*, 21 Wis. 58, on whether tenant may deny lessor's title in proceedings to dispossess; *Buel v. Buel*, 76 Wis. 413, 45 N. W. 324, holding son who occupied home by agreement, not a tenant who could be dispossessed under statute.

Distinguished in *Webb v. Seekins*, 62 Wis. 26, 21 N. W. 814, holding tenant at will liable to be dispossessed by landlord by summary process.

Nature of lease.

Cited in note in 17 A. D. 520, on what constitutes a lease.

Conventional tenancies.

Cited in *People ex rel. Mitchell v. Simpson*, 28 N. Y. 55, on what constituted conventional relation of landlord and tenant; *People ex rel. Ainslee v. Howlett*, 76 N. Y. 574, holding where lease was executed under usurious agreement, conventional relation of landlord and tenant did not exist.

Judicial liability.

Cited in note in 24 A. D. 50, on judicial liability.

Who may maintain action of unlawful detainer.

Cited in *People ex rel. Gault v. Van Nostrand*, 9 Wend. 50, holding party in actual possession of lands may proceed under statute of forcible entries and detainers.

Who may maintain trespass.

Cited in reference notes in 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 35 A. D. 511, on sufficiency of possession alone to maintain trespass against wrongdoer; 31 A. D. 65, on necessity of possession to maintain trespass *quare clausum fregit*.

Liability of officer acting without jurisdiction.

Cited in *Imbert v. Hallock*, 23 How. Pr. 456, holding want of jurisdiction by omission of essential proof made proceedings void; *State v. Richmond*, 26 N. H. 232, holding proceedings of tribunals having no jurisdiction absolutely void; *Pratt v. Hill*, 16 Barb. 303, holding justice who caused arrest without authority, liable in trespass.

Trespass for disturbing possession of land.

Cited in *Wiggin v. Woodruff*, 16 Barb. 474; *Fagan v. Scott*, 14 Hun, 162,—holding one in possession under executory contract for purchase could not bring trespass against owner for dispossession.

21 AM. DEC. 223, PINNEY v. GLEASON, 5 WEND. 393.

Measure of damages.

Cited in *Smith v. Dunlap*, 12 Ill. 184, holding measure of damages on breach of contract for sale of chattels cash value at time they should have been delivered; *Derleth v. Degraaf*, 19 Jones & S. 369, on measure of damages for failure to pay notes; *Scott v. Rogers*, 4 Abb. App. Dec. 164 note, on damages for sale by factors contrary to instructions of merchant.

— On breach of contract to pay in specific articles.

Cited in *Cummings v. Dudley*, 60 Cal. 383, 44 A. R. 58, holding amount in agreement of sale in lieu of which horses were to be delivered, liquidated damages; *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408, holding agreed value of chattels to be given in payment binding upon recovery for nonperformance; *Heywood v. Heywood*, 42 Me. 229, 66 A. D. 277, holding in default of payment of certain amount in articles, plaintiff could claim only amount named; *Herrick v. Carter*, 56 Barb. 41, holding balance of purchase payable in nails, could, on default, be recovered in money; *Fletcher v. Derrickson*, 3 Bosw. 181, holding debtor who agreed to pay in goods at stipulated price, liable for that amount in money; *Stever v. Lamoure*, Hill & D. Supp. 352, allowing recovery of agreed price paid for wagon on nondelivery of same; *Weaver v. Demuth*, 40 N. J. L. 238, on power to decree money payment in lieu of one to be made in choses in action.

Cited in reference notes in 55 A. D. 375, on measure of damages for breach of contract to deliver goods sold; 52 A. D. 291, on measure of damages for non-delivery of chattels.

Debts payable in specific articles.

Cited in *Rodes v. Bronson*, 34 N. Y. 649, holding promise to pay express sum in specific articles, is for benefit of promisor; *Langtry v. Walker*, 6 Humph. 336, holding written promise to pay sum in bar iron at stipulated price, a property contract; *Hand v. Belcher Mosaic Glass Co.* 30 N. Y. S. R. 389, 9 N. Y. Supp. 738, defining meaning of payment of certain amount "in trade"; *Moore v. Taylor*, 42 Hun, 45, allowing recovery where payment for railroad work was to be made in stock.

Cited in notes in 21 A. D. 424, on notes payable in specific articles; 21 A. D. 425, as to when right to pay in specific articles as provided in note is lost; 46 A. R. 308, on necessity for demand and refusal before recovery on instrument for payment in specific property.

Distinguished in *Sternberger v. McGovern*, 4 Daly, 456, holding agreement to pay for land in mortgages and other land, an exchange.

— Right to elect medium of payment.

Cited in *Murray v. Harrison*, 47 Barb. 484, 33 How. Pr. 90, holding contract to pay certain sum in specific articles gave option to pay in money or articles; *Jones v. Dimmock*, 2 Mich. N. P. 87, holding agreement to pay certain sum in specific articles may be discharged by payment in money; *Leopold v. McCartney*, 14 Colo. App. 442, 60 Pac. 640, holding note payable in property might be satisfied by payment in money; *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180, holding agreement to pay for work in articles at certain price may be discharged by payment in money; *Trowbridge v. Holcomb*, 4 Ohio St. 38, holding agreement to pay sum in wool at certain price may be discharged by payment in money; *Hazeltine v. Brockway*, 26 Colo. 291, 57 Pac. 1077, holding debtor who has option to pay in property or money, must pay in money if he fails to elect; *Irving v. Bond*, 76 Neb. 293, 107 N. W. 585, holding one who may pay debt in money or property, bound to pay cash when he alienates property; *Rockwell v. Rockwell*, 4 Hill, 164, holding allegation of nonpayment of note payable in specific articles, sufficient; *Wilson v. George*, 10 N. H. 445, holding contract to pay certain sum in articles, inadmissible under count for money had and received; *Thomas v. Murray*, 32 N. Y. 605, holding contract to pay absolutely in goods not discharged by payment in money; *Dowdney v. McCullom*, 59 N. Y. 367, 48 How. Pr. 342, holding agreement to pay part of contract price in money and part by conveyance cannot be fulfilled by payment of all in money.

— Interest on.

Cited in *Van Rensselaer v. Jewett*, 5 Denio, 135, 41 A. D. 750, allowing interest on value of articles agreed upon as rent after time for delivery; *Dana v. Fiedler*, 1 E. D. Smith, 463 (dissenting opinion), on recovery of interest upon breach of contract.

— Amount payable in stocks and bonds.

Cited in *Bates v. Cherry Valley, S. & A. R. Co.* 3 Thomp. & C. 16, holding payment of certain sum in stock must be at par value of stock; *Pusey v. New Jersey W. L. R. Co.* 14 Abb. Pr. N. S. 434, holding recovery would lie for sum payable in bonds, if no election was made; *Noonan v. Ilsley*, 17 Wis. 315, 84 A. D. 742, holding agreement to pay certain amount in stock meant at its par value.

— Amounts payable "in coin."

Cited in *Kimpton v. Bronson*, 45 Barb. 618, holding mortgage specifying payment in "gold or silver coin" might be satisfied by treasury notes; *Murray v. Gale*, 5 Abb. Pr. N. S. 236, 24 Phila. Leg. Int. 228, holding contract specifying payment in "gold or silver coin" satisfied by payment in legal tender; *Wilson v. Morgan*, 30 How. Pr. 386, 4 Robt. 58, 1 Abb. Pr. N. S. 174, holding freight payable in gold or silver dollars, satisfied by payment of legal tender notes.

Distinguished in *Bank of Prince Edward's Island v. Trumbull*, 35 How. Pr. 8, 4 Abb. Pr. N. S. 82, 53 Barb. 459, holding bill of exchange payable in United States gold coin, must be paid in gold or equivalent value in legal tender notes.

21 AM. DEC. 232, McLAUGHLIN v. WAITE, 5 WEND. 404.

Lost property, rights of finder.

Cited in *New York & H. R. Co. v. Haws*, 3 Jones & S. 372; *Ellery v. Cunningham*, 1 Met. 112,—holding finder of lost property has lawful possession which none but owner can question; *Goddard v. Winchell*, 86 Iowa, 71, 41 A. S. R. 481, 17 L.R.A. 788, 52 N. W. 1124, holding aërolite became property of owner of soil upon which it fell; *Livermore v. White*, 74 Me. 452, 43 A. R. 600, holding hides inadvertently left in vats for many years do not belong to finder; *Mathews v. Harrell*, 1 E. D. Smith, 393, holding servant who finds chattels, may maintain trover against wrongdoer who converts it; *Ferguson v. Ray*, 44 Or. 557, 102 A. S. R. 648, 1 L.R.A. (N.S.) 477, 77 Pac. 600, 1 A. & E. Ann. Cas. 1, holding gold bearing quartz found buried in ground not "treasure-trove."

Cited in reference note in 29 A. D. 215, on lost property.

Cited in notes in 37 L.R.A. 119, on right of action by finder of property; 18 A. D. 55, 57, on trover by finder of lost articles; 11 L.R.A. 172, on right of finder of lost property to bring replevin; 55 A. D. 511, on property in goods left derelict at sea.

— Lost choses in action.

Cited in *The Emblem*, 2 Ware, 68, Fed. Cas. No. 4,434, allowing no salvage for saving bills of exchange or evidences of debt from wreck; *Yates v. Tisdale*, 3 Edw. Ch. 71, holding action for prize money on lottery ticket can be sustained only by lawful owner.

Cited in note in 52 A. D. 455, on right of finder of bank bill as against his bailee.

Distinguished in *Tancil v. Seaton*, 28 Gratt. 601, 26 A. R. 380, holding finder of bank note has such an interest therein that he may recover it from a bailee.

21 Am. Dec. 241, FORSYTH v. GANSON, 5 WEND. 558.**Implied promise to pay for benefit done by another.**

Cited in *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450, holding payment to discharge liability of another party sufficient consideration for promise to repay.

Cited in reference note in 27 A. D. 390, on *assumpsit* to reach money of which defendant has received the benefit.

Disapproved in *Force v. Haines*, 17 N. J. L. 385, holding action will not lie for act for benefit of another without previous request or subsequent promise to pay.

—To pay for necessities.

Cited in *Manning v. Wells*, 85 Hun, 27, 32 N. Y. Supp. 601, holding promise implied on part of defendant to pay for necessities furnished infant son.

Distinguished in *Raymond v. Loyl*, 10 Barb. 483, holding action will not lie by third person against parent for necessities furnished infant without express or implied contract by parent to pay.

Admissions of executors and administrators.

Cited in *M'Intire v. Morris*, 14 Wend. 90, holding corepresentative not bound; *Elwood v. Deifendorf*, 5 Barb. 398, holding admissions by executors or administrators cannot bind coexecutors or administrator; *Cayuga County Bank v. Bennett*, 5 Hill, 236, holding admissions of two of three executors not receivable to affect all; *Caruthers v. Mardis*, 3 Ala. 599, holding promise by one of several administrators will not take case out of statute of limitations; *Weston v. Murman*, 4 Ind. 271, holding note given by one of several administrators not admissible in suit against coadministrator; *La Bau v. Vanderbilt*, 3 Redf. 384; *Balley v. Spofford*, 14 Hun, 86,—the same as to executors; *Rogers v. Grannis*, 20 Ala. 247, holding admission by administrator in chief as to genuineness of note not admissible against administrator *de bonis non*; *Phars v. Leachman*, 20 Ala. 662, holding administrator may by admission revive claim already created against estate; *Lawson v. Powell*, 31 Ga. 681, 79 A. D. 296, holding declarations and admissions of administrator, admissible in suit concerning estate; *Marshall v. Adams*, 11 Ill. 37, holding admissions by administrator cannot bind joint promisor with intestate; *Spencer v. Hall*, 30 Misc. 75, holding admissions of sole administrator in transaction of business as such, bind estate of intestate; *Lane v. Doty*, 4 Barb. 530, holding survivor of joint contractors cannot revive contract by admission, as against personal representative of deceased; *Re M'Williams*, 3 Clark, 321, holding admissions of one executor do not bind fund in hands of representative of deceased executor; *Karl v. Black*, 2 Pittsb. Rep. 19, holding one of three executors cannot confess judgment which will bind estate; *Hall v. Boyd*, 6 Pa. 267, holding same as to confession of judgment barred by statute of limitations; *Scruggs v. Driver*, 31 Ala. 274, holding one of two executors cannot bind estate by purchase of property.

Cited in note in 51 A. D. 321, on effect of admissions by one of several joint obligors as to others.

Order of proof.

Cited in *Rushville & S. R. Co. v. McManus*, 4 Ind. 275, on order of evidence when several facts must be proved to maintain issue.

21 AM. DEC. 245, MARTIN v. DWELLY, 6 WEND. 9.**Necessity of acknowledgment.**

Cited in *McDaniel v. Grace*, 15 Ark. 465, denying validity as to wife of deed
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of her estate, executed by husband under her power of attorney not acknowledged in mode required for deeds; *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242, sustaining validity of wife's deed as a conveyance although not acknowledged; *Dickinson v. Glenney*, 27 Conn. 103, denying validity of wife's conveyance of her realty where not acknowledged by husband as prescribed; *Dodge v. Hollinshead*, 6 Minn. 25, Gil. 1, 80 A. D. 433, denying validity of married woman's deed not in fact acknowledged, as required by statute; *Goss v. Furman*, 21 Fla. 406; *Wooden v. Morris*, 3 N. J. Eq. 65,—denying validity of agreement by husband and wife for conveyance of latter's realty, in absence of wife's acknowledgment on private examination; *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079, denying validity of married woman's covenant as to building line, where without prescribed acknowledgment; *Knowles v. McCamly*, 10 Paige, 342, 2 N. Y. Leg. Obs. 272, denying decree against heir of *feme covert*, for specific performance of latter's contract to convey, when same without prescribed acknowledgment; *Hait v. Houle*, 19 Wis. 472, holding mortgage executed by husband and wife but not acknowledged by latter, inoperative as against her; *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362, sustaining validity of mortgage of homestead as against husband who owns same, although wife signed but did not attest or acknowledge.

Sufficiency of acknowledgment.

Cited in *Simms v. Herve*, 19 Iowa, 273; *Boykin v. Rain*, 28 Ala. 332, 65 A. D. 349,—denying validity of mortgage to pass estate of married woman whose acknowledgment not such as required by law; *Wamble v. Foote*, 2 Dak. 1, 2 N. W. 239, refusing to regard married woman's deed not duly acknowledged as prescribed by law, as agreement to convey, especially in absence of receipt of consideration; *Heaton v. Fryberger*, 38 Iowa, 185, holding married woman's omission in acknowledgment to state knowledge with contents of conveyance, fatal; *Chauvin v. Wagner*, 18 Mo. 531, holding married woman's acknowledgment of conveyance of her own estate not vitiated by omission of statement of explanation, where stating her knowledge of contents.

Cited in reference notes in 52 A. D. 519, on invalidity of deed of married woman not acknowledged in statutory mode; 25 A. S. R. 806, on effect of married woman's deed defectively acknowledged; 36 A. D. 90, on sufficiency of married woman's certificate of acknowledgment to deed.

Cited in notes in 18 A. D. 450, on invalidity of deed by married woman not acknowledged in prescribed manner; 41 A. D. 179, on substantial compliance with statute in acknowledgment by married woman.

Parol proof to cure defective acknowledgment.

Cited in *O'Ferrall v. Simplot*, 4 G. Greene, 162, holding that material defect or omission in wife's acknowledgment cannot be supplied by parol; *Willis v. Gattman*, 53 Miss. 724, holding incompetent, parol proof of primary examination not stated in certificate.

Validity of contract or conveyance by married woman.

Cited in *Haussman v. Burnham*, 59 Conn. 117, 21 A. S. R. 74, 22 Atl. 1065 (dissenting opinion), on validity of wife's agreement to reconvey upon request, where she obtained conveyance thereby; *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433, sustaining validity under statute requiring husband to join in wife's deed, of conveyance by agent omitting husband's name but under duly executed power, and where consideration retained; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 A. D. 336, sustaining validity of wife's conveyance of all her interest in separate estate although husband joins in warranty and wife relinquishes dower right; *Shroyer v. Nickell*, 55 Mo. 264, denying validity of married woman's deed of realty not conveyed to her in form and manner prescribed by statute; *State v. Clay*, 100

Mo. 571, 13 S. W. 827, denying validity of married woman's power of attorney for sale of land, in absence of enabling statute; *Shaffer v. Kugler*, 107 Mo. 58, 17 S. W. 698, denying validity of postnuptial agreement for conveyance to husband by wife of her general fee-simple estate; *Young v. Paul*, 10 N. J. Eq. 401, 64 A. D. 456, holding void, married woman's agreement to join in deed of husband's land; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9, sustaining validity of wife's mortgage of her property, upon prescribed acknowledgment but without husband joining; *Scott v. Battle*, 85 N. C. 184, 39 A. R. 694, holding void, wife's conveyance in which husband does not join, and on which she is not privily examined; *Frarey v. Wheeler*, 4 Or. 190, holding married woman not bound by contract to convey jointly executed with husband.

Cited in reference notes in 39 A. S. R. 672, on validity of married women's deeds; 23 A. D. 777, as to when conveyances by married women are void; 29 A. D. 72, on enforceability of contracts of married woman with respect to her separate property; 47 A. D. 115, on execution and acknowledgment of conveyance by *feme covert*.

Cited in notes in 45 A. D. 176, on validity of married woman's contracts and covenants; 43 A. D. 426, on wife's liability for breach of warranty in deed of her property executed jointly with husband.

Separate property of married woman.

Cited in reference note in 49 A. D. 73, on liability of married woman's property for her debts.

Cited in note in 32 A. D. 602, on wife's separate property.

Validity of judgment against married woman.

Cited in *Cary v. Dixon*, 51 Miss. 593, holding void, judgment against married woman in case unauthorized by law.

Estoppel of feme covert — By deed.

Cited in *Childs v. McChesney*, 20 Iowa, 431, 89 A. D. 545, holding *feme covert* not estopped by joining with husband in conveyance of her realty with covenants of general warranty, from asserting title subsequently acquired with her own means; *Preston v. Evans*, 56 Md. 476, holding that *feme covert's* covenant of general warranty does not preclude assertion of subsequently acquired interest; *Wilson v. King*, 23 N. J. Eq. 150, holding validity of mortgage assigned to wife, not affected by her previous unauthorized warranty of freedom from encumbrance of same property when deeded by husband; *Dominick v. Michael*, 4 Sandf. 374, holding married woman not estopped by deed creating trust in separate estate in case of sale by administrator under will whereby derived, to dispute administrator's right to sell; *Moore v. Tyler*, 1 Monaghan (Pa.) 529, 17 Ala. 216, denying estoppel against married woman to assert interest in land acquired subsequently to warranty deed thereof by husband as owner in which she joined.

Cited in reference notes in 58 A. D. 569, as to when married woman is estopped by her covenants; 54 A. S. R. 109, on estoppel of married woman by covenants in deed; 77 A. D. 651, on estoppel by *feme covert* by covenants of warranty in deed; 23 A. D. 706, on conclusiveness on married woman of covenants in her deed; 31 A. D. 446, on estoppel of married woman to assert subsequently acquired title by covenant of warranty.

Cited in note in 89 A. D. 549, on married woman's estoppel to assert after-acquired title by joining her husband in warranty deed.

— In pais.

Cited in *Rannells v. Gerner*, 80 Mo. 474, holding estoppels *in pais* not applicable to *feme covert*, except where regarded as *feme sole*, in consequence of possessing

separate estates; *Coster v. Isaacs*, 16 Abb. Pr. 328, 1 Robt. 176 (dissenting opinion), on liability of married woman for rent of premises represented as leased for use in her separate business.

Specific performance of contract.

Cited in *Blythe v. Dargin*, 68 Ala. 370, denying enforceability of wife's deed as contract to convey, although signed by husband where husband not joined as grantor as prescribed; *Annan v. Merritt*, 13 Conn. 478, denying enforceability in chancery against husband and wife of husband's contract for wife's land; *Atkison v. Henry*, 80 Mo. 151, holding mere acceptance by wife of purchase money for land held in entirety, not ground for specific performance; *Wooden v. Morris*, 3 N. J. Eq. 65, holding that equity will not decree specific enforcement of agreement of *feme covert*, with assent of husband, to convey her realty, when same is void at law; *Pentz v. Simonson*, 13 N. J. Eq. 232, denying right to specific performance of married woman's contract to convey.

Cited in reference note in 23 A. D. 777, on enforcement in equity of defectively executed instrument by married woman.

Cited in notes in 24 L.R.A. 763, on specific performance against wife on contract of conveyance by husband and wife; 19 A. D. 232, 234, on power of equity to perfect or enforce defectively executed or acknowledged instruments of married woman.

Distinguished in *De Pierres v. Thorn*, 4 Bosw. 266, sustaining enforceability of married woman's contract executed abroad.

Reformation of contract.

Cited in *Cannon v. Beatty*, 19 R. I. 524, 34 Atl. 1111; *Moulton v. Hurd*, 20 Ill. 137, 71 A. D. 257,— denying equitable power to reform married woman's mortgage, where instrument would be essentially changed and contrary to intent at making; *Gebb v. Rose*, 40 Md. 387, holding that omission of statutory requirement in deed of *feme covert*, essential to its validity, cannot be corrected in equity; *Carr v. Williams*, 10 Ohio, 305, 36 A. D. 87, holding that *feme covert's* deed not executed according to statute, cannot be rectified so as to bind her right.

Cited in note in 51 A. R. 462, on equitable correction of married woman's deed.

Distinguished in *Gardner v. Moore*, 75 Ala. 394, 51 A. R. 454, sustaining equitable jurisdiction to reform mortgage of homestead by correcting admitted error in designation of subdivisions of same section, where duly executed and acknowledged by husband and wife.

Condition precedent to recovery.

Cited in *Brown v. Pechman*, 53 S. C. 1, 30 S. E. 586, holding that equity cannot make return of purchase money, condition precedent to married woman's recovery for invalidity of conveyance.

Appealability of order.

Cited in *Cruger v. Douglass*, 8 Barb. 81, 2 N. Y. Code Rep. 123, holding order awarding process to render decree effective, appealable as affecting merits.

21 AM. DEC. 256, LUPIN v. MARIE, 6 WEND. 77.

Passing of title to chattels sold.

Cited in *Kelley v. Upton*, 5 Duer, 336, holding character of contract of sale determined by intentions as to vesting of title; *Fuller v. Bean*, 34 N. H. 290, holding sale not complete while something remains to be done to ascertain price; *Decker v. Furniss*, 3 Duer, 291 (dissenting opinion), on title to goods when some act is to be done to ascertain price; *Rinehart v. Olivine*, 5 Watts & S. 157, holding

lessor to be paid rent in grain had no interest in it until it was severed and delivered; *Harrison v. Williamson*, 2 Edw. Ch. 430, holding a sale of goods absolute and unconditional.

Cited in reference note in 28 A. D. 550, as to when sales are complete.

— **Payment as prerequisite.**

Cited in *Baker v. Bourcicault*, 1 Daly, 23, holding title to goods not divested until payment, unless there is waiver by vendor; *Russell v. Minor*, 22 Wend. 659, holding title to goods to be paid for in notes does not pass without giving of notes; *Chalmers v. McAuley*, 68 Vt. 44, 33 Atl. 767, holding title to chattels to be paid for in notes remains in vendor until delivery.

— **Waiver of nonpayment or other condition by delivery.**

Cited in *People v. Haynes*, 14 Wend. 546, 28 A. D. 530 (reversing 11 Wend. 557); *Smith v. Lynes*, 3 Sandf. 203; *Dodge v. Waterman*, 36 N. H. 186,—holding delivery of goods without requiring note for price as agreed, waiver of stipulation for note; *Sutro v. Hoile*, 2 Neb. 186; *Russell v. Minor*, 22 Wend. 659; *Moffatt v. Green*, 9 Ind. 198,—holding delivery of goods, without exacting performance of conditions, a waiver thereof; *Smith v. Lynes*, 5 N. Y. 41, holding burden of proving sale conditional on vendor who delivered goods without exacting notes as agreed; *Hogan v. Shorb*, 24 Wend. 458, holding title passed to purchaser from factor of goods sold for cash but delivered without payment; *Furniss v. Hone*, 8 Wend. 247, holding upon delivery of goods, failure to take notes as agreed vests absolute title in vendee; *Ives v. Humphreys*, 1 E. D. Smith, 196, holding voluntary delivery of goods without reservation waiver of simultaneous payment; *Lees v. Richardson*, 2 Hilt. 164, holding condition not performed at time of sale or shortly after, deemed to be waived; *Osborn v. Gantz*, 60 N. Y. 540, holding presumption of waiver of present payment by absolute delivery may be rebutted by circumstance.

Distinguished in *Genin v. Tompkins*, 12 Barb. 265, on waiver of condition with respect to right to demand immediate payment for chattels.

Delivery as passing title.

Cited in *Morgan v. Powers*, 66 Barb. 35, holding delivery of animal to be exchanged for another passed title to it; *Manton v. Gammon*, 7 Ill. App. 201, holding conditional delivery of goods passed no title to vendee.

Cited in note in 16 A. D. 436, on passing of title by delivery without payment.

Sale to insolvent.

Cited in *Redington v. Roberts*, 25 Vt. 686, holding mere insolvency of vendee will not avoid a sale; *Mulliken v. Millar*, 12 R. I. 296, holding proof of general intent to defraud by purchasing after insolvency, sufficient; *Smith v. Smith*, 21 Pa. 367, 60 A. D. 51; *Reed v. Felmlee*, 25 Pa. Super. Ct. 37,—holding intention of insolvent buyer not to pay, not fraud, without false representations; *Nichols v. Pinnaer*, 18 N. Y. 295, holding omission of vendee to disclose insolvency, not a fraud for which sale may be avoided; *Bidault v. Wales*, 19 Mo. 36, 59 A. D. 327, holding sale to vendee who is ignorant of insolvency, not fraudulent.

Cited in note in 27 A. R. 505, on validity of purchase by insolvent made without intention to pay.

Assignment by insolvent.

Cited in *Leger v. Bonafé*, 2 Barb. 475, holding under general assignment for creditors, no new consideration being advanced, notes pass subject to existing equities.

Vendor's lien on land.

Cited in *Hall v. Click*, 5 Ala. 363, 39 A. D. 327, holding vendor of real estate retains lien for unpaid purchase money; *Burr v. Robinson*, 25 Ark. 277, holding mortgages with power to sell has no lien as vendor in case of sales.

Cited in reference notes in 37 A. D. 633, on vendor's lien; 39 A. D. 330, on creation, existence, and extent of vendor's lien; 52 A. D. 435, on nature of vendor's lien; 24 A. D. 691, on equitable lien for unpaid purchase money; 40 A. D. 460, on right of vendor of real estate to lien for purchase money; 45 A. D. 272; 52 A. D. 212; 60 A. D. 559,—on vendor's lien upon real estate for purchase money; 50 A. D. 548, on vendor's lien on realty as doctrine of equity.

Cited in notes in 39 A. D. 202, on vendor's lien on realty for purchase money; 28 A. D. 199, on existence, waiver, and assignability of vendor's lien.

— On chattels.

Cited in *Myers v. King*, 48 Hun, 106; *Cole v. Smith*, 24 W. Va. 287; *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910,—holding vendor of personal property has no lien for unpaid purchase money after delivery; *Buck v. Grimshaw*, 1 Edw. Ch. 140, holding delivery of goods unconditionally and without fraud gave vendor no lien for purchase price; *Blackshear v. Burke*, 74 Ala. 239, holding vendor who delivers chattels unconditionally has no lien for purchase money.

Cited in reference notes in 19 A. S. R. 255, on lien of vendor on sale of personalty; 77 A. D. 95, on loss of lien on personalty by surrendering possession.

Cited in notes in 83 A. S. R. 453, on lien of vendor of personalty; 83 A. S. R. 457, on effect of delivery on lien of vendor of personalty.

Effect of failure to pay for chattel as agreed.

Cited in *Conway v. Bush*, 4 Barb. 564, holding buyer of chattels for cash cannot take goods or sue for them without payment; *Yale v. Coddington*, 21 Wend. 175, holding vendor may sue for breach of agreement to pay for goods in notes as agreed.

Completion of contract.

Cited in *Falls v. Gaither*, 9 Port. (Ala.) 605, holding offer to sell, by letter, binds offerer when accepted if not revoked prior thereto.

21 AM. DEC. 262, MACTIER v. FRITH, 6 WEND. 103.**Necessary mutuality and accord of minds to form contract.**

Cited in *McConnell v. Brillhart*, 17 Ill. 354, 65 A. D. 661, holding contract must be mutual, reciprocal, and upon good consideration; *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337, holding matter in contract not sufficiently definite to constitute contract; *Ivey v. Kern County Land Co.* 115 Cal. 196, 46 Pac. 926, holding contract made where last act performed which rendered it obligatory; *Falls v. Gaither*, 9 Port. (Ala.) 605, holding concurrence of minds necessary to contract need not take place at same instant of time; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476, holding insurance contract made where last act necessary to complete it was done.

Offer and acceptance, in general.

Cited in *Curtis v. Blair*, 26 Miss. 309, 59 A. D. 257, holding acceptance of full, unconditional offer makes completed contract; *Kleinhans v. Jones*, 15 C. C. A. 644, 37 U. S. App. 185, 68 Fed. 742, holding where consent is not given by one party to terms to which other has agreed, there is no contract; *Garfield's Case*, 11 Ct. Cl. 592, holding acceptance of bid imposes liability on other party without formal contract; *Seamans v. Knapp-Stout & Co.* 89 Wis. 171, 46 A. S. R. 825,

27 L.R.A. 362, 61 N. W. 757, holding insurance contract not complete until application and premium note were received and approved by company; *Bentley v. Columbia Ins. Co.* 17 N. Y. 421, holding general insurance agent not authorized to insure property before receipt of application; *New Haven County Bank v. Mitchell*, 15 Conn. 206, holding in case of contract of suretyship, for paper, no acceptance necessary to make surety liable; *Fellows v. Prentiss*, 3 Denio, 512, 45 A. D. 484, holding proposition to become surety for third party, not binding without acceptance; *Weaver v. Burr* (*Weaver v. Gay*), 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743 (dissenting opinion), on whether proposal was accepted so as to make it valid contract.

Cited in reference note in 97 A. D. 571, on necessity of acceptance of offer to make it binding.

— By mail or message.

Cited in *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415, holding offer and acceptance by mail must be definite to make contract; *Averill v. Hedge*, 12 Conn. 424, holding offer by mail must be accepted within reasonable time; *Butterfield v. Spencer*, 1 Bosw. 1, holding offer communicated by letter when accepted by letter becomes binding contract; *Sherman v. White*, How. App. Cas. 29, on correspondence between parties as making contract; *Lucas v. Western U. Teleg. Co.* 131 Iowa, 669, 6 L.R.A.(N.S.) 1016, 109 N. W. 191, holding offer by mail impliedly authorizes acceptance through same agency.

Cited in note in 6 E. R. C. 90, 92, 132, on offer and acceptance of contract made by letter.

Distinguished in *Haas v. Myers*, 111 Ill. 421, 53 A. R. 634, holding acceptance of offer by mail or telegraph will not complete contract where anything remains to be done.

— Assent or acceptance after death of party.

Cited in *Scruggs v. Cotterill*, 67 App. Div. 583, 73 N. Y. Supp. 882, holding agreement between stockholders giving each right to purchase stock of other in case of death, enforceable against executors; *Haarstick v. Fox*, 9 Utah, 110, 33 Pac. 251, holding death of vendor who had mailed acceptance of offer did not affect transaction; *Northwestern Mut. L. Ins. Co. v. Joseph*, 31 Ky. L. Rep. 714, 12 L.R.A.(N.S.) 439, 103 S. W. 317, holding death of insured after acceptance of option, before delivery of acceptance did not nullify contract.

Cited in notes in 23 L.R.A. 708, on effect on contract of sale of death of party thereto; 12 L.R.A.(N.S.) 439, on effect of death of party after mailing but before receipt of his letter accepting an offer.

Continuance and duration of offer.

Cited in *Pettibone v. Moore*, 75 Hun, 461, 27 N. Y. Supp. 455, holding offer presumed to be open for time specified for its continuance; *Moore v. Pierson*, 6 Iowa, 279, 71 A. D. 409, holding offer in general presumed to continue until acceptance; *Berly v. Taylor*, 5 Hill, 577, holding proposition to sell presumed to continue until revoked; *Wylie v. Brice*, 70 N. C. 422, holding offer to pay draft continued for reasonable time after making; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315, holding offer to sell, unsupported by consideration, may be withdrawn any time before acceptance; *Simonson v. Kissick*, 4 Daly, 143, holding vendor may retract offer if not accepted when made unless there is consideration allowing election; *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268, holding application for insurance construed to stand until contrary appears; *Wheat v. Cross*, 31 Md. 99, 1 A. R. 28, holding offer continued until notice of withdrawal actually reached

vendor; *Sherley v. Reehl*, 84 Wis. 46, 54 N. W. 267; *McCleskey v. Howell Cotton Co.* 147 Ala. 573, 42 So. 67,—holding offer deemed to continue until answered or withdrawn; *Phillips v. Moor*, 71 Me. 78, holding objection to acceptance as being too late waived if not communicated promptly.

Cited in reference note in 34 A. S. R. 344, on continuing offer to sell.

Time for acceptance of offer.

Cited in *Batterman v. Morford*, 76 N. Y. 622, holding parties bound by offer only for reasonable time; *Union Nat. Bank v. Miller*, 106 N. C. 347, 19 A. S. R. 538, 11 S. E. 321, holding offer comes to end if not accepted within definite time named; *Donaldson v. Kerr*, 6 Pa. 486, holding bid made at sheriff's sale withdrawn by implication when sale is adjourned; *James v. Marion Fruit Jar & Bottle Co.* 69 Mo. App. 207, holding party cannot accept terms of offer before they are communicated by offerer; *Mathews Slate Co. v. New Empire Slate Co.* 122 Fed. 972, holding offer to convey land enforceable if assented to before withdrawal.

Acceptance by relation to time of offer.

Cited in *Goodpaster v. Porter*, 11 Iowa, 161, holding acceptance of offer to buy upon election to sell, made consideration relate back to promise.

Means and sufficiency of acceptance.

Cited in *Fried v. Royal Ins. Co.* 50 N. Y. 243, holding acceptance of proposal to insure with receipt of premium made binding contract; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96, holding acceptance of application of insurance, premiums to be paid in advertising, completed contract; *Samuel v. Cravens*, 10 Ark. 390, holding institution of action not acceptance of offer of bankruptcy to pay.

— Overt acts or acquiescent silence.

Cited in *Fox v. Turner*, 1 Ill. App. 153, holding overt act showing determination to accept offer, completes contract; *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268, holding contract arises when overt act is done intending to signify acceptance of proposition; *New York & N. H. R. Co. v. Pixley*, 19 Barb. 428, holding silence under certain circumstances assent to a proposition.

Compliance with statute of frauds.

Cited in note in 15 E. R. C. 357, on sufficiency of writing to satisfy statute of frauds.

Conformity of acceptance to offer.

Cited in *Myers v. Smith*, 48 Barb. 614, holding acceptance of offer made by letter must be accordant with terms of offer; *Myers v. Trescott*, 59 Hun, 395, 13 N. Y. Supp. 54; *Nundy v. Matthews*, 34 Hun, 74,—holding answer proposing modifications to offer must be expressly accepted; *Lewis v. Browning*, 130 Mass. 173, holding offer by letter requiring acceptance by certain date depends upon such acceptance.

Knowledge of acceptance by offerer.

Cited in *Ryder v. Frost*, 3 La. Ann. 523, holding knowledge of acceptance by proposer not necessary to complete contract; *Falls v. Gaither*, 9 Port. (Ala.) 605, holding sale complete when offer accepted, even though offerer ignorant of acceptance; *People ex rel. Frost v. Fay*, 3 Lans. 398, holding notice to party of acceptance of bid would make binding contract.

Completion of acceptance.

Cited in *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 55 A. S. R. 680, 44 N. E. 959, holding place where bid was received and negotiations concluded, place of contract.

Cited in notes in 55 A. S. R. 45, on place of contract; 99 A. D. 668, on place of last act of assent as place where contract was made.

— Of acceptance by mail or the like.

Cited in *Winterport Granite & Brick Co. v. The Jasper*, Holmes, 99, Fed. Cas. No. 17,898; *Kempner v. Cohn*, 47 Ark. 519, 58 A. R. 775, 1 S. W. 869; *Moore v. Pierson*, 6 Iowa, 279, 71 A. D. 409; *Ferrier v. Storer*, 63 Iowa, 484, 50 A. R. 752, 19 N. W. 288; *Abbott v. Shepard*, 48 N. H. 14; *Vassar v. Camp*, 14 Barb. 341; *Clark v. Dales*, 20 Barb. 42; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495; *Vassar v. Camp*, 11 N. Y. 441; *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747; *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362,—holding contract complete when answer containing acceptance is despatched by mail or otherwise; *Minnesota Linseed Oil Co. v. Collier White-Lead Co.* 4 Dill. 431, Fed. Cas. No. 9,635, holding same rule when acceptance is deposited for transmission in telegraph office; *Tayloe v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187, holding contract of insurance complete when insured put letter of acceptance in postoffice; *Levy v. Cohen*, 4 Ga. 1, holding acceptance by written reply takes effect from time communication is sent; *Trevor v. Wood*, 26 How. Pr. 451, 41 Barb. 255, holding rule as to contracts made by mail not applicable to communications by telegraph; *Trevor v. Wood*, 36 N. Y. 307, 93 A. D. 511, 3 Abb. Pr. N. S. 355, holding sending of despatch by telegraph acceptance of offer made in same way.

Cited in reference note in 35 A. D. 189, as to when contract of sale by letter is complete.

Cited in notes in 93 A. D. 515, as to when contract by mail or telegraph is consummated; 99 A. D. 669, on place where assent to proposal is mailed as place of contract.

Acts requiring concurrence of minds.

Cited in *Kavanaugh v. Security Trust & L. Ins. Co.* 117 Tenn. 33, 7 L.R.A. (N.S.) 253, 96 S. W. 499, 10 A. & E. Ann. Cas. 680, holding communication as to maturity of premium must be received to operate as notice upon which forfeiture may be based; *The Palo Alto*, 2 Ware, 344, Fed. Cas. No. 10,700, holding revocation of remission of forfeiture by Secretary of Treasury inoperative until notice given to claimant.

Distinguished in *Crown Point Iron Co. v. Aetna Ins. Co.* 127 N. Y. 608, 14 L.R.A. 150, 28 N. E. 653, holding cancelation of policy incomplete until request for same reached insured.

Retroactive assent to act.

Cited in *Drennen v. Walker*, 21 Ark. 539, holding ratification by principal of unauthorized act of agent relates back to first act of agent.

Mailing as equivalent to delivery of message.

Cited in *Wayne County Sav. Bank v. Low*, 6 Abb. N. C. 76, holding note delivered to bank when deposited in mail box in another state.

Revocation of agency by mail.

Cited in *Robertson v. Cloud*, 47 Miss. 208, holding revocation of agency sent by mail becomes operative on its receipt by agent.

What excuses performance of contract.

Cited in note in 1 E. R. C. 348, on *vis major* or inevitable accident as excusing performance of contract.

Concealment as fraud.

Cited in reference note in 44 A. D. 463, as to when suppression of truth constitutes fraud.

Right of stoppage in transitu.

Cited in reference notes in 28 A. D. 550, on termination of right of stoppage in transitu; 23 A. D. 614, as to when right of stoppage in transitu exists.

Cited in note in 29 A. D. 394, on how stoppage in transitu is effected.

21 AM. DEC. 306, TUTTLE v. JACKSON, 6 WEND. 213.**Exemplifications of transcript of justice's court as evidence.**

Cited in *Herrick v. Ammerman*, 32 Minn. 544, 21 N. W. 836, holding exemplification of justice's judgment docketed in the district court, attested by the clerk, with seal of the court annexed, are competent evidence to prove the judgment. *Dickinson v. Smith*, 25 Barb. 102, holding the transcript and docketing justice's judgment all that is necessary, to establish the judgment as a lien, and the authority of the clerk to issue execution.

— Necessity that transcript show jurisdiction.

Cited in *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 A. D. 557, holding a transcript of a justice's judgment is good, although it does not, on its face, show that the justice had jurisdiction; *Agar v. Tibbets*, 46 Hun, 52, holding no action lies upon a judgment docketed in clerk's office, upon the filing of a transcript of a justice's judgment, unless the jurisdiction of the justice is shown by the transcript or proved.

Judicial sales of champertous titles.

Cited in *Mann v. Fairchild*, 5 Barb. 108; *Sandiford v. Frost*, 9 App. Div. 55, 41 N. Y. Supp. 103; *Eisemann v. Lapp*, 38 Misc. 14, 76 N. Y. Supp. 695; *Stevens v. Hauser*, 39 N. Y. 302; *De Garino v. Phelps*, 176 N. Y. 455, 68 N. E. 873; *Chalmers v. Wright*, 5 Robt. 713; *Traux v. Thorn*, 2 Barb. 156,—holding statute forbidding the purchase of pretended titles, not applicable to judicial sales, or transfer by operation of law; *Knapp v. Burton*, 7 N. Y. Civ. Proc. Rep. 448, holding same because party in possession must claim adverse to grantor, and where the conveyance is under judicial sale, the question of adverse possession is not involved; *Sims v. Cross*, 10 Yerg. 460, holding champerty act not applicable to sale by decree of court; *Hoyt v. Thompson*, 5 N. Y. 320, holding sale by receiver of corporation is a judicial one, and passes a good title to purchaser, notwithstanding an adverse possession by third party; *Stevens v. Palmer*, 10 Bosw. 60, holding conveyance by assignee in bankruptcy, by order of court, not within prohibition against conveying lands held adversely; *Trimm v. Marsh*, 54 N. Y. 599, 13 A. R. 623, holding interest of mortgagor out of possession may be sold on execution, and the owner of the mortgage in possession can become the purchaser.

Cited in note in 15 A. D. 411, on necessity of judgment, execution, and title in defendant to support of sheriff's deed.

Distinguished in *Mann v. Fairchild*, 14 Barb. 548, holding statute prohibiting purchase of choses in action by attorneys, for purpose of bringing suits thereon, extends to purchases made at judicial sales.

What is champerty.

Cited in reference notes in 29 A. R. 136; 37 A. D. 562,—on what constitutes champerty.

Mode of proving judgment.

Cited in reference notes in 24 A. D. 630, on mode of proving judgment; 26 A. D. 82, on proof of judgment by best evidence available.

Amendments.

Cited in reference notes in 34 A. D. 105, on amendments; 35 A. D. 735, on

amendment of pleadings; 37 A. D. 245, on amendment of declaration in ejectment.

Execution of process by sheriffs and deputies after term.

Cited in *People ex rel. Dunn v. Boring*, 8 Cal. 406, 68 A. D. 331, holding on election of new sheriff, the former sheriff must complete execution of all final process begun before expiration of his term; *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645, holding by statute, where a sale of mortgaged property has been made by a deputy sheriff, the successor of his principal may execute the deed; *Averill v. Wilson*, 4 Barb. 180; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911,—holding sheriff's deed may be executed by ex-sheriff after his term where he levied on execution and advertised the property for sale during his term; *Barclay v. Bates*, 2 Mo. App. 139, holding as to sale made by sheriff, as trustee under a deed of trust, a memorandum which satisfies the statute of frauds may be made by a deputy sheriff other than the one conducting the sale; *People ex rel. Woolley v. Baker*, 20 Wend. 602, holding second or subsequent creditor with right to redeem may pay the necessary money to a deputy sheriff who made the sale, after the term of his principal; *People ex rel. McAllister v. Lynch*, 68 N. Y. 473, holding deputy sheriff may execute deeds of land sold by him and receive redemption after term of his principal, and after such term, redemption must be made to him if in attendance at sheriff's office.

Cited in reference note in 36 A. D. 543, on power and duty of sheriffs after expiration of term.

Distinguished in *Moore v. Willamette Transp. & Locks Co.* 7 Or. 359, holding by statute, a sheriff's deed may be executed by the sheriff who is in office at time deed is due, after time of redemption has expired.

Right of defendant in ejectment to show different titles.

Cited in *Johnstone v. Scott*, 11 Mich. 232 (dissenting opinion), on right of defendant in ejectment to show any number of titles, and that his possession will be presumed from the valid one.

Cited in note in 60 A. D. 602, on sufficiency of proof of prior possession less than statutory period to sustain ejectment.

Validity of title of subsequent purchaser or mortgagee with actual notice of prior unrecorded conveyance.

Cited in *Butler v. Viele*, 44 Barb. 166; *Smith v. Branch Bank*, 21 Ala. 125,—holding an unrecorded mortgage valid as to all subsequent creditors and purchasers with notice of its existence; *Jackson ex dem. Merrick v. Post*, 15 Wend. 595; *Dixon v. Doe*, 1 Smedes & M. 70, holding notice by subsequent creditors and purchasers of prior unrecorded deed is equivalent to registration of such deed; *Keirsted v. Avery*, 4 Paige, 9, on validity of unrecorded sheriff's deed as to subsequent purchaser at sheriff's sale, who has neither actual nor constructive notice that title has been divested; *Riley v. Hoyt*, 29 Hun, 114, holding subsequent purchaser for value, whose deed is first recorded is not bound by a prior unrecorded mortgage without actual notice of it; *Westbrook v. Gleason*, 79 N. Y. 23 (dissenting opinion), on validity of assignment of mortgage by mortgagee with notice of prior unrecorded mortgage; *Reynolds v. Darling*, 42 Barb. 418, on validity of title of purchaser with notice from judgment debtor within period of limitation; *Valentine v. Marshall*, Fed. Cas. No. 16,812a, on actual notice as equivalent to registry.

Cited in reference note in 38 A. D. 130, on effect of actual or constructive notice of unrecorded deed.

Cited in note in 25 A. D. 334, on validity of unrecorded deed as against second purchaser with notice.

Disapproved in *Martin v. Dryden*, 6 Ill. 187, holding attaching creditor who levies without actual or constructive notice of prior deed acquires a lien, which, if perfected by judgment, execution, sale, and deed, will hold the legal estate, as against prior unrecorded deed, although at time of his execution and sale he had notice of the deed.

Notice from knowledge of facts challenging inquiry.

Cited in *Ellis v. Harriman*, 90 N. Y. 466; *Parker v. Kane*, 4 Wis. 1, 65 A. D. 283,—holding whatever is sufficient to make it the purchaser's duty to inquire as to the rights of others is considered legal notice of those rights; *Kellogg v. Smith*, 26 N. Y. 18 (dissenting opinion), to the same point; *Acer v. Westcott*, 46 N. Y. 384, 7 A. R. 355, holding recital in deed forming link in the chain of title which should put a subsequent grantee or mortgagee upon inquiry as to defect in title, is constructive notice; *Doran v. Dazey*, 5 N. D. 167, 57 A. S. R. 550, 64 N. W. 1023, holding person so put on inquiry as to existence of unrecorded deed, and who fails to make such inquiry, cannot claim as a bona fide purchaser; *Doyle v. Stevens*, 4 Mich. 87, holding notice of prior unrecorded mortgage, and actual possession by the prior mortgagee sufficient notice to subsequent mortgagee; *Lyon v. Gombert*, 63 Neb. 630, 88 N. W. 774, holding claimant is by statute, chargeable with notice of such facts as he might have learned by exercise of ordinary care and diligence; *Peck v. Mallams*, 10 N. Y. 509; *Fort v. Burch*, 6 Barb. 60,—holding notice must be direct and positive, or implied, and notice barely sufficient to put party on inquiry is not enough, or is a suspicion sufficient; *Williamson v. Brown*, 15 N. Y. 354, holding the presumption of notice from knowledge of facts sufficient to put one upon inquiry is one of fact and may be rebutted; *Williams v. Birbeck*, Hoffm. Ch. 359, holding it sufficient as to third persons if, with exercise of ordinary caution, they would have been led to a knowledge of a revocation of a power of attorney.

Cited in reference notes in 42 A. S. R. 733, on matter putting one on inquiry as notice; 38 A. D. 131, on effect of notice putting one on inquiry as to another's rights; 25 A. D. 676, on whatever puts party on inquiry as notice of all facts ascertainable by ordinary diligence.

Cited in note in 62 A. D. 321, on inference of notice arising from newspaper articles or publication not required or authorized by law.

Recording of conveyance as constructive notice.

Cited in *Wright v. Ross*, 36 Cal. 414, holding one with notice of prior equitable rights of a third person by record cannot become a bona fide purchaser or mortgagee; *Wood v. Chapin*, 13 N. Y. 509, 67 A. D. 62, holding recorded deed of creditor at sale, by virtue of legal proceedings to collect his debt, valid as against prior unrecorded deed by the judgment debtor, of which creditor had no notice.

Possession of land as notice to subsequent purchasers and creditors.

Cited in *Smith v. Zurcher*, 9 Ala. 208; *Hamilton v. Fowlkes*, 16 Ark. 340; *Pell v. McElroy*, 36 Cal. 268; *Massey v. Hubbard*, 18 Fla. 688; *Rupert v. Mark*, 15 Ill. 540; *Minor v. Willoughby*, 3 Minn. 225, Gil. 154; *Morrison v. March*, 4 Minn. 422, Gil. 325; *Walker v. Gilbert*, Freem. Ch. (Miss.) 85; *Jenkins v. Bodley*, Smedes & M. Ch. 338; *Dixon v. Doe*, 1 Smedes & M. 70; *Troup v. Hurlburt*, 10 Barb. 354; *Merithew v. Andrews*, 44 Barb. 200; *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. 555; *Ward v. Metropolitan Elev. R. Co.* 82 Hun, 545, 31 N. Y. Supp. 527; *Livingston v. Arnoux*, 56 N. Y. 507; *Phelan v. Brady*, 119 N. Y. 587 (affirm-

ing 19 Abb. N. C. 289); *Frame v. Frame*, 32 W. Va. 463, 5 L.R.A. 323, 9 S. E. 901; *Hardy v. Heard*, 15 Ark. 184,—holding possession of land constructive notice to subsequent creditor or purchaser of the rights of possessor; *Brown v. Volkening*, 64 N. Y. 76; *Webster v. Van Steenberg*, 46 Barb. 211,—holding the actual possession of premises, which operates as constructive notice, must be visible and open, and not a mere constructive possession; *Vaughn v. Tracy*, 22 Mo. 415; *Fair v. Stevenot*, 29 Cal. 486,—holding notice from possession under an unrecorded deed not conclusive notice to subsequent purchaser but only evidence tending to prove notice; *Wright v. Douglass*, 10 Barb. 97, holding deed on record at time one purchased at execution sale and possession by defendant, was enough to put such purchaser on inquiry as to defendant's title; *Johnson v. Strong*, 65 Hun, 470, 20 N. Y. Supp. 392, holding possession in third party is notice to grantee of all rights of party in possession so far as diligent inquiry suggested by possession would disclose them; *Lamont v. Cheshire*, 65 N. Y. 30, holding title of one in possession under prior unrecorded conveyance, not affected by filing *lis pendens*, when plaintiff at time of filing such notice had actual or constructive notice of his rights; *Cook v. Travis*, 22 Barb. 338, holding general rule that possession of land is notice to others of possessor's title not universal, and that it must be governed by circumstances of each case; *Van Epps v. Clock*, 3 Silv. Sup. Ct. 500, 7 N. Y. Supp. 21, 25 N. Y. S. R. 896, holding a subsequent purchaser with knowledge of plaintiff's possession and negotiations to buy land was not a bona fide purchaser; *Moyer v. Hinman*, 13 N. Y. 180; *Parks v. Jackson*, 11 Wend. 442, 25 A. D. 656,—holding purchaser at sheriff's sale chargeable with constructive notice of equitable rights of vendee of the judgment debtor, in actual possession under contract to purchase, executed prior to docketing of the judgment.

Cited in reference notes in 25 A. D. 676, on possession as notice; 24 A. D. 235, on possession as notice of occupant's rights; 28 A. D. 51, as to when possession is notice of occupant's title; 11 A. S. R. 633, on possession of personalty as evidence of ownership; 62 A. D. 334, on possession as prima facie evidence of title.

Cited in notes in 60 A. D. 601, on possession as evidence of title; 11 E. R. C. 548, on possession as evidence of seisin in fee; 13 L.R.A. (N.S.) 72, on persons reached or affected by notice of title from possession.

Bona fide purchasers.

Cited in *Grimstone v. Carter*, 3 Paige, 421, 24 A. D. 230, holding purchaser in good faith, under the recording act, and a bona fide purchaser, as recognized by courts of equity in other cases substantially same; *Schutt v. Large*, 6 Barb. 373, holding person whose title to land was obtained by fraud cannot shield his title by conveying to bona fide purchaser, and afterwards purchasing it back.

Cited in reference note in 24 A. D. 235, on who are bona fide purchasers.

Pleading bona fide purchase.

Cited in *Seymour v. McKinstry*, 106 N. Y. 230, 14 N. E. 94, 11 N. Y. S. R. 760, holding defendant must positively deny notice of rights of another, although notice is not charged, if his claim is supportable only as bona fide purchaser.

Title of purchasers without notice.

Cited in *Birdsall v. Russell*, 1 Robt. 538, holding such title valid where stolen securities were payable to holder if purchaser had no notice such as would put on honest, careful person upon inquiry as to true ownership.

Admission of title of common grantor.

Cited in *Johnstone v. Scott*, 11 Mich. 232, on admission of title in common source in ejectment.

Personal defenses.

Cited in *Dix v. Van Wyck*, 2 Hill, 522, holding a deed or contract cannot be avoided for usury by mere stranger to the transaction, but only by party who made it, or his legal privy.

21 AM. DEC. 316, JACKSON EX DEM. WILLIAMS v. MILLER, 6 WEND. 228.**Presumption as to fraud.**

Cited in *Root v. Davis*, 10 Mont. 228, 25 Pac. 105, holding it will not be presumed that a father will act fraudulently in aid of his son's claim.

Relation of landlord and tenant and subtenant.

Cited in *Carlisle v. McCall*, 1 Hilt. 399 (dissenting opinion), on relation of landlord and tenant attaching to all succeeding to the possession during the demise, as undertenant or assignee; *Hennesy v. Farrell*, 20 Wis. 43, holding a person entering into possession by direction of mortgagee after default, becomes tenant of such mortgagee.

Cited in reference notes in 15 A. S. R. 719, on relation between landlord and subtenant; 61 A. D. 542, on person entering directly under tenant standing in same relation; 39 A. D. 73, on party entering under tenant or by his permission standing in like situation.

Cited in note in 45 A. D. 456, on assignee of lessee as tenant.

Distinguished in *Sands v. Hughes*, 53 N. Y. 287, holding an adverse possession may be originated during an assessment lease, as the relation of landlord and tenant does not exist in such case.

Estoppel to deny title of landlord.

Cited in *Renada v. Gardner*, 3 Barb. 589, on right of party in possession to dispute his landlord's possession; *Rockwell v. Saunders*, 19 Barb. 473 holding vendee of landlord under contract to purchase and one in possession as assignee of such vendee, estopped to deny landlord's title.

Cited in reference notes in 27 A. D. 466; 38 A. S. R. 194; 82 A. S. R. 183,—on estoppel of tenant to dispute landlord's title; 39 A. D. 334, on tenant's right to dispute landlord's title during tenancy.

Cited in notes in 21 L. ed. U. S. 779, on right of tenant to dispute landlord's title; 120 A. S. R. 57, on estoppel of tenant to deny landlord's title.

Parol partition.

Cited in reference note in 92 A. D. 120, on parol partition of land among tenants in common and validity of parol partition.

Presumption of partition.

Cited in *Allen v. Seawell*, 17 C. C. A. 217, 37 U. S. App. 436, 70 Fed. 561, upholding presumption where cotenants occupy different parts of land in severalty, for more than fifty years, with consent of each other, and citing annotations also on this point; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, holding designation of land as Duke's farm, King's farm, and then Queen's farm, until 1705, when it was granted to Trinity church, raises inference that it was in control of the government of the sovereign as sole owner.

Cited in note in 92 A. D. 125, on presumption as to voluntary partition in mutual conveyances by cotenants to strangers.

Parol trusts.

Cited in reference notes in 41 A. S. R. 229; 61 A. S. R. 664,—on parol trusts in real property; 36 A. D. 182, on establishing trust by parol; 24 A. D. 417, on parol

evidence to establish trust; 55 A. D. 755, as to when trust in land may be created or established by parol under statute of frauds.

Resulting trusts.

Cited in reference notes in 46 A. S. R. 513, on resulting trusts; 36 A. D. 166, on trust resulting in favor of party paying consideration; 39 A. D. 46, on resulting trust in favor of party furnishing consideration for land conveyed to another; 57 A. D. 618, on resulting trust where one pays purchase price of land deed to which is taken in name of another.

Cited in notes in 34 L. ed. U. S. 1091, on resulting trusts; 28 A. D. 416, as to when trust results in favor of party furnishing consideration.

Declarations against interest by occupant of land.

Cited in *Gibney v. Marchay*, 34 N. Y. 301, holding declarations of person in possession admissible against party making them, or his privies in blood or estate only to explain the character of the possession.

Cited in reference note in 40 A. D. 241, on admissibility of declarations of grantor after conveyance against those claiming under him.

Admissibility of records of public officers.

Cited in reference note in 47 A. D. 465, on official books and papers as evidence.

Explained in *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868, as not in conflict with holding that official registers kept by public officers for entry of official transactions are admissible in evidence, although no statute expressly authorizes such registers to be kept.

Presumption of conveyance from lapse of time and possession.

Cited in *Brinley v. Forsythe*, 69 Mo. 176, holding a conveyance may be presumed after lapse of seventy-five years; *Grady v. Ward*, 20 Barb. 543, holding deed, its execution and loss may be presumed from an undisturbed possession for fifty years.

Cited in reference note in 39 A. D. 686, on presumption of grant from long-continued adverse possession.

Distinguished in *Kincaid v. Meadows*, 3 Head, 188, holding a grant will not be presumed from mere assertion of ownership by actual exclusive, adverse possession.

21 AM. DEC. 323, WRIGHT v. BUTLER, 6 WEND. 284.

Pleading estoppel by judgment.

Cited in *Gray v. Gillilan*, 15 Ill. 453, 60 A. D. 761, holding former recovery conclusive when offered in evidence under the general issue; *Stipp v. Washington Hall*, 5 Blackf. 473; *Glidden v. Unity*, 30 N. H. 104; *Isaacs v. Clark*, 12 Vt. 692, 36 A. D. 372; *Sheldon v. Patterson*, 55 Ill. 507,—holding where there has been no opportunity to plead a matter of estoppel in bar, it is conclusive if offered in evidence; *Wood v. Jackson*, 18 Wend. 107 (dissenting opinion), on same point; *Miller v. Manice*, 6 Hill, 114, on conclusiveness of former judgment as evidence under the general issue; *Dows v. McMichael*, 6 Paige, 139; *Kingsland v. Spalding*, 3 Barb. Ch. 341,—holding in cases where the form of proceeding does not allow of special pleading a former decision of the same matter may be given in evidence and is binding; *Krekeler v. Ritter*, 62 N. Y. 372, holding judgment in former action proper, as evidence of facts established thereby, although not pleaded; *Hendricks v. Decker*, 35 Barb. 298, holding since adoption of the Code, a former recovery cannot be given in evidence under general denial, but must be pleaded.

Res judicata as bar or estoppel.

Cited in *Kerr v. Simmons*, 9 Mo. App. 376, holding recovery of double rent, under the lease, for holding over one month is a bar to a recovery, under same covenant, for a second month; *Halsey v. Reed*, 9 Paige, 446, holding recovery for partial payment no bar to new suit for money's plaintiff is afterwards compelled to pay on same account; *Andrews v. Varrell*, 46 N. H. 17, holding if cause of action is identical judgment recovered in one is a defense in other suit although forms of action are different; *Baker v. Rand*, 13 Barb. 152, holding former suit between the same parties, in another state, bar to second suit on same facts and issues; *Etheridge v. Osborn*, 12 Wend. 399, holding verdict and judgment thereon, on a fact or title put in issue may be pleaded by way of estoppel in another action between the same parties or their privies, in respect to same fact or title; *Wilbur v. Brown*, 3 Denio, 356, on same point; *Embury v. Conner*, 3 N. Y. 511, 53 A. D. 325, holding fact put in issue by the record and found by judgment of court having jurisdiction cannot be again litigated by the parties or their privies; *Gray v. Pingry*, 17 Vt. 419, 44 A. D. 345, holding if a fact does not appear by the record to have been distinctly in issue, or not pleaded as an estoppel, the record and finding in the former trial are evidence, but not conclusive; *Barras v. Bidwell*, 3 Woods, 5, Fed. Cas. No. 1,039, holding denial that plaintiff suing as administrator is administrator cannot be pleaded after judgment by default.

Cited in reference notes in 13 A. D. 99, on estoppel by judgment; 23 A. D. 449, on *res judicata* as estoppel; 24 A. D. 615; 26 A. D. 609,—as to when former judgment is a bar or estoppel; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded; 44 A. D. 129, on judgment affecting parties and privies only.

Distinguished in *Ezzell v. Maltbie*, 6 Ga. 495, holding where there has been a recovery and a new suit is brought, the former record will not settle the present matter unless the judgment could not have been had without deciding the present matter.

Former recovery as evidence.

Cited in note in 26 A. D. 610, on admissibility and effect of former recovery as evidence under general issue.

Action for money paid to use of defendant.

Cited in *Camp v. Tompkins*, 9 Conn. 545; *Moore v. Mandlebaum*, 8 Mich. 433; *Rathbone v. Stocking*, 2 Barb. 135; *Neass v. Mercer*, 15 Barb. 318; *Irvine v. Angus*, 35 C. C. A. 501, 93 Fed. 629,—holding action for money paid for use of another will lie if a person has received money belonging to another, which, in justice and equity, he ought to pay over; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 A. D. 516 (dissenting opinion); *Kingston Bank v. Eltinge*, 66 N. Y. 625,—to same point.

— By indorser against maker or prior indorser.

Cited in *Martin v. Farnum*, 24 N. H. 191; *Rushworth v. Moore*, 36 N. H. 188,—holding it maintainable by subsequent indorsee, who has paid a bill or note, to recover amount paid, of prior indorser.

Cited in reference notes in 69 A. S. R. 502, on liability of prior indorser; 53 A. D. 127, on rights of indorsees against prior indorsers and maker.

Distinguished in *Woodruff v. Moore*, 8 Barb. 171, holding payment by payee to holder, is in fulfilment of his contract as indorser, and is not money paid to the use of maker of the note.

— By indorser where note is enforceable by him.

Cited in *Baker v. Martin*, 3 Barb. 634, holding indorsee can either sue the in-

dorser on the note, or for money had and received, but where he has only paid part of it he can only recover against the indorser for the money actually paid; *Wyckoff v. Degraaf*, 11 Daly, 322, holding it is only where subsequent indorser has no right to enforce the whole note, that he may recover against prior indorser in assumpsit.

— Where note is barred as to defendant.

Cited in *Godfrey v. Rice*, 59 Me. 308, holding where the first indorser of a note has been compelled to pay it, by a judgment in a suit commenced prior to intervention of statute of limitations, he may recover the amount from the maker; *Barker v. Cassidy*, 16 Barb. 177, holding statute of limitations runs from time of paying the money, and not time note fell due.

— Separate actions for contributory parts of money paid.

Cited in *Newman v. Goza*, 2 La. Ann. 642, holding where the indorser of a note, after the maker's protest for nonpayment, pays a part of its amount, he may recover such payments from the maker; *McGregory v. Gregory*, 107 Mass. 543, holding where one joint payee and indorser of dishonored note paid half of it to the other payee, who took up the note and indorsed the payment upon it, and recovered judgment against the makers for the balance, the first-named payee could also maintain an action against them for the amount paid by him, as money paid to their use; *Rawlings v. Poindexter*, 14 Smedes & M. 66, 53 A. D. 125, holding indorser of note or bill of exchange, after he has paid any part of it, may maintain such action against the maker or drawer.

Actions on money counts.

Cited in *Hathaway v. Cincinnati*, 62 N. Y. 434, holding one principal may recover by action for money had and received by another, paid over by mistake and without consideration through a common agent; *Otis v. Crouch*, 89 Hun, 548, 35 N. Y. Supp. 291, holding action for money had and received, though equitable in its nature, is a common-law action, and the county court has jurisdiction; *Vinton v. Cattaraugus County*, 89 Hun, 582, 35 N. Y. Supp. 283, holding county entitled to credit for money applied improperly to benefit of town, by principles applicable to action for money had and received.

Implied contract against person benefited.

Cited in *Walker v. Brown*, 28 Ill. 378, 81 A. D. 287, holding implied undertaking cannot be raised on part of one benefited by work done under special contract with other parties.

21 AM. DEC. 328, PEARL v. WELLS, 6 WEND. 291.

Agreement to forbear to sue.

Cited in *Watson v. Randall*, 20 Wend. 201, holding an agreement to forbear to sue a debtor, a good consideration for promise of third person to pay the debt.

Cited in notes in 36 A. S. R. 146, on promise not to sue for limited time; 52 A. D. 638, on suits for money paid on judgments where defenses were concealed.

Parol extension of time for payment.

Cited in *Hunt v. Bloomer*, 5 Duer, 202, on extending time for payment of bond or performance of agreement under seal, by parol.

Cited in note in 1 A. D. 93, on parol agreement changing time of performance.

21 AM. DEC. 331, HEMPHILL v. HEMPHILL, 13 N. C. (2 DEV. L.) 291.**Presumption as to testator's capacity and knowledge of contents of will.**

Cited in *Re Shapter*, 35 Colo. 578, 117 A. S. R. 216, 6 L.R.A. (N.S.) 575, 85 Pac. 688, holding testator presumed to be acquainted with contents of will prepared at his direction, left with him several hours before it was executed, and signed in presence of attesting witnesses present at his request for that purpose; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870, holding where the capacity of a testator is perfect, his knowledge of the will's contents is presumed from its execution.

Cited in reference notes in 2 A. S. R. 532, on burden of proof of execution of will and capacity of testator; 47 A. D. 422, on presumption of testator's sanity.

Necessity of reading will to illiterate testator.

Cited in *King v. Kinsey*, 74 N. C. 261, holding it not necessary that it be read to him in presence of attesting witnesses, presumption being that he knew its contents.

Cited in reference notes in 39 A. S. R. 94, on validity of will not read to testator; 82 A. D. 551, on effect on validity of will of its not being read to or by testator.

Validity of will of blind or illiterate person.

Cited in *Pickett's Will*, 49 Or. 127, 89 Pac. 377, holding the signing of a will for a blind person by another at request of testator who can hear and speak and is present, is sufficient.

Cited in reference notes in 49 A. D. 650; 50 A. D. 413,—on validity of will of blind person.

21 AM. DEC. 335, RE KING, 13 N. C. (2 DEV. L.) 341.**Effect of levy as satisfaction of debt.**

Cited in *Hunn v. Hough*, 5 Heisk. 708, holding levy on personalty constructive satisfaction of execution, to prevent wrong.

Cited in reference notes in 28 A. D. 388, on effect of levy of execution; 44 A. D. 738, on what constitutes satisfaction of judgment.

Cited in notes in 58 A. D. 351, on satisfaction of judgments and executions by levy on real or personal property; 58 A. D. 356, on levy producing no satisfaction when removed from plaintiff's possession by legal process.

— As respects codefendants.

Cited in *Eason v. Petway*, 18 N. C. (1 Dev. & B. L.) 44, holding as to a sheriff, all defendants in execution are principals, and he may levy upon which, and in what proportion he pleases; *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635, holding the same unless the judgment shows relation of surety existed, indorsed upon the execution, in which event the officer must first proceed against principal as directed by statute; *Shaw v. McFarlane*, 23 N. C. (1 Ired. L. 216), holding if two persons are bound by bond or a judgment to pay money, each is liable to creditor to same extent, although as between themselves they are principal and surety.

— Repossession by execution debtor of goods taken on levy.

Cited in *Wright v. Watt*, 52 Miss. 634; *Wade v. Watt*, 41 Miss. 248,—holding levy on personalty prima facie evidence of satisfaction which may be rebutted by showing that the property has not been legally disposed of, or that defendant has not been deprived of it by the levy; *Aldridge v. Loftin*, 104 N. C. 122, 10 S. E.

210, holding levy on goods allowed to remain in hands of debtor, or where debtor regains possession against sheriff's will, not a satisfaction of the execution; *Binford v. Alston*, 15 N. C. (4 Dev. L.) 351, holding same and that new execution may issue; *Marshall v. Morris*, 13 Ga. 185, on the satisfaction of a judgment by leaving the personalty levied on with the defendant; *Banks v. Evans*, 10 Smedes & M. 35, 48 A. D. 734, holding a levy on personalty only prima facie satisfaction and if legally removed or removed without act of plaintiff in execution, it is not a satisfaction; *Fry v. Manlove*, 1 Baxt. 256, 25 A. R. 775, holding supersedeas destroys execution but not the judgment debt.

Cited in note in 58 A. D. 355, on levy being no satisfaction of judgment and execution if chattels again come into debtor's possession.

21 AM. DEC. 336, WASHINGTON v. SANDERS, 13 N. C. (2 DEV. L.) 343.

Advice from court to officer executing its writs.

Cited in *Wiley v. Bridgman*, 1 Head, 68, holding as to proper disposition of money raised on several executions, the court will advise sheriff and so appropriate the money as to bind suitors and protect sheriff; *Millikan v. Fox*, 84 N. C. 107, holding practice of directing sheriffs as to proper distribution of proceeds of sale of debtors' property under executions in favor of different plaintiffs, extends only to cases where sheriff has raised the money and holds it subject to order of the court.

Remedies of claimants to property levied on or its proceeds.

Cited in *Bates v. Lilly*, 65 N. C. 232, holding conflicting claims to proceeds of executions against the same defendant, cannot be submitted to a judge, without an action under the statute, by adverse claimants; *Dewey v. White*, 65 N. C. 225, holding sheriff cannot compel claimants to interplead, but the party against whom there is no execution may pursue his remedy against the sheriff for taking his goods.

Validity of attachments not returnable at day certain.

Cited in *Houston v. Porter*, 32 N. C. (10 Ired. L.) 174; *Clark v. Quinn*, 27 N. C. (5 Ired. L.) 175,—holding attachments from a justice not made returnable on a certain day, are void.

Right of sheriff to execute writs returnable to court.

Cited in *Sanderson v. Rogers*, 14 N. C. (3 Dev. L.) 38, holding levying sheriff's successor could do no official act under the writ, and was not entitled to commissions.

Appearance as waiver of error in process.

Distinguished in *Symons v. Northern*, 49 N. C. (4 Jones, L.) 241, holding after defendant has appeared and pleaded to an attachment, it is too late to object to errors in the form of the attachment.

21 AM. DEC. 340, PALMER v. CLARKE, 13 N. C. (2 DEV. L.) 354.

Retaining execution as waiver of lien.

Cited in *Roberts v. Scales*, 23 N. C. (1 Ired. L.) 88, holding sheriff leaving goods for unreasonable time after seizure on debtor's premises for his use prima facie loses his property in them for presumptive fraud, and another officer may seize and sell them; *Smith v. Spencer*, 25 N. C. (3 Ired. L.) 256, on fraud as between creditors where one of them holds up his execution until the other has sold, and then uses it to avoid the sale.

Cited in reference notes in 24 A. D. 593, on loss of lien of execution; 34 A. D. 116, on how lien of execution may be lost or postponed.

Effect of indulgence by execution creditor.

Cited in note in 27 L.R.A. 380, on effect as to debtors of creditor's consent to delay or postponement of sale.

— On alias writ.

Cited in *Doe ex dem. Arrington v. Sledge*, 13 N. C. (2 Dev. L.) 359, holding if plaintiff in an original *feri facias* grants indulgence to defendant, and afterwards issues an alias, this indulgence does not affect the lien of the first writ, as to defendant or his vendee; *Roberts v. Oldham*, 63 N. C. 297, holding if an execution by its own teste be upon an equal footing with executions in behalf of others, it will not be postponed because, being an alias, the original upon which it issued was indulged.

When lien of execution attaches.

Cited in notes in 11 A. D. 772, 773, on time from which execution binds property; 24 A. D. 454; 27 A. D. 103, 528,—as to time from which execution binds personality; 11 E. R. C. 628, as to when lien of writ of execution attaches.

— Lien of alias writ by relation to original.

Cited in *Spencer v. Hawkins*, 39 N. C. (4 Ired. Eq.) 288, holding where a series of executions issue on the same judgment, and have bona fide acted on, the last of them relates to the teste of the first and binds the property from that time; *Harding v. Spivey*, 30 N. C. (8 Ired. L.) 63, holding alias writ warranted sale of undivided interest in proceeds of slaves, sold for a division among the joint owners by order of court, pending execution; *McIver v. Ritter*, 60 N. C. (Winst. Eq.) 56, holding *feri facias* cannot by relation continue a lien on property created by previous writ, unless it purports to be an alias; *Goode v. Hawkins*, 17 N. C. (2 Dev. Eq.) 393, on an alias *feri facias*, as binding all debtor's property from the teste of the first *feri facias*; *Dawson v. Shepherd*, 15 N. C. (4 Dev. L.) 497, holding *feri facias* issued upon a dormant judgment is not void, and has priority over a later alias where the original was never delivered.

Distinguished in *Watt v. Johnson*, 49 N. C. (4 Jones, L.) 190, holding an execution after assignment of partnership effects, although tested before such assignment does not relate back to the teste, and therefore the sheriff may return *nulla bona*.

Priorities between executions.

Cited in *Worsley v. Bryan*, 86 N. C. 343, holding money raised by sale of debtor's land under execution must be applied to that execution in preference to claim of prior judgment creditor whose execution was not in sheriff's hands at time of sale, but lien of such prior judgment is not thereby effected.

Cited in reference notes in 34 A. D. 116; 36 A. D. 583; 86 A. D. 783,—on priority of executions against same debtor.

Conclusiveness of sheriff's return.

Cited in *Dewey v. White*, 65 N. C. 225, holding sheriff's return conclusive upon a rule to apply money in his hands to a particular writ, and the court acts solely on facts stated in his return, in making such application.

Cited in reference notes in 24 A. D. 39, on officer's return as evidence; 29 A. D. 121, on officer's return of execution as evidence.

Cited in note in 43 A. D. 531, on conclusiveness as against sheriff of his return of process.

Advising distribution of avails of execution.

Cited in *Millikan v. Fox*, 84 N. C. 107, holding practice of advising sheriffs as to distribution of proceeds of sale property under executions in favor of different plaintiffs, extends only to cases where sheriff has raised the money and holds it subject to court's order.

21 AM. DEC. 344, HUDSPETH v. WILSON, 13 N. C. (2 DEV. L.) 372.**Property and possession necessary to maintain trover.**

Cited in reference notes in 36 A. D. 115, on property necessary to maintain trover for chattels; 24 A. D. 39, on sufficiency of property to maintain trover; 23 A. D. 685, on property and possession sufficient to maintain trover; 28 A. D. 708, on property and possession necessary to maintain trover; 26 A. D. 430, on trover by bailee.

Trover for choses in action.

Cited in *Payne v. Elliot*, 54 Cal. 339, 35 A. R. 80, holding trover will lie for the conversion of shares of stock which the certificate represents, and for the certificate.

Cited in reference notes in 52 A. D. 73, on action of trover for judgment; 73 A. D. 106, on trover for note, writ of execution, or judgment; 53 A. D. 414, as to whether trover will lie for judgment rendered by justice of peace.

Overruled in *Cobb v. Cornegay*, 28 N. C. (6 Ired. L.) 358, 45 A. D. 497, holding justices' judgments are not property, for which trover will lie.

Gaming or illegal contract.

Cited in *Teague v. Perry*, 64 N. C. 39, holding a note, given subsequently, in purchase of justice's judgment which had been won at cards by payee from maker, is not void under statute against gaming; *Pearce v. Foote*, 113 Ill. 228, 58 A. R. 414 (dissenting opinion), on recovery of money advanced in pursuance of illegal contract.

Cited in reference notes in 36 A. D. 757, on action for money lost in gaming; 40 A. D. 421, on right to recover money lost in gaming.

21 AM. DEC. 346, LAWRENCE v. MABRY, 13 N. C. (2 DEV. L.) 473.**Right to fill blanks in negotiable instruments.**

Cited in *Weston v. Myers*, 33 Ill. 424, holding a bona fide holder of a note, or duebill, may fill up the blank left for payee's name, with that of an indorser.

Cited in reference notes in 59 A. D. 270, on right of holder to fill up blank paper; 47 A. D. 739, on right of holder to fill blanks on note, and effect.

21 AM. DEC. 347, NOBLET v. GREEN, 13 N. C. (2 DEV. L.) 517.**Sufficiency of consideration.**

Cited in *Hudson v. Critcher*, 53 N. C. (8 Jones, L.) 485, holding an equitable demand, a sufficient consideration to support at law a promise to pay.

Cited in notes in 36 A. D. 154; 44 A. D. 283; 49 A. D. 552; 60 A. D. 524,—on forbearance to sue as consideration for promise.

21 AM. DEC. 350, CHESS v. CHESS, 1 PENR. & W. 32.**Grantor's declarations as evidence.**

Cited in *Williams v. Mears*, 2 Disney (Ohio) 604, holding grantor's subsequent parol statements not admissible to invalidate his deeds.

Cited in reference notes in 61 A. D. 318, as to when declarations of grantor as

to fraudulent conveyance are admissible; 24 A. D. 395, on evidence of grantor's declarations to impeach deed; 40 A. D. 241, on admissibility of declarations of grantor after conveyance against those claiming under him; 24 A. D. 395, on admissibility of testator's declarations made after execution of will.

Cited in note in 42 A. D. 633, on inadmissibility of declarations of vendor after conveyance.

Declarations evincive of mental state of declarant.

Cited in *Dinges v. Branson*, 14 W. Va. 100; *Rice v. Rice*, 127 Pa. 181, 14 A. S. R. 831, 24 W. N. C. 205, 17 Atl. 888, 46 Phila. Leg. Int. 328,—holding declarations prior to execution of deed admissible on question of mental capacity of grantor; *McTaggart v. Thompson*, 14 Pa. 149, holding testator's declaration subsequent to making of will, admissible to show mental condition; *Robinson v. Hutchinson*, 26 Vt. 38, 60 A. D. 298, holding declarations about time of making will admissible on question of condition of mind at the time.

Evidence of character to impeach or support witness.

Cited in *Morss v. Palmer*, 15 Pa. 51, holding evidence of character in another county where he had previously resided admissible to sustain character of witness; *Com. v. McClain*, 4 Clark (Pa.) 462, holding evidence of general bad character admissible to impeach witness in criminal action; *Fletcher v. State*, 49 Ind. 124, 19 A. R. 673, holding evidence of general moral character not admissible to impeach or sustain witness in criminal action.

Cited in reference notes in 21 A. D. 154; 39 A. D. 530,—on impeachment of witness; 82 A. S. R. 26, on impeachment of witness by proof of character; 45 A. D. 230, on impeachment of witness by evidence of general bad character; 36 A. D. 765, on questions allowable on impeachment of witness; 73 A. D. 162, on form of interrogations to impeach witnesses.

Cited in notes in 82 A. S. R. 33, on impeachment of witness by proof of character; 73 A. D. 772, on right to ask impeaching witness whether from his knowledge of general reputation of other witness he would believe him under oath.

—Laying foundation for.

Cited in reference note in 34 A. D. 557, on admissibility of evidence of contradictory statements by witness without first interrogating witness in regard thereto.

Cited in note in 73 A. D. 771, on laying foundation for proof of character of witness for veracity.

Admissibility of character evidence generally.

Cited in *Moyer v. Moyer*, 49 Pa. 210, holding evidence of general character for truth and veracity admissible in mitigation of damages in action for defamation of character by charging commission of perjury.

What is "general" reputation.

Cited in *Mose v. State*, 36 Ala. 211, holding evidence of slave's character in community of about ten whites and fifty slaves admissible as general character.

Meaning of "neighborhood."

Cited in *Com. v. Cornelly*, 42 W. N. C. 34; *McNutt v. McEwen*, 1 W. N. C. 552, 10 Phila. 112, 31 Phila. Leg. Int. 53,—on person's neighborhood being coextensive with range of his frequent intercourse with his fellow citizens.

Ratification of fraudulent contract.

Cited in *Lauer's Appeal*, 12 W. N. C. 165, on ratification of fraudulent contract.

Delivery of deed.

Cited in *Arriason v. Harmstead*, 2 Pa. St. 191, holding delivery sufficient where deed was left with magistrate taking acknowledgment, and later handed to agent of grantee; *Eyrick v. Hetrick*, 13 Pa. 488, holding delivery to trustee for benefit of another valid, though trustee was a lunatic; *Blight v. Schenck*, 10 Pa. 285, 51 A. D. 478, holding delivery sufficient where deed has been left with magistrate by the parties, for signature, and grantor signs it and leaves it without farther instructions; *Geisinger's Estate*, 11 Pa. Co. Ct. 168, 1 Pa. Dist. R. 338, holding that declaration in will by grantor that he had delivered deeds to third party to be handed to grantees upon his death, raises presumption of delivery; *Eckert v. Lewis*, 4 Phila. 422, 18 Phila. Leg. Int. 4, holding deed not delivered at time of execution where parties left it with justice, pending payment of purchase money.

Cited in reference notes in 34 A. D. 444, on what is a delivery of a deed; 30 A. D. 89, on necessity of delivery to validity of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed; 27 A. S. R. 581, on delivery of deed to third person for grantee; 37 A. D. 138, on registration of deed as delivery; 32 A. D. 677, on inferring delivery of deed from grantor's conduct.

Cited in notes in 55 A. D. 413, on invalidity of deed for want of delivery; 8 E. R. C. 597, on necessity of delivery of deed; 64 A. D. 647, on recording deed as prima facie evidence of delivery; 18 L. ed. U. S. 542, on recording deed as delivery or evidence of delivery; 53 A. S. R. 539, as to whom delivery of deed may be made; 53 A. S. R. 552, on delivery to third person for use of grantee as delivery of deed; 54 L.R.A. 807, on delivery of deed to third person not previously authorized or designated by grantee; 54 L.R.A. 885, on grantor's intent in recording deed or delivering it for record.

Voidability of deeds.

Cited in note in 70 A. D. 492, on deeds void and voidable.

—Effect of recording or acknowledgment.

Cited in *Rowell v. Hayden*, 40 Me. 582, holding recording of deed prima facie evidence of its delivery; *Mitchell v. Ryan*, 3 Ohio St. 377; *McCrudden's Estate*, 12 Phila. 69, 35 Phila. Leg. Int. 153; *Harvey v. Jones*, 1 Disney (Ohio) 65,—holding that presumption of delivery arising from recording of deed, may be rebutted; *Peterson v. Speer*, 29 Pa. 478, on same point; *Hartman v. Stahl*, 2 Penr. & W. 223, holding that acknowledgment of sheriff's deed and possession by vendee, long continued, is strong evidence of delivery of the deed; *Donnel v. Bellas*, 10 Pa. 341, 11 Pa. 341, on placing deed on record not being delivery.

21 AM. DEC. 361, MCGIRR v. AARON, 1 PENR. & W. 49.**Validity of charitable gifts.**

Cited in reference notes in 26 A. D. 68, 459; 33 A. D. 479,—on charitable uses; 24 A. D. 680, on charitable devises and bequests; 59 A. D. 619, on validity of bequests to charitable uses; 42 A. D. 355, as to when charitable bequests are valid.

Cited in note in 5 E. R. C. 576, on validity of bequest in trust for charitable purposes.

—To or for unincorporated society.

Cited in *Burr v. Smith*, 7 Vt. 241, 29 A. D. 154; *Magill v. Brown*, Brightly N. P. 346, Fed. Cas. No. 8,952,—holding valid, a devise to unincorporated body for purposes of religion, charity, and education.

Cited in reference note in 26 A. D. 68, on trust in favor of unincorporated religious or charitable society.

Cited in notes in 32 L.R.A. 627, on right of unincorporated charity to take real estate or permanent fund; 14 L.R.A.(N.S.) 142, on unincorporated associations as beneficiaries in bequest for charity or religion; 14 L.R.A.(N.S.) 114, on unincorporated associations as trustees for charitable or religious purposes.

Distinguished in *Zeisweiss v. James*, 63 Pa. 465, 3 A. R. 558, 2 Legal Gaz. 25, 27 Phila. Leg. Gaz. 28, holding remainder after life estate, limited to "infidel society hereafter to be incorporated" void for remoteness.

— **Uncertainty of gifts to charity.**

Cited in *McLain v. White Twp.* 51 Pa. 196, 23 Phila. Leg. Int. 165, holding that uncertainty will not defeat bequest to charity if it can be made certain by discretionary power vested in trustees.

— **Validity of gifts lacking a trustee or donee.**

Cited in *Frazier v. St. Luke's Church*, 28 W. N. C. 307, 10 Pa. Co. Ct. 53, 48 Phila. Leg. Int. 276, holding that devise to charity will be sustained by naming new trustee where trustee named in will is incapable of holding title; *American Bible Soc. v. Wetmore*, 17 Conn. 181; *Williams v. Williams*, 8 N. Y. 525,—holding that devise for charitable use, will be sustained though defective for want of grantee capable of taking; *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436, holding that formal defect in execution of power under will, does not defeat charitable bequests therein; *Pearsall v. Post*, 20 Wend. 111, on dedications of land for religious, and charitable purposes, and for public ways, parks, and the like being upheld though no person capable of taking as grantee is in existence at the time.

Cited in reference note in 35 A. S. R. 504, on failure of trust for want of trustee.

Cited in note in 14 L.R.A.(N.S.) 109, on absence or incapacity of trustee as affecting enforcement of general bequest for charity or religion.

Construction of charitable gift by *cy pres* rule.

Cited in *Philadelphia v. Girard*, 45 Pa. 9, 84 A. D. 470, 20 Phila. Leg. Int. 220; *Re Philadelphia*, 2 Brewst. (Pa.) 462,—holding that where necessary to sustain devise, court may employ *cy pres* interpretation to part thereof.

Criticized in *Cresson v. Cresson*, 5 Clark (Pa.) 431, Fed. Cas. No. 3,389, as changing usual meaning of words used, in order to sustain devise.

— **Gifts for benefit of a society as vesting in it.**

Cited in *Yard's Appeal*, 64 Pa. 95, 27 Phila. Leg. Int. 126, holding that devise to poor of certain churches, vests in the church corporations; *Keiper's Estate*, 5 Pa. Co. Ct. 568, 45 Phila. Leg. Int. 266, holding that legacy for building of church only, will go to church corporation for general benefit, where church is already built and paid for; *Domestic & F. Missionary Soc. Appeal*, 30 Pac. 425, holding that legacy to mission and school to be established at certain place, is good as bequest to society establishing them, such society being known to testator; *Price v. Maxwell*, 28 Pa. 23, construing devise for increase of salaries of teachers in school, as a devise for benefit of the school and valid; *Corr's Estate*, 12 Pa. Dist. R. 788, 29 Pa. Co. Ct. 276, construing devise to parochial school of a church to be devise to church corporation.

21 AM. DEC. 363, McLANAHAN v. WYANT, 1 PENR. & W. 96.

Implied charge of legacies on land.

Cited in *Miltnerberger v. Schlegel*, 7 Pa. 241, holding that mere direction to devisee to pay legacy does not make it a charge upon land devised.

Cited in reference notes in 80 A. D. 197, on recovery of legacy charged on land by *assumpsit*; 25 A. D. 721, as to when legacies given by will are a charge upon the land; 38 A. D. 773, as to when legacy is charge on land and remedy for recovery thereof; 43 A. D. 518, on personal liability of devisee of land subject to legacy.

Distinguished in *Hackadorn's Appeal*, 11 Pa. 86, holding that where devisees are directed to pay legacies in proportion to value of lands received, such legacies are not charges on the land; *Walters v. Steele*, 11 Pa. Super. Ct. 303, holding that provision in devise of land to son, that daughter is to have living on the land as long as she remain unmarried, does not create charge upon land.

— From blending realty and personalty in one fund.

Cited in *Allegheny Nat. Bank v. Hays*, 12 Fed. 663, 12 W. N. C. 338, 39 Phila. Leg. Int. 375, 13 Pittsb. L. J. N. S. 19; *Heddleson's Estate*, 8 Phila. 602, 28 Phila. Leg. Int. 380, 1 Legal Gaz. Rep. 336, 3 Legal Gaz. 379; *Munro's Estate*, 9 Phila. 309, 29 Phila. Leg. Int. 332, 4 Legal Gaz. 333; *Davis's Appeal*, 83 Pa. 348, 4 W. N. C. 267, 34 Phila. Leg. Int. 194, *Lewis v. Darling*, 16 How. 1, 14 L. ed. 819,—holding that where testator blends real and personal estate in one fund, legacies become a charge upon the land; *Re Tower*, 9 Watts & S. 103, 42 A. D. 319; *Gallagher's Appeal*, 48 Pa. 121; *Wertz's Appeal*, 69 Pa. 173, 3 Legal Gaz. 245; *Snyder's Estate*, 14 Pa. Super. Ct. 509; *Silverthorn's Estate*, 2 Pa. Co. Ct. 393, 7 Sadler (Pa.) 220, 11 Atl. 455; *Clyde v. Simpson*, 4 Ohio St. 445,—holding that where testator devises all his property and directs devisee to pay certain legacies, they are a charge upon the realty; *Mellon's Appeal*, 46 Pa. 165, holding that blending of realty and personalty will not charge realty with legacy of a specific fund.

Cited in note in 8 A. S. R. 723, on changing of legacies on land by blending real and personal property into one mass.

Mode of objecting for nonjoinder.

Cited in reference notes in 41 A. D. 296, as to when and how objection of nonjoinder is made; 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of.

Cited in note in 1 E. R. C. 165, on how advantage may be taken of nonjoinder of party to real action.

Effect of judicial sale to extinguish charge on land.

Cited in *Hellman v. Hellman*, 4 Rawle, 440, holding that judicial sale discharges lien of legacy charged upon the land, though some of the instalments are not due at time of sale; *Randolph's Appeal*, 5 Pa. 242, holding charge of legacies on land discharged by judicial sale thereof, as to subsequent encumbrances, though condition of sale specified that liens should remain.

Distinguished in *Jordan v. Donahue*, 12 R. I. 199, holding that action at law will not lie against purchaser of realty for recovery of legacy charged upon the land.

Effect of judicial sales upon liens.

Cited in *Abbott v. Remington*, 4 Phila. 34, 17 Phila. Leg. Int. 108, holding that judicial sale discharges all liens which are payable out of money produced by the sale; *Luce v. Snively*, 4 Watts, 396, 28 A. D. 725, holding that sheriff's sale devests lien of debts of ancestor of execution debtor; *Thompson v. Phillips, Baldw.* 246, Fed. Cas. No. 13,974, holding that sheriff's sale under judgment devests lien

of prior judgment; *Pierce v. Potter*, 7 Watts, 475, holding that sale under mortgage extinguishes lien of the mortgage; *Re McKenzie*, 3 Pa. St. 156, holding that judicial sale of land does not discharge lien of recognizance of sheriff and sureties; *Zeigler's Appeal*, 35 Pa. 173, holding lien of prior mortgage not discharged by sheriff's sale under express condition that purchaser should take subject to mortgage; *Anshutz v. McClelland*, 5 Watts, 487, on effect of sheriff's sale under one of several mechanics' liens.

Cited in reference notes in 28 A. D. 729, on effect of judicial sale to divest liens; 42 A. D. 323, on extent to which judicial sale divests lien.

Cited in notes in 28 A. D. 694, on loss of lien of vendor of personality; 51 A. D. 550, as to when judicial sale divests mortgage liens in Pennsylvania.

Distinguished in *Mentzer v. Menor*, 8 Watts, 296, holding that judicial sale does not divest land of lien of a recognizance to secure widow's third.

Administrators as parties to actions affecting realty.

Cited in *Gardiner v. Painter*, 3 Phila. 365, 16 Phila. Leg. Int. 141, holding that administrator of grantee in ground-rent deed is proper party in suit for rent accrued after grantee's death; *Brown v. Webb*, 1 Watts, 411, holding that executors or administrators are necessary parties in suit to revive judgment against decedent.

Criticized in *Lapsley v. Lapsley*, 9 Pa. 130, as to executor or administrator being necessary party in suit to recover legacy charged upon land.

21 AM. DEC. 370, *DONER v. STAUFFER*, 1 PENR. & W. 198.

Partner's interest in firm property.

Cited in *Menagh v. Whitwell*, 52 N. Y. 146, 11 A. R. 683, on interest of partner in firm property being his share after accounting and debts paid; *Scott's Estate*, 16 W. N. C. 410, 42 Phila. Leg. Int. 266, on guardian's right to indemnity for liability incurred for ward being similar to partner's right to firm assets.

Cited in reference notes in 80 A. D. 455, on partner's interest in partnership goods; 94 A. D. 642, on rights of partners *inter se* upon a settlement of partnership.

Equities of firm creditors as derived from firm equities.

Cited in *Scull's Appeal*, 115 Pa. 141, 7 Atl. 588, 19 W. N. C. 70, 44 Phila. Leg. Int. 217; *Himmelreich v. Shaffer*, 182 Pa. 201, 61 A. S. R. 698, 37 Atl. 1007, 28 Pittsb. L. J. N. S. 122; *Maxwell v. Wheeling*, 9 W. Va. 206; *York County Bank's Appeal* (*Taggart v. Keys*) 32 Pa. 446 (affirming 3 Phila. 96, 15 Phila. Leg. Int. 86),—holding that equities of joint creditors depend upon equities between partners, and where partners made mutual agreement as to their property rights, creditors are controlled thereby; *Stuart v. McHenry*, 3 Phila. 340, 16 Phila. Leg. Int. 37; *Powell's Appeal*, 2 Pa. Super. Ct. 618,—on equity of creditors depending upon equity of partners; *Brenton v. Thompson*, 20 Phila. Leg. Int. 133, holding equity of partner to have partnership effects applied first to partnership debts, not lost by sheriff's sale and available to creditors; *Christy v. Sill*, 131 Pa. 492, 19 Atl. 295, 25 W. N. C. 501, 20 Pittsb. L. J. N. S. 365, 47 Phila. Leg. Int. 455, on change of firm releasing firm liability for former debts leaving only former members individually liable; *Johnson v. Hersey*, 70 Me. 74, 35 A. R. 303, holding that firm creditor can attach fund paid by one partner out of firm assets to his personal creditor who had notice that payment was without consent of firm.

Preference of firm debts on firm property.

Cited in *Snodgrass's Appeal*, 13 Pa. 471, holding that to entitle debt from members of partnership to preference, it must be shown that it was a firm debt; *Re Hallock*, 47 Misc. 571, 96 N. Y. Supp. 105, holding firm creditors entitled to preference over holder of note of one partner indorsed by copartner; *Backus v. Murphy*, 39 Pa. 397, 80 A. D. 531; *Cope's Appeal*, 39 Pa. 284,—holding that after dissolution of firm partnership, creditors have no preference over individual creditors.

Cited in reference note in 23 A. D. 180, on preference given to partnership creditors.

Cited in note in 6 L.R.A. 740, on application of partnership property to firm debts.

Distinguished in *Black's Appeal*, 44 Pa. 503, 20 Phila. Leg. Int. 340, holding in case of insolvency where there are partnership and individual creditors, each class has priority upon its respective estate.

Levy on individual property for firm debt and vice versa.

Cited in *Vandike's Appeal*, 57 Pa. 9, 25 Phila. Leg. Int. 268, holding proceeds of firm property sold under executions against the partners individually represent the several interests of each and not that of the partnership; *Winston v. Ewing*, 1 Ala. 129, 34 A. D. 768, holding that debt due partnership cannot be attached for individual debt of partner; *Scruggs v. Burruss*, 25 W. Va. 670, holding that firm creditor attaching interest of one partner, obtains thereby no preference over other firm creditors; *Beatty's Appeal*, 3 Grant, Cas. 213, holding that creditor having preferred claim against firm, is not entitled to proceeds from judicial sale of partner's separate interest; *Richard v. Allen*, 117 Pa. 199, 2 A. S. R. 652, 11 Atl. 552, 20 W. N. C. 190, 44 Phila. Leg. Int. 432, holding sheriff's levy upon partnership goods for individual debt of partner, void; *Deal v. Bogue*, 20 Pa. 228, 57 A. D. 702, holding sheriff liable in trespass for selling and delivering firm property under execution against one partner; *Vandike v. Roskam*, 67 Pa. 330, 3 Legal. Gaz. 52, on same point; *Phillips v. Cook*, 24 Wend. 389, holding that trespass will not lie against sheriff for seizure and sale of partner's interest in firm property under execution against one of partners.

Cited in reference notes in 25 A. D. 745, on liability of partnership property; 57 A. D. 707, on levy on partnership property for partner's private debt; 51 A. D. 601, on partnership property being first liable for partnership debts; 34 A. D. 770, on interest sold by execution creditor of partner.

Cited in note in 46 L.R.A. 496, on levy on partnership property of executions against both partners.

— Right to proceeds.

Cited in *Rex v. Lomman*, 3 Phila. 287, 15 Phila. Leg. Int. 372, holding firm creditors entitled to proceeds of sale under executions against individual partners and others against the firm; *Coover's Appeal*, 29 Pa. 9, 70 A. D. 149; *King's Appeal*, 9 Pa. 124,—holding the same though execution against individual partner was first in hands of sheriff; *Randall v. Johnson*, 13 R. I. 338, on disposal of proceeds of execution sale of partner's interest in firm; *Gregory's Appeal*, 4 Pennyp. 221, on rights of creditors under sheriff's sale of partnership property.

Cited in note in 37 A. R. 241, on remedy of second partner where firm property sold for individual debt of first.

Distinguished in *Cooper's Appeal*, 26 Pa. 262, holding that proceeds of simul-

taneous sale under separate executions against partners will be distributed proportionate to interests of partners in firm.

Effect of sale or alienation of individual interests in firm.

Cited in *Walsh v. Adams*, 3 Denio, 125; *Baker's Appeal*, 21 Pa. 76, 59 A. D. 752; *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 624, 20 L. ed. 82,—holding that purchaser of right of partner in firm takes only his interest in assets after accounting; *Shimer v. Huber*, 14 Phila. 402, Fed. Cas. No. 12,787, 36 Phila. Leg. Int. 339, holding that transfer in good faith by one partner of his interest to his copartner is good as against firm creditors; *Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184, 23 W. N. C. 428, 46 Phila. Leg. Int. 290, 19 Pittsb. L. J. N. S. 486, on sheriff's sale of partner's interest in firm passing only his interest therein after final accounting; *Dunbar Fire Brick Co. v. Madeira*, 7 Pa. Dist. R. 246, holding that where interests of all the members of a firm are sold upon executions against individual partners firm creditors have no lien upon the property; *Steiner v. Peters Store Co.* 119 Ala. 371, 24 So. 576, holding that purchaser at execution sale under joint judgment against each of members of partnership for joint obligation takes property free from claims of firm creditors; *McNutt v. Strayhorn*, 39 Pa. 269, holding that where partners assign their firm property to third person, it is no longer subject to levy and execution for firm debts.

Cited in note in 30 A. R. 534, on effect of transfer by partner of firm assets.

21 AM. DEC. 374, KONIGMACHER v. KIMMEL, 1 PENR. & W. 207.

Submission to arbitration by executors and administrators.

Cited in reference note in 82 A. D. 269, on right of executors and administrators to submit matters to arbitration.

Cited in notes in 30 A. D. 633, on right of executors or administrators to submit to arbitration; 9 E. R. C. 341, on submission to arbitration as admission of assets by executor.

Liability of guardians, executors, and trustees.

Cited in *Eyster's Appeal*, 16 Pa. 372, holding guardian liable only for gross negligence in management of ward's property; *Nyce's Estate*, 5 Watts & S. 254; *Calhoun's Estate*, 6 Watts, 185,—holding executors bound to exercise only ordinary diligence and attention in care of funds of the estate; *Myers v. Zetelle*, 21 Gratt. 733, holding trustee acting in good faith not liable for loss in management of trust fund; *Neff's Appeal*, 57 Pa. 91, 25 Phila. Leg. Int. 92, holding trustees not liable beyond what they actually receive unless in case of gross negligence.

Cited in reference notes in 69 A. S. R. 873, on liability of executors and administrators; 29 A. D. 543, on liability of guardian; 49 A. D. 722, on liability of guardian for loss of trust funds by unsafe investment.

Cited in note in 75 A. D. 449, on personal liability of guardians; 32 A. D. 208, on duty and liability of guardian to investments; 40 A. D. 518, on duty of trustee to follow directions in will as to investment of funds.

—For not taking security.

Cited in *Swoyer's Appeal*, 5 Pa. 377, holding trustee liable for loss from sale without taking security; *Dietterich v. Heft*, 5 Pa. 87, holding guardian liable upon loan without security to person in equivocal circumstances; *Percival v. Cooper*, 6 Phila. 48, 22 Phila. Leg. Int. 237, holding by analogy that factors with authority to sell and receive proceeds may sell upon credit in absence of special instructions.

Distinguished in *Cline's Appeal*, 106 Pa. 617, 15 W. N. C. 104, 42 Phila. Leg. Int.

27, holding that executor may sell goods in the ordinary course of a business carried on as an active trust under the will, without taking security.

— Losses ensuing on delay to collect assets or convert same into cash.

Cited in *Stem's Appeal*, 5 Whart. 472, 34 A. R. 569, holding guardian not liable for loss on note received from administrator though the note might have been collected by prompt suit when due; *Wonder's Estate*, 9 Pa. Co. Ct. 271, holding guardian not liable for failure to recover from predecessor, certain fees retained by him claimed to be excessive; *Falconer's Estate*, 1 Pa. Dist. R. 672, 11 Pa. Co. Ct. 354, holding that guardian need not turn securities in which funds are invested into cash when called upon to account to successor; *Webb's Estate*, 165 Pa. 330, 44 A. S. R. 666, 30 Atl. 827, 35 W. N. C. 571, 25 Pittsb. L. J. N. S. 339, holding executor not liable for more than is received unless grossly negligent.

— Loss by selling or disposing of assets.

Cited in *Dundas's Appeal*, 64 Pa. 325, 27 Phila. Leg. Int. 149, 2 Legal Gaz. 145, holding that executor is not liable for selling property at less than value unless grossly negligent in making the sale.

Bringing up case on appeal.

Cited in *Nixon's Estate*, 13 Phila. 355, 37 Phila. Leg. Int. 202, 28 W. N. C. 390, on certiorari not being necessary to bring case from lower to the supreme court.

21 AM. DEC. 382, HART v. WITHERS, 1 PENR. & W. 285.

Power of partner to bind copartners.

Cited in *Cleaver v. Brenzel*, 9 Luzerne Leg. Reg. 269, denying right of one partner to assign or sell joint property without consent of other, if present and capable of acting; *Smith v. Wesner*, 1 Woodw. Dec. 182, holding that acknowledgment of one joint obligor on note will not remove bar of statute of limitations against co-obligor.

— By sealed instrument.

Cited in *Overton v. Tozer*, 7 Watts, 331, holding that partner cannot bind his copartner by deed without special authority; *Heft v. Basford*, 2 Pa. Co. Ct. 278, 18 Phila. 272, 43 Phila. Leg. Int. 414, holding that confession of judgment by partner in firm name binds only partner signing it; *Fichthorn v. Boyer*, 5 Watts, 159, 30 A. D. 300, holding copartner bound by instrument signed and sealed in firm name by another partner in his presence and with his assent; *Gallagher v. Strobbridge Lithographic Co.* 6 Sadler (Pa.) 118, 9 Atl. 487, 18 Phila. 397, 43 Phila. Leg. Int. 270, 2 Pa. Co. Ct. 358, on doctrine that agent's authority to execute deed under seal in name of principal must be under seal.

Cited in reference notes in 29 A. D. 584; 30 A. D. 291, 304,—on power of partner to bind copartners by sealed instrument; 60 A. D. 310, on power of partner to bind copartner by instrument under seal executed without authority.

Cited in notes in 37 A. S. R. 205, on power of partner to bind firm by sealed instrument; 20 L. ed. U. S. 798, on right of partners to convey partnership realty.

— Necessity of authority under seal.

Cited in reference notes in 24 A. D. 128, on necessity of seal to authority to execute deed; 55 A. D. 343, on necessity that authority to execute sealed instrument be under seal; 52 A. D. 533, on necessity of authority under seal to enable one copartner to bind others by note.

— Instruments for benefit of firm.

Distinguished in *Kramer v. Dinsmore*, 152 Pa. 264, 25 Atl. 789, 23 Pittsb. L.

J. N. S. 342, holding firm bound by deed under seal signed in name of partnership by one partner, where firm accepted benefits thereunder.

—Ratification of signature.

Cited in *Martin v. Bray*, 1 Monaghan (Pa.) 155, 16 Atl. 515, 24 W. N. C. 378, holding admissible in evidence instrument signed by one partner with firm name to be followed by proof of assent and ratification.

Cited in reference note in 60 A. D. 310, on partner's power to bind copartners by instrument under seal if they assent thereto before execution or ratify it afterwards.

Effect of signature by hands of another.

Cited in *Greenough v. Greenough*, 11 Pa. 489, 51 A. D. 567, holding that express direction by testator to sign his name to will, must be proved by witnesses, and such express direction makes signature testator's immediate act; *Long v. Zook*, 13 Pa. 400, holding that error in testator's name as signed by third person to will, does not invalidate it where testator has personally put his mark to the will; *Gratz v. Philips*, 1 Penr. & W. 333, on deed signed by attorney in presence of, and with assent of principal, being deed of principal.

Cited in note in 52 A. D. 742, on validity of signing of grantor's name to deed by third person in his presence.

Time for objections.

Cited in reference note in 39 A. D. 368, on time to object to defect in declaration.

21 AM. DEC. 387, SIDWELL v. EVANS, 1 PENR. & W. 383.

Questions on appeal.

Cited in *McBee v. Ceasar*, 15 Or. 62, 13 Pac. 652, holding that appellate court on bill of exceptions will not consider question of error in facts decided by jury; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309, holding that order on motion for new trial cannot be considered on appeal; *Dives v. Fidelity & C. Co.* 206 Pa. 199, 55 Atl. 950, holding question of election between counts will not be considered upon appeal.

Forbearance to sue as consideration.

Cited in *Burns v. Harding*, 5 Luzerne Leg. Reg. 215, holding forbearance to enforce well-founded claim is valid consideration; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415, 29 S. E. 1094; *Hopkinson v. Davis*, 5 Phila. 147, 20 Phila. Leg. Int. 76; *Giles v. Ackles*, 9 Pa. 147, 49 A. D. 551; *Calkins v. Chandler*, 36 Mich. 320, 24 A. R. 593,—holding forbearance to sue for indefinite time, good consideration.

Cited in reference notes in 26 A. D. 109, on sufficiency of consideration for promise; 36 A. D. 154; 44 A. D. 283,—on forbearance to sue as a consideration; 49 A. D. 68, 552, on forbearance to prosecute unfounded claim as consideration for promise.

Cited in note in 60 A. D. 524, 526, 527, on forbearance to sue as consideration for promise.

Distinguished in *Pittsburgh & C. R. Co. v. Barker*, 29 Pa. 160; *Garrard v. Pittsburgh & C. R. Co.* 29 Pa. 154,—holding that deposit of bond as collateral security is without consideration though creditor thereupon voluntarily delayed bringing suit.

Construction of written evidence as law question.

Cited in *Bock v. Lauman*, 24 Pa. 435; *Charlotte v. Chouteau*, 25 Mo. 465,—holding that construction of foreign law is for the court; *Stack v. O'Hara*, 98 Pa.

213, 12 Pittsb. L. J. N. S. 65, 38 Phila. Leg. Int. 420, holding that interpretation of provisions for church government in church law is for the court; *M'Gee v. Northumberland Bank*, 5 Watts, 32, holding that facts stated in protest by notary public are to be interpreted by the jury.

Cited in reference notes in 26 A. D. 83, on construction of written evidence as question for court; 60 A. D. 390, on construction of written instrument by court; 69 A. D. 59, on construction of written contract as question for court.

Distinguished in *Sayres v. State*, 30 Ala. 15, holding that issue of *idem sonans* is for the court without evidence.

Construction of parol evidence as fact question.

Cited in *Warren v. Palmer*, 24 Mo. 78, holding that terms and extent of parol contract are to be found by jury; *Holmes v. Chartiers Oil Co.* 138 Pa. 546, 21 A. S. R. 919, 21 Atl. 231, 21 Pittsb. L. J. N. S. 387, 27 W. N. C. 156, sustaining the submission to jury of questions as to what were the terms of an oral contract; *M'Farland v. Newman*, 9 Watts, 55, 34 A. D. 497, holding that question of effect of oral words as constituting a warranty is for the jury; *Simpson v. M'Beth*, 4 Watts, 409, holding that it is error for judge to give legal interpretation to words of a witness; *Lavelle v. Melley*, 27 Pa. Super. Ct. 69; *Hawn v. Stoler*, 22 Pa. Super. Ct. 307,—holding that meaning and effect of words of invalid, since deceased, as to disposition of funds, is for jury.

Cited in reference note in 34 A. D. 503, on construction of parol evidence as question for jury.

Construction of mixed written and parol evidence as jury question.

Cited in *Home Bldg. & L. Asso. v. Kilpatrick*, 140 Pa. 405, 21 Atl. 397, 22 Pittsb. L. J. N. S. 29; *Wetherill Bros. v. Erwin*, 12 Pa. Super. 259,—holding that admixture of written and oral evidence draws the whole to the jury; *Hillman v. Joseph*, 9 Pa. Super. Ct. 1, 43 W. N. C. 215 (dissenting opinion), on same point; *Miller v. Fichthorn*, 31 Pa. 252, holding that written evidence accompanied by oral testimony to aid or rebut inferences to be drawn from it, goes to the jury.

Instruction on evidence.

Cited in *Rhodes v. Frick*, 6 Watts, 315, sustaining trial court in refusing to give binding direction to jury on question of fact; *Whitehill v. Wilson*, 3 Penr. & W. 405, 24 A. D. 326, holding it error to leave to jury, the finding of a fact of which there is no color of proof.

Cited in reference notes in 39 A. D. 657, on courts's right to express opinion on controverted facts; 50 A. D. 360, on right of court to submit opinion upon the facts to jury accompanied by statement that jury are to judge of the facts; 70 A. D. 291, on judge not being bound to present case in every aspect of which it is susceptible on the evidence; 90 A. D. 344, on correctness of instruction stating or construing evidence.

Cited in note in 72 A. D. 542, on comments on evidence by court.

Variance.

Cited in note in 62 A. D. 119, as to when variance between allegation and proof is material.

Immaterial averments in pleadings.

Cited in *Hastings v. Speer*, 34 Pa. Super. Ct. 478, holding that immaterial averments needlessly introduced in statement need not be proven.

Bill of exceptions.

Cited in reference note in 38 A. D. 250, on correction of jury's errors on bill of exceptions.

Bill of particulars.

Cited in reference note in 51 A. D. 51, on necessity, sufficiency, and effect of bill of particulars.

21 AM. DEC. 394, HALL v. BENNER, 1 PENR. & W. 402.**Validity of judgment.**

Cited in reference note in 53 A. D. 155, on validity of erroneous judgments.

What constitutes a lease.

Cited in reference note in 44 A. D. 212, on what constitutes a lease.

Estoppel to deny landlord's title.

Cited in *Wiggin v. Wiggin*, 58 N. H. 235, holding that tenant accepting lease under entire misapprehension of its purport and effect, is not estopped to deny his landlord's title; *Hockenbury v. Snyder*, 2 Watts & S. 240, holding that relation of landlord and tenant induced by misrepresentation as to title, will be dissolved upon proof thereof.

Cited in reference notes in 71 A. S. R. 469, on estoppel of landlord and tenant; 27 A. D. 466, on estoppel of tenant to deny landlord's title; 34 A. D. 695; 41 A. D. 253,—as to when tenant is not estopped from disputing landlord's title; 55 A. D. 708, on right of lessee induced by fraud to accept lease to controvert lessor's title.

Cited in notes in 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title; 89 A. S. R. 72, on condition of landlord's title as affecting tenant's estoppel to deny it.

Distinguished in *Ewing v. Cottman*, 43 W. N. C. 525, 9 Pa. Super. Ct. 447, holding that lessee taking possession under lease cannot avoid the estoppel by voluntary removal.

— Under void lease.

Cited in *Owens v. Eaton*, 5 Ind. Terr. 275, 82 S. W. 746, holding that tenant under lease void and prohibited by statute may deny his landlord's title.

Cited in note in 120 A. S. R. 62, on invalidity of lease as defense in action for unlawful detainer.

— Under lease to tenant already in possession by other title.

Cited in *Berridge v. Glassey*, 18 Phila. 410, 43 Phila. Leg. Int. 281, *Gleim v. Rise*, 6 Watts, 44; *Franklin v. Merida*, 35 Cal. 558, 95 A. D. 129,—holding that possession by tenant at time of taking lease relieves him from the estoppel against his setting up title adverse to his landlord; *Baskin v. Seechrist*, 6 Pa. 154, holding that tenant in prior possession who is induced by fraud and threat, to take lease, is not estopped to deny landlord's title; *Marshall v. Mellon*, 26 Pittsb. L. J. N. S. 290, 17 Pa. Co. Ct. 366, holding that no estoppel arises where tenant has not taken possession nor exercised any rights under the lease.

Cited in reference notes in 58 A. D. 233, on estoppel arising from acceptance of lease by one in possession; 60 A. D. 712, on tenant's right to dispute landlord's title when attornment was made under misapprehension.

Cited in notes in 89 A. S. R. 95, on effect of tenant being in possession when relation arises on right to deny landlord's title; 13 A. D. 69, on acceptance of lease by one in possession from one claiming title as creating estoppel to deny claimant's title.

Rights and liabilities under judicial sale pending deed.

Cited in *Thomas v. Connell*, 1 Clark (Pa.) 319, holding purchaser at sheriff's sale not liable for ground rent accruing after sale but before acknowledgment of

sheriff's deed; *Collins v. London Assur. Corp.* 165 Pa. 298, 30 Atl. 924, 25 Pittsb. L. J. N. S. 301, holding that debtor's title to land sold under execution does not pass from him until deed is executed; *Slater's Appeal*, 28 Pa. 109, holding that purchaser under sheriff's sale before deed issues, has such interest in property as may be bound by judgment; *Greenough v. Small*, 137 Pa. 132, 21 A. S. R. 859, 20 Atl. 553, 26 W. N. C. 567, 47 Phila. Leg. Int. 454, holding interest of heir not divested by orphans' court sale of estate until confirmed by the court and delivery of the deed; *Demmy's Appeal*, 43 Pa. 155, to show analogy existing between sheriff's sales and sales under order of orphans' court.

Distinguished in Bank of Pennsylvania v. Wise, 3 Watts, 394, holding purchaser of lessor's title at sheriff's sale entitled to rents accruing thereafter.

Presumptions as to time of delivery of deed.

Cited in *Woodrow v. Blythe*, 2 Del. Co. Rep. 18; *Crossen v. Oliver*, 37 Or. 514, 61 Pac. 885,—holding that where time of delivery is not shown, a deed will be presumed to have been delivered on date of deed; *Wickham v. Morehouse*, 16 Fed. 324, sustaining presumption that deed and purchase-money security bearing even date, were delivered simultaneously.

Cited in reference notes in 67 A. D. 270, on presumption that deed was made on day of its date; 86 A. D. 63, as to whether deed is presumed to have been delivered at its date or at date of acknowledgment.

When deed takes effect.

Cited in reference note in 47 A. D. 540, on deed taking effect from delivery.

Delivery of deed.

Cited in note in 53 A. S. R. 541, on by whom and to whom deed may be delivered.

Estoppel by recitals.

Cited in reference notes in 56 A. D. 107, on recitals as estoppels; 51 A. D. 115, on recitals in deeds as estoppels; 38 A. D. 768, on recitals in sheriff's deeds as evidence; 78 A. D. 533, on estoppel of grantor and privies by recitals in deeds.

Cited in note in 11 E. R. C. 72, on estoppel by recitals in deed.

Parol evidence as to writing.

Cited in note in 37 A. D. 77, on parol evidence to explain ambiguities in instrument.

What passes as appurtenant.

Cited in reference note in 28 A. D. 708, on what pass as appurtenances.

Cited in notes in 15 L.R.A. 652, on corporeal appurtenances to realty; 81 A. S. R. 768, on passing of ways as appurtenances; 58 L.R.A. 487, on how far grant of mill includes water rights.

21 AM. DEC. 404, SMITH v. JOHNSTON, 1 PENR. & W. 471.

Right to growing crops on land conveyed or devised.

Cited in *Reed v. Johnson*, 14 Ill. 257, holding that growing corn is personalty.

Cited in reference notes in 39 A. S. R. 367, as to whether crops pass on conveyance of land; 24 A. D. 341; 99 A. S. R. 606,—on growing crops passing by deed of land; 50 A. D. 237, on right to growing crops on conveyance or lease of the land.

Cited in notes in 35 A. D. 742, on right to growing crops; 23 L.R.A. 451, on sale or mortgage of future crops on sale of the land.

Distinguished in Johnston v. Smith, 3 Penr. & W. 496, 24 A. D. 339, holding
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that conveyance of land by lessor conveys his right to share in crop growing thereon.

Disapproved in *Wintermute v. Light*, 46 Barb. 278, holding that growing wine plants pass by absolute conveyance of land.

Overruled in *Wilkins v. Vashbinder*, 7 Watts, 378, holding that title to growing grain passes by conveyance of the land.

Cited as overruled in *Burnside v. Weightman*, 9 Watts, 46, holding that title to growing grain by conveyance of the land; *Long v. Seavers*, 103 Pa. 517, 13 W. N. C. 428, 14 Pittsb. L. J. N. S. 490, 40 Phila. Leg. Int. 360; *King v. Bosserman*, 8 Pa. Dist. R. 344,—holding that judgment sale of land passes title to share of crops growing thereon under lease with debtor; *Bittinger v. Baker*, 29 Pa. 66, 70 A. D. 154, holding tenant entitled to way-going crop sown prior to levy and sale under judgment; *Gracey v. Mellinger*, 30 Phila. Leg. Int. 122, holding although estate is insolvent, growing crops go to devisee until land is sold to pay debts.

Mixtures as part of soil.

Cited in *Walker v. Sherman*, 20 Wend. 636, holding that machinery in factory, not affixed to building or to land, is personal property.

21 AM. DEC. 407, ROBINSON v. JUSTICE, 2 PENR. W. 19.

Estoppel by silence.

Cited in *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43, 21 W. N. C. 38, 18 Pittsb. L. J. N. S. 349, 45 Phila. Leg. Int. 45; *Com. v. Rogers*, 4 Clark (Pa.) 252, Brightly (Pa.) 450,—holding that silence will not create an estoppel in the absence of fraud; *McClure v. Douthitt*, 6 Pa. 414, holding that estoppel by silence cannot affect rights of wife in land conveyed by husband without her signature; *Ferris v. Chapman*, 10 Cal. 580, holding that silence by owner while stranger makes improvements upon his land does not estop him to assert his rights where title is known or readily ascertained; *Hefner v. Downing*, 57 Tex. 576, holding that acquiescence in boundary line established and acted upon creates an estoppel in favor of purchasers acting thereupon; *Hamilton v. Hamilton*, 4 Pa. 193, holding that person receiving benefit of sale and standing by in silence while purchaser makes improvements is estopped from asserting title; *Woods v. Wilson*, 37 Pa. 379, holding heir estopped to assert his title against innocent purchaser without notice, where he stood by in silence for twenty years knowing his rights.

Distinguished in *Logan v. Gardner*, 136 Pa. 588, 20 A. S. R. 939, 20 Atl. 625, 47 Phila. Leg. Int. 475, 26 W. N. C. 497, holding that silence with knowledge of improvements being made by party in possession may create an estoppel.

Estoppel in pais to assert title.

Cited in *Rhodes v. Frick*, 6 Watts, 315; *Bloch v. Sammons*, 37 Or. 600, 62 Pac. 290,—holding that person representing to purchaser that he has no interest in lands which is acted upon, is estopped to assert title in himself; *Chapman v. Chapman*, 59 Pa. 214, holding person disclaiming any title to lands which are being improved, estopped to assert his title; *Smith v. Warden*, 19 Pa. 424, holding heir accepting purchase money under inoperative sale estopped from asserting title; *Beaupland v. McKeen*, 28 Pa. 124, 70 A. D. 115, holding agent who negotiates, encourages, and assists in purchase of land estopped to set up title in himself as against the purchaser; *Swartz v. Swartz*, 4 Pa. 353, 45 A. D. 697, holding that parol agreement as to mill and water power under which mill is

erected creates an estoppel against parties to deny rights thereunder; *Hill v. Epley*, 31 Pa. 331, holding joint owner not estopped from asserting his title against purchase at execution sale against cotenant where his title was on record.

Distinguished in *Hayes v. Livingston*, 34 Mich. 384, holding that an estoppel resting in parol cannot work a transfer of legal title to lands under statute of frauds.

Elements of estoppel in pais.

Cited in *Newman v. Edwards*, 34 Pa. 32, holding that acts done in ignorance of a person's rights create no estoppel, unless acted upon so as to cause detriment to others.

Elements of fraudulent intent.

Cited in *Rheinstrom v. Green*, 4 Luzerne Leg. Reg. 219, 7 Legal Gaz. 255, holding fraudulent intent depends upon knowledge of falsehood of statement and not upon dishonesty of purpose in making it.

Concealment as fraud.

Cited in reference notes in 44 A. D. 463, as to when suppression of truth constitutes fraud; 16 A. S. R. 260, on concealment as fraud; 90 A. D. 428, on concealment of defects, fraud, or surprise as vitiating contract of sale; 90 A. D. 429, on voidability of sale where article sold is disguised or a fair examination prevented.

Imputing fraud.

Cited in reference note in 36 A. S. R. 591, on imputing knowledge of fraud.

Rights as to improvements.

Cited in note in 81 A. S. R. 177, on set-off of improvements in ejectment or trespass to try title.

Instructions on evidence.

Cited in reference note in 39 A. D. 657, on court's right to express opinion on controverted facts.

Cited in note in 72 A. D. 542, on comments on evidence by court.

21 AM. DEC. 410, ROBERTS v. BEATTY, 2 PENR. & W. 63.

Construction of contracts.

Cited in reference notes in 30 A. D. 699; 40 A. D. 224,—on intention of parties as governing construction of contract.

Cited in note in 56 A. D. 618, on how written instrument construed.

Tender of chattels, etc.

Cited in reference notes in 27 A. D. 178, as to when tender of personalty is valid; 50 A. D. 519, on tender on notes payable in specific articles.

Cited in notes in 77 A. D. 481, on tender of goods, chattels, etc.; 77 A. D. 470, 471, on general requisites of good tender and effect thereof; 77 A. D. 489, on effect of tender and refusal of chattels.

—Time and place of tender generally.

Cited in reference note in 77 A. D. 478, as to time when tender must be made.

Cited in note in 77 A. D. 479, 480, on place of tender.

—Place for tender of chattels or services.

Cited in *Barr v. Myers*, 3 Watts & S. 295, holding that vendor under contract for delivery of specific articles by a certain time, no place being specified, must tender delivery at vendee's residence; *Van Rensselaer v. Jones*, 5 Denio, 449, holding demand and naming of place necessary under agreement to render serv-

ice with carriage and horses as rent for land; *Musselman v. Stoner*, 31 Pa. 265, holding parol evidence admissible to show place of delivery where written contract is silent.

Cited in reference note in 26 A. D. 546, on time and place of tender of specific articles.

Cited in notes in 24 A. D. 296, on duty to pay in money on failure to pay in specific articles at time and place agreed; 12 A. D. 574, as to where tender of personalty must be made where time but no place is ascertainable by terms of contract.

Reasonable time for payment.

Cited in *Ex parte Lowe*, 20 Ala. 330, holding payment of costs on first day of succeeding term to be within reasonable time under order granting new trial conditional on payment of costs.

Time for performance.

Cited in note in 11 L.R.A. 526, on time for performance of contract.

Effect of failure to perform as agreed.

Cited in note in 54 A. D. 480, on recovery for work and materials when not furnished in time or manner required by special contract.

Averment of performance.

Cited in reference note in 26 A. D. 625, on necessity of averring performance or offer thereof by plaintiff.

Obligations payable in chattels.

Annotation cited in *Cummings v. Dudley*, 60 Cal. 383, on rights of parties under notes payable in specific articles.

Cited in reference notes in 54 A. S. R. 903, on payment in specific articles; 33 A. S. R. 809, on payments made in specific property by agreement; 22 A. D. 167, 458; 46 A. D. 498; 50 A. D. 519; 57 A. D. 310,—on notes payable in specific articles; 25 A. D. 455, on note payable in merchandise; 38 A. D. 91, as to when notes payable in articles become payable in cash; 52 A. D. 756, on effect of failure to pay in chattels at time agreed; 46 A. D. 99, on note payable in specific articles becoming payable in cash after default; 38 A. D. 433, on negotiability of note payable in something other than money.

— Option to pay in money or chattels.

Cited in *Church v. Feterow*, 2 Penr. & W. 301; *Chambers v. Harger*, 18 Pa. 15; *Templeton v. Shakley*, 107 Pa. 370, 16 Pittsb. L. J. N. S. 11, 42 Phila. Leg. Int. 314; *Haskins v. Dern*, 19 Utah, 89, 56 Pac. 953; *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517; *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485,—holding that debtor under alternative contract for payment of money or goods, loses option unless tender be made by the day fixed for payment; *Hazeltine v. Brockway*, 26 Colo. 291, 57 Pac. 1077, holding attorney entitled to judgment for delivery of proceeds of action, or fee in money at his option under contract payable in proceeds of action but repudiated by client; *White v. Tompkins*, 52 Pa. 363, on right to pay in money where contract specifies certain sum payable in goods at certain price.

Annotation cited in *Branson v. Oregonian R. Co.* 10 Or. 278, holding that upon failure of railroad to perform contract to pay certain sum in freight over its road, the amount becomes payable in money.

Cited in note in 12 L.R.A. 690, on right of election under option contract.

Necessity of demand for chattels to be delivered under contract.

Cited in *Vance v. Bloomer*, 20 Wend. 196, holding demand necessary on note

payable in ready-made clothing; *Gould v. Richardson*, 11 Phila. 202, 33 Phila. Leg. Int. 158, holding demand necessary on duebill for time specifying neither time nor place of delivery; *Baker v. Stoughton*, 1 Or. 227, holding demand and direction necessary before suit on contract to deliver timber of such size and shape as obligee should direct; *Stewart v. Morrow*, 1 Grant, Cas. 204, on demand not being necessary on note payable in merchandise, no time or place being specified.

Cited in note in 46 A. R. 308, on necessity for demand and refusal before recovery on instrument for payment in specific property.

Distinguished in *Hotchkiss v. Newton*, 10 Ga. 560; *Hamilton v. Calhoun*, 2 Watts, 139; *Widner v. Walsh*, 3 Colo. 548,—holding demand necessary upon duebill payable in specific articles, no time being specified; *Phillips v. Allegheny Car Co.* 82 Pa. 368, 3 W. N. C. 347, 33 Phila. Leg. Int. 453, holding demand necessary before suit for payment of entire amount in money, where payment was to be half cash and half in stock of corporation; *Hall v. Rupley*, 10 Pa. 231, holding proof of demand not necessary in action for value of part performance where party failed to furnish material for completion as provided in contract.

— **Necessity of demand or tender where time and place are specified.**

Cited in *Deel v. Berry*, 21 Tex. 463, 73 A. D. 236, holding demand not necessary on contract or delivery of goods or payment in cash at a certain time; *Santee v. Santee*, 64 Pa. 473, 2 Legal Gaz. 202, 27 Phila. Leg. Int. 285, holding tender at residence necessary under contract for payment of money and delivery of certain articles annually at certain time; *Fleming v. Potter*, 7 Watts, 380, holding demand not necessary on note for payment of a certain sum in specific articles at a certain place.

Cited in reference note in 56 A. D. 298, on necessity of special request of payment when time and place fixed by contract.

— **Necessity of demand or tender of bulky articles.**

Cited in *Wisecarver v. Adamson*, 118 Pa. 53, 12 Atl. 358, 21 W. N. C. 152, 18 Pittsb. L. J. N. S. 251, 45 Phila. Leg. Int. 371, holding demand at place specified necessary under contract for delivery of bulky goods at specified place.

Delivery of part under entire contract.

Cited in *Clarke v. Moore*, 3 Mich. 55, holding that where part of goods under an entire contract is delivered and retained by vendee, vendor may recover for part delivered.

Effect of dependent covenants.

Cited in reference notes in 24 A. D. 143, on dependent and independent covenants and promises; 24 A. D. 95, on necessity of full performance by plaintiff where there are dependent covenants.

When title passes.

Cited in note in 55 A. D. 459, as to when title passes to goods sold.

Proper presentation of case.

Cited in *Nicholas v. Putnam Mach. Co.* 7 North. Co. Rep. 137, on duty of counsel to fully present case to court.

Bill of particulars.

Cited in reference note in 51 A. D. 51, on necessity, sufficiency, and effect of bill of particulars.

21 AM. DEC. 426, JOHNSTON v. HARVY, 2 PENR. & W. 82.**Conveyances in fraud of creditors.**

Cited in *Zerbe v. Miller*, 16 Pa. 488; *Ashmead v. Hean*, 13 Pa. 584,—holding conveyance made with intent to hinder and delay creditors void where vendee had notice though made for full consideration; *Witmer v. Eshleman*, 18 Lanc. L. Rev. 329, refusing to set aside in favor of creditor failing to establish claim conveyance by parents to daughter in consideration of support.

Cited in reference notes in 31 A. D. 216, on conveyances fraudulent as to creditors; 26 A. D. 386, as to when conveyance from father to son is fraudulent; 26 A. S. R. 123, as to what conveyances between parent and child are fraudulent; 67 A. D. 245, on validity of conveyance by father on verge of insolvency to sons on their agreement to pay certain judgments; 54 A. S. R. 203, on ineffectiveness of fraudulent conveyances; 25 A. D. 59; 28 A. D. 206,—on validity of fraudulent conveyance as between parties.

Cited in note in 50 A. S. R. 708, on enforcement of illegal contracts.

—Trusts reserving benefit to settlor or his family.

Cited in *Sanders v. Wagoneller*, 19 Pa. 248; *Houseman v. Grossman*, 177 Pa. 453, 35 Atl. 736; *Shakely v. Bartley*, 2 Pa. Super. Ct. 414; *Minin v. Warner*, 2 Phila. 124, 13 Phila. Leg. Int. 180, 2 Grant, Cas. 448,—holding conveyance providing for maintenance as part consideration fraudulent as to creditors; *McClurg v. Lecky*, 3 Penr. & W. 83, 23 A. D. 64, holding that debtor making assignment cannot make reservation for the benefit of himself or his family; *Pennsylvania Knitting Co. v. Bibb Mfg. Co.* 21 Pa. Co. Ct. 537, holding transfer by insolvent of property with reservation for his own benefit is void as against creditors; *Mackason's Appeal*, 20 Phila. Leg. Int. 28, holding trust to use of settlor for life and after his death to his heirs or appointee invalid as against creditors; *Pacific Nat. Bank v. Windram*, 133 Mass. 175, holding that person creating trust for his own benefit cannot provide restraint on alienation by anticipation so as to place income beyond reach of creditors; *Bartram's Estate*, 42 Pa. 330, 82 A. D. 517; *Patrick v. Smith*, 39 W. N. C. 4, 2 Pa. Super. Ct. 113,—holding that trust cannot be created in one's own property so as to derive an income therefrom and still have it beyond reach of creditors.

Cited in reference note in 83 A. D. 534, on effect of conveyance by father to son in consideration of support on rights of creditors.

Distinguished in *Hennon v. McClane*, 88 Pa. 219, holding conveyance of land with provision for maintenance as consideration, valid where no creditors existed at the time; *Drum v. Painter*, 27 Pa. 148, holding valid, a conveyance of land which provides for payment of all debts and then reserves support for life as part consideration.

—Assignment stipulating for release.

Cited in *Re Wilson*, 4 Pa. 430, 45 A. D. 701; *Hennessy v. Western Bank*, 6 Watts & S. 300, 40 A. D. 560,—holding that assignment stipulating for release without transferring all the property liable for the debts, is invalid.

Notice to purchaser from fraudulent grantee.

Cited in *State use of Erhardt v. Estel*, 6 Mo. App. 6, holding purchaser charged with notice where circumstances should place him on inquiry as to conveyance being in fraud of creditors.

Title of purchaser from fraudulent grantee.

Cited in note in 67 L.R.A. 898, on title of bona fide purchaser from fraudulent grantee.

Authority of record party to bind his privies.

Cited in *Reid v. Clendenning*, 193 Pa. 406, 44 Atl. 500, 29 Pittsb. L. J. N. S. 396, holding that appearance by party of record though he appear in representative capacity, waives irregularities as to notice.

Ejectment to recover property fraudulently conveyed.

Cited in *Dunn v. Truitt*, 8 Phila. 27, 28 Phila. Leg. Int. 332; *Ward v. Sturdivant*, 81 Ark. 73, 98 S. W. 690,—holding that purchaser at execution sale of land fraudulently conveyed may recover possession by ejectment without first having fraudulent deed set aside.

21 AM. DEC. 432, BAVINGTON v. CLARKE, 2 PENR. & W. 115.**Validity of infant's act which could have been compelled.**

Cited in reference note in 47 A. D. 273, on effect of voluntary performance by infant of act which would be compelled at law.

Cited in note in 18 A. S. R. 641, on validity of infant's act which he would have been compelled by law to do.

Right to have judicial partition.

Cited in *Longwell v. Bentley*, 23 Pa. 99, holding that vendee in possession under written contract for purchase of land has sufficient interest to maintain partition proceedings; *Gallagher v. Gallagher*, 36 Pittsb. L. J. N. S. 305, holding tenants in common entitled to partition prior to ascertainment of damages caused legacies by widow's election.

Cited in reference note in 28 A. D. 166, on right to partition between tenant and common partner.

Effect of partition.

Cited in note in 41 A. S. R. 150, on effect of partition of decedent's estate.

Voluntary partition of estates.

Cited in *McKnight v. Bell*, 135 Pa. 358, 19 Atl. 1036, 26 W. N. C. 281, 47 Phila. Leg. Int. 300, 21 Pittsb. L. J. N. S. 73; *Mathes v. Nissler*, 17 Mont. 177, 42 Pac. 763,—sustaining equitable parol partition with possession thereunder; *Bumgardner v. Edwards*, 85 Ind. 117, sustaining voluntary petition followed by possession; *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742, holding that partition by parol and possession thereunder acquiesced in will creates estoppel against parties thereto to assert title contrary to its terms; *Re Meyers*, 179 Pa. 157, 36 Atl. 239, 28 Pittsb. L. J. N. S. 6, holding that parties in partition proceedings may make agreements in regard thereto, which will be binding; *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90, holding in absence of creditors, heirs or legatees may divide decedent's personal property as they see fit; *Mellon v. Reed*, 114 Pa. 647, 8 Atl. 227, 19 W. N. C. 194, 44 Phila. Leg. Int. 318, 17 Pittsb. L. J. N. S. 285, holding voluntary partition not binding on tenant taking no part therein and receiving no part of estate nor anything in lieu thereof; *Williard v. Williard*, 56 Pa. 119, holding that voluntary partition followed by judicial sale of entirety of one tenant severs the possession and leaves title to other part in the other tenant; *Huntington v. Huntington*, 9 N. Y. Civ. Proc. Rep. 182, holding that right of dower is confined to lands set off, where husbands have executed voluntary deeds of partition of lands held in common; *Schee v. McQuilken*, 59 Ind. 269, sustaining decree in suit by minors for partition, giving woman life estate and remainder to minors in fee, where lands were devised to woman and her minor children in fee.

Cited in note in 92 A. D. 127, on validity of voluntary partition by infants.

Distinguished in *McMahan v. McMahan*, 13 Pa. 376, 53 A. D. 481, holding voluntary partition with possession not binding on tenant not present and joining therein.

Rights under judicial partition.

Cited in *Dornblaser's Estate*, 22 Pa. Co. Ct. 379, 15 Mont. Co. L. Rep. 134, holding that title vests in allottee in partition proceedings, when recognizance for payment of amounts charged thereon is given; *Davis v. Dickson*, 92 Pa. 365, 37 Phila. Leg. Int. 446, holding that irregular decree of partition not consummated by acceptance of its terms and payments thereunder is ineffective.

— Effect on liens.

Cited in *Polhemus v. Empson*, 27 N. J. Eq. 190; *Robisson v. Miller*, 158 Pa. 177, 27 Atl. 887; *Argyle v. Dwinel*, 29 Me. 29,—holding that attachment of estate of tenant in lands held in common attaches to portion set off to him upon partition; *Machett's Estate*, 4 W. N. C. 371, on same point; *Lawrence v. Korn*, 184 Pa. 500, 39 Atl. 295, 42 W. N. C. 89, holding that mortgagee's right to enforce his mortgage is not affected by the institution of partition proceedings; *Stewart v. Allegheny Nat. Bank*, 101 Pa. 342, 13 Pittsb. L. J. N. S. 209, 40 Phila. Leg. Int. 90, 13 W. N. C. 256, holding that mortgagee of undivided interest has no lien on part allotted to another than mortgagor in partition proceedings; *McCandless's Appeal*, 98 Pa. 489, 10 W. N. C. 563, 12 Pittsb. L. J. N. S. 166, 39 Phila. Leg. Int. 22, holding that lien of owelty charged in partition proceedings takes priority over mortgage of undivided interest given before partition.

Distinguished in *Klinger v. Seiwel*, 6 Kulp, 229, holding that amount charged against a purport in partition proceedings is a lien on the part and payable from proceeds of sheriff's sale thereof.

Lien and effect of judgment against cotenant.

Cited in reference note in 60 A. D. 632, on effect on right to partition of judgment against tenant in common.

Cited in notes in 117 A. S. R. 780, on judgment lien as affecting estates in common; 93 A. D. 355, on applicability of judgment lien to interest of part owner of land.

Contracts in discharge of infant's legal obligation.

Cited in *Stowers v. Hollis*, 83 Ky. 544, holding valid, a contract by infant for the support of his bastard child.

21 AM. DEC. 437, ASHCOM v. SMITH, 2 PENR. & W. 211.

Right to recover for deficiency in quantity of land sold.

Cited in *Kreiter v. Bomberger*, 82 Pa. 59, 22 A. R. 750, 2 W. N. C. 685, 33 Phila. Leg. Int. 304, holding that vendee under executed sale of defined tract of land, cannot recover for deficiency in quantity in the absence of fraud; *Painter v. Wilson*, 197 Pa. 434, 47 Atl. 349, on recovery for deficiency in quantity of land in defined tract; *Coughenour v. Stauff*, 77 Pa. 191, 32 Phila. Leg. Int. 99, holding that under sale of defined tract of land for round sum, specifying also price per acre, vendor cannot recover for excess in quantity over the sum specified; *Hassel v. Denlinger*, 24 Lanc. L. Rev. 323, holding purchaser for certain sum of tract specified as containing given acreage more or less, not entitled to abatement of price for deficiency; *Galbraith v. Galbraith*, 6 Watts, 112, construing appraisal by jury of tract found to contain a specified quantity more or less at so much per acre to mean appraisal at specific sum regardless of excess or deficiency in the quantity.

Cited in reference notes in 68 A. D. 214, on construction of words "more or less" in deed; 37 A. D. 562, on effect of use in deed of words "more or less."

Auction sales.

Cited in reference notes in 28 A. S. R. 128, on auction sales of realty; 90 A. D. 466, on advertisement of auction as condition of sale.

— Terms of.

Cited in *Ransberger v. Ing*, 55 Mo. App. 621, holding that representation in advertisement of auction is not part of contract of sale; *Morrison v. Morrison*, 6 Watts & S. 516, holding that written terms of sale of land at auction may be varied by parol during sale.

Grounds for relief in equity.

Cited in reference notes in 41 A. D. 379, as to when equity will relieve against mistake; 90 A. D. 425, on suppression and concealment of material facts as rendering sale fraudulent.

Cited in note 55 A. S. R. 513, on ignorance of one's rights under contracts as ground of relief.

— Relief from bid made under mistake.

Cited in *Rittenburg v. Freeman*, 33 Pa. Co. Ct. 467, holding purchaser at auction sale bidding under misdescription by auctioneer entitled to recover money deposited thereon.

Liability for refusing to complete bid.

Cited in *Tompkins v. Haas*, 2 Pa. St. 74, holding that vendee refusing to perform under bid at auction is liable to vendor for loss at resale; *Bowser v. Cessna*, 62 Pa. 148, holding measure of damages for vendee's failure to comply with his bid at auction sale, to be difference between his bid and price at resale.

Damages for breach of agreement to sell generally.

Cited in *Newport & S. Valley R. Co. v. Seager*, 7 Pa. Super. Ct. 268 (affirming 19 Pa. Co. Ct. 465), on measure of damages for failure to deliver bond sold, being difference between contract price and market value.

Cited in reference notes in 33 A. D. 304, on measure of damages for refusal to complete sale; 90 A. D. 425, as to rule of damages on resale and otherwise where vendee has refused to complete purchase.

Cited in note in 52 L.R.A. 249, on vendor's right to resell on breach by vendee and effect of same on right to recover loss of profits.

— For breach of contract for sale of land.

Cited in *Meason v. Kaine*, 67 Pa. 126, holding that measure of damages for breach of parol contract for sale of land, is difference between contract price and market value at time of breach.

Cited in note in 8 L.R.A.(N.S.) 139, on right of vendor of real estate, on purchaser's refusal to perform, to resell at latter's risk and hold him liable for deficiency.

Distinguished in *Carner v. Peters*, 43 W. N. C. 261, 9 Pa. Super. Ct. 29, holding that where vendee fails to perform under parol contract for sale of land, vendor retaining land can recover only nominal damages.

21 AM. DEC. 445, HEISSE v. MARKLAND, 2 RAWLE, 274.

Legacy to a class to be ascertained in futuro.

Cited in *Thomas v. Thomas*, 149 Mo. 426, 73 A. S. R. 405, 51 S. W. 111, holding that legacy to a class goes to all who answer the description at time

of distribution, excluding any who may answer description thereafter; *Schuld's Estate*, 199 Pa. 58, 48 Atl. 879, holding time of distribution of bequest to children as a class when they shall attain a certain age, is when one reaches the prescribed age.

Considering testator's intention in construing will.

Cited in reference notes in 57 A. D. 144, on intention of testator governing in construction of will; 39 A. D. 582, on ascertainment of testator's intent in construing will; 77 A. D. 679, on effect of testator's intention in construing will.

21 AM. DEC. 447, APP v. DREISBACH, 2 RAWLE, 287.

Conclusiveness of decree of probate court.

Cited in *Thompson v. M'Gaw*, 2 Watts, 161; *Barney v. Chittenden*, 2 G. Greene. 165; *Klingensmith v. Bean*, 2 Watts, 486, 27 A. D. 328,—holding that decree of orphans' court within its jurisdiction cannot be attacked collaterally; *Keech v. Rinehart*, 10 Pa. 240, on decree of orphans' court, being conclusive in all matters within its jurisdiction upon which it directly acted; *Moorhead's Estate*, 12 Pittsb. L. J. N. S. 291, 1 Chester Co. Rep. 435, holding decree of distribution of surplusage of estate conclusive upon all persons interested.

Cited in reference notes in 35 A. D. 516; 48 A. D. 119,—on conclusiveness of decrees of orphans' court; 95 A. D. 224, on conclusiveness of decrees of probate court; 46 A. S. R. 466, on conclusiveness of final settlement in probate court.

Cited in notes in 21 L.R.A. 681, on nature of probate decree; 39 A. D. 724, on how far settlement of administrator's account is conclusive.

Several suits against administrators.

Cited in *French v. Peters*, 177 Mass. 568, 59 N. E. 449, holding that appeal of one administrator will not be dismissed for failure of his coadministrator to join therein where severance in pleadings appear of record; *Burgie v. Parks*, 11 Lea, 84, on different pleas where there are several executors, and judgment in favor of one and against another.

Distinguished in *Geddis v. Irvine*, 5 Pa. 508, holding where only one of two trustees is liable, action must be brought against him alone.

Exclusiveness of statutory remedy.

Cited in reference notes in 28 A. D. 527, on necessity of pursuing statute—introducing new rights or offenses; 62 A. D. 791, on duty to follow statute which gives remedy where there was none before.

Suit for legacy.

Cited in reference notes in 43 A. D. 518, on suits to recover legacies; 80 A. D. 197, on recovery of legacy in assumpsit.

When statute of limitations applies.

Cited in note in 23 A. D. 755, on limitations in equity.

—In cases of fraud.

Cited in reference notes in 61 A. D. 317, on applicability of statute of limitations to cases of fraud; 27 A. D. 502, on running of limitations in case of fraud; 36 A. D. 107, on how far fraud prevents running of statute of limitations.

Cited in note in 51 A. D. 584, on statute of limitations in case of fraud.

—In cases of trusts.

Cited in *Heckert's Appeal*, 24 Pa. 482, holding statute not applicable to trust, exclusively cognizable in equity; *Barton v. Dickens*, 48 Pa. 518, 22

Phila. Leg. Int. 372a; *Finney v. Cochran*, 1 Watts & S. 112, 37 A. D. 450,—holding that statute of limitations applies to trusts where the remedy is certain at law.

Cited in reference notes in 47 A. D. 638, on statute of limitations in cases of trusts; 61 A. D. 317, on inapplicability of statute of limitations to trusts; 40 A. S. R. 108, on limitations of actions in cases of express trusts; 37 A. D. 454, on statute of limitations as bar in cases of trust.

Cited in note in 8 L.R.A. 648, on statute of limitations as operating against deposit constituting direct trust.

— **To claims against decedent's estates.**

Cited in *York's Appeal*, 110 Pa. 69, 2 Atl. 65, 17 W. N. C. 33. 16 Pittsb. L. J. N. S. 248, 43 Phila. Leg. Int. 415, holding limitations good bar to action in orphans' court for claim against an estate; *Man v. Warner*, 4 Whart. 455, holding that statute of limitations applies to debts created by decedent during life but not payable until after his death.

Cited in notes in 99 A. D. 394, on effect of statute of limitations on liabilities of executors and administrators; 8 L.R.A. 649 on application of statute of limitations as to executors and administrators acting as trustees.

Distinguished in *Thompson v. M'Gaw*, 2 Watts, 161, holding that statute does not apply to action for legacy.

Time of running of statute of limitations.

Cited in *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. 635, holding that statute of limitations runs only from discovery of the fraud, in action for relief on ground of fraud.

Annotation cited in *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557, holding that in action upon administrator's bond, the statute of limitations runs from accrual of cause of action.

Jurisdiction of equity.

Cited in reference notes in 32 A. D. 695, on legal remedy as bar to equitable relief; 52 A. D. 209, as to when legal remedy will not bar equitable relief.

Jurisdiction of probate courts.

Cited in reference notes in 94 A. D. 55, on jurisdiction of orphans' courts; 44 A. D. 472; 78 A. D. 374,—on chancery powers of orphans' court; 95 A. D. 224, on chancery powers of probate court; 71 A. D. 595, as to whether orphans' and probate courts are courts of inferior and limited jurisdiction; 73 A. D. 558, on how far jurisdiction of chancery is devested by probate system.

Effect of legal notice of judicial settlement.

Cited in *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517; *Priestley's Appeal*, 127 Pa. 420, 4 L.R.A. 503, 17 Atl. 1084, 24 W. N. C. 305, 46 Phila. Leg. Int. 455,—holding that lack of actual notice is not good ground for review of account of trustee already confirmed, where legal notice is conceded; *Sheets's Estate*, 215 Pa. 164, 24 Atl. 413, on same point.

Sufficiency of notice by publication.

Cited in *Re Harrisburg & C. Turnpike*, 2 Dauphin Co. Rep. 51, holding notice by publication of application for appointment of jury in proceeding to condemn turnpike, sufficient.

21 AM. DEC. 454, FIELD'S ESTATE, 2 RAWLE, 351.

Unenforceable debt as consideration for new promise.

Distinguished in *M'Pherson v. Rees*, 2 Penr. & W. 521, holding that where

executor's account has been accepted by the court, an item of supposed liability therein is not good consideration for promise to pay it.

— Debt discharged by bankruptcy.

Cited in *Trumbull v. Tilton*, 21 N. H. 128, holding that debt discharged by bankruptcy is good consideration for new promise; *Earnest v. Parke*, 4 Rawle, 452, 27 A. D. 280, holding that promise to pay debt discharged by bankruptcy creates new contract enforceable at law.

Cited in reference notes in 64 A. D. 126, on promise to pay debt discharged by bankruptcy; 43 A. D. 176, on effect of promise to pay debt after discharge in bankruptcy; 64 A. D. 346, on effect of distinct promise to pay debt barred by bankruptcy; 44 A. D. 353, on enforceability of new promise to pay debt discharged by bankruptcy.

Declaration on new promise to pay barred or discharged debt.

Cited in *Dusenbury v. Hoyt*, 45 How. Pr. 147, 14 Abb. Pr. N. S. 132, 4 Jones & S. 95; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142, 17 Pittsb. L. J. N. S. 181, 43 Phila. Leg. Int. 532; *Fleming v. Lullman*, 11 Mo. App. 104,—holding new promise to be the only cause of action; *Wolfe v. Eberlein*, 74 Ala. 99, 49 A. R. 809, holding that where debt had been reduced to judgment prior to discharge, suit may be brought on the judgment; *Graham v. Hunt*, 8 B. Mon. 7, holding new promise not available as reply to defense of discharge by bankruptcy in suit on note; *Reeside v. Hadden*, 12 Pa. 243, on declaration on new promise being the proper mode of procedure.

Cited in reference note in 52 A. D. 782, as to whether old debt or new promise is cause of action in case of revival by new promise of debt barred by limitations or discharge in bankruptcy.

Parol new promise to pay specialty.

Cited in *Hittson v. Davenport*, 3 Colo. 597, holding reply of new promise not available against defense of statute of limitations in action of debt on a specialty; *Postens v. Postens*, 3 Watts & S. 127, holding that indorsement of promise to pay sealed instrument is evidence to rebut presumption of payment from lapse of time; *Ott v. Perry*, 1 Phila. 77, 7 Phila. Leg. Int. 118, holding that judgment discharged by bankruptcy cannot be revived by new promise.

Effect of discharge in bankruptcy.

Cited in *Root v. Espy*, 93 Ind. 511, holding that discharge in bankruptcy extinguishes a pre-existing judgment and all its incidents.

Estoppel by inference.

Cited in reference note in 87 A. D. 318, as to whether estoppel is to be taken by inference or argument.

Interest on claims against insolvent.

Distinguished in *Strickler's Estate*, 13 Phila. 504, 35 Phila. Leg. Int. 276, 2 Pearson (Pa.) 307, holding that where sale is made in assignment for benefit of creditors, under order of court, interest on claims ceases from confirmation of sale.

21 AM. DEC. 458, BRUCH v. LANTZ, 2 RAWLE, 392.

Liability of land to execution sale.

Cited in reference note in 49 A. D. 233, on liability of lands to execution at common law.

Liability of decedent's lands for debts.

Cited in reference notes in 31 A. D. 72, on priority of creditor's interest in decedent's estate; 40 A. D. 193, on liability of property in hand of heirs, devisees, or alienees to payment of decedent's debts.

Lien on decedent's lands.

Cited in reference note in 28 A. D. 729, on lien of decedent's debts on his realty.

Limitations on lien of debts against decedent's estate.

Overruled in *Bailey v. Bowman*, 6 Watts & S. 118; *Greenough v. Patton*, 7 Watts, 336; *Kerper v. Hoch*, 1 Watts, 9,—holding that unsecured debts of decedent are not lien on lands after seven years as against bona fide purchasers, heirs, or devisees under statute; *Penn v. Hamilton*, 2 Watts, 53, holding the same though debts had been sued on and judgments filed against executor.

Power of sale to executor.

Cited in reference note in 33 A. D. 98, on effect of power of sale given to executor.

Purchase of or dealings with estate by trustee, etc.

Cited in *Beeson v. Beeson*, 9 Pa. 279; *Henninger v. Boyer*, 10 Pa. Co. Ct. 506; *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546,—holding that sale of land by administrator to himself through third party, is voidable; *Hays v. Heidelberg*, 9 Pa. 203, holding that administrator of judgment debtor purchasing at sheriff's sale takes title in trust for creditors; *Re Hallman's Estate*, 13 Phila. 562, 34 Phila. Leg. Int. 169, 1 Chester Co. Rep. 141, on right of trustees to purchase their trust estates.

Cited in reference notes in 56 A. D. 93, as to whether administrator or executor may purchase property of estate for his own benefit; 25 A. D. 399, on invalidity of purchase by trustee at his own sale; 42 A. D. 542, on voidability of purchase by executor of property of estate; 33 A. D. 581, on power of administratrix to avoid purchase made at her own sale; 52 A. D. 406, on voidability of purchase made by trustees as executors, administrators, and sheriffs at their own sale.

Distinguished in *Cadbury v. Duval*, 10 Pa. 265, holding that where executor is not connected with the trust, he may purchase at trustee's sale; *Hall's Appeal*, 40 Pa. 409, holding that where trust is separate from duties of executors, a contract to employ an executor in the trust affairs is valid.

21 AM. DEC. 466, SNYDER v. VAUX, 2 RAWLE, 423.**When trover or replevin lies.**

Cited in reference notes in 26 A. D. 689; 58 A. D. 66,—as to when replevin lies; 36 A. D. 115, on property necessary to maintain trover for chattels.

Cited in notes in 8 A. D. 672, as to when trover lies; 80 A. S. R. 759, on what property is repleviable.

— To recover property wrongfully severed from soil.

Cited in *Davis v. Easley*, 13 Ill. 192, holding that replevin may be maintained for boards, made from trees wrongfully cut on lands of another; *Herdie v. Young*, 55 Pa. 176, 93 A. D. 739, holding same as to logs cut on lands of another, under mistake as to boundaries; *Lieberman v. Clark* (*Wheeler v. Clark*), 114 Tenn. 117, 69 L.R.A. 732, 85 S. W. 258, holding same as to logs cut by trespasser.

Cited in reference notes in 23 A. D. 333, on replevin for trees cut; 36 A.

D. 202, on replevin for trees cut or slates taken against party in possession of land; 85 A. D. 327, on replevin or trover by owner of freehold for property wrongfully severed where defendant is in possession under claim of title.

Cited in note in 69 L.R.A. 734, on nature of adverse possession of land as affecting right to maintain replevin by or against the person in possession for things severed.

Distinguished in *Anderson v. Hapler*, 34 Ill. 436, 85 A. D. 318, holding that replevin will not lie for wood cut by one in possession of land under color of title; *Wetherbee v. Green*, 22 Mich. 311, 7 A. R. 653, holding where trees are cut in good faith under supposed right and manufactured into hoops, the title thereto passes from owner of land and his remedy is in damages.

— To recover chattels not remaining in specie.

Cited in *Ames v. Mississippi Boom Co.* 8 Minn. 467, Gil. 417, holding that in action of replevin to recover logs, the specific articles must be identified; *Silbury v. McCoon*, 3 N. Y. 379, 53 A. D. 307, holding that owner may recover whisky made from corn taken from him by a wilful trespasser; *Lake Shore & M. S. R. Co. v. Hutchins*, 37 Ohio St. 282, on right to recover property wrongfully taken or its value in its improved state.

Determining title to land in personal actions.

Cited in *Lewis v. Robinson*, 10 Watts, 338, holding that conflicting titles to land cannot be tried in action of assumpsit.

Cited in reference note in 79 A. S. R. 24, on trial of title to land in replevin.

Cited in notes in 89 A. D. 429, on right to try title in replevin and trover; 80 A. S. R. 752, on trial of title in replevin or claim and delivery.

Remedy for injury to land held adversely.

Cited in reference note in 74 A. S. R. 658, on remedy of owner for removal of timber by one in adverse possession.

Cited in note in 85 A. D. 322, on remedy for injuries to real estate held adversely to plaintiff.

Accession and confusion of goods.

Cited in reference note in 33 A. D. 766, on title by accession.

Cited in notes in 54 A. D. 586, on effect of bestowing labor upon another's property; 26 A. R. 525, on owner's right to take property in changed form upon proof of identity of original materials; 44 A. S. R. 444, 445, as to whether personal property taken by one not the owner can become his property; 32 L.R.A. 425, 426, 427, on title by accession to crops, fruit, and timber, severed and converted with wrongful intent; 32 L.R.A. 429, 430, on title by accession to crops, fruit, and timber, wrongfully severed when they are distinguishable though changed or mixed.

Measure of damages for conversion.

Cited in note in 24 A. D. 87, on measure of damages in trover as against innocent purchaser.

21 AM. DEC. 469, COLLINS v. LEMASTERS, 1 BAIL. L. 348.

Recovery against joint obligor as satisfaction.

Cited in *Union Bank v. Hodges*, 11 Rich. L. 480, 724, holding recovery against some partners, where there are more, is no bar to a subsequent suit against all on same cause of action; *Watson v. Owens*, 1 Rich. L. 111, holding judgment against active partner on his note for goods purchased, no bar to action against dormant partners.

Cited in reference notes in 30 A. S. R. 657, on judgment against one of several joint debtors as bar to action against others; 50 A. D. 301, on unsatisfied judgment against one joint debtor as bar to action against the other.

Cited in notes in 1 E. R. C. 182, on recovery against one joint debtor as bar to action against codebtor; 43 L.R.A. 161, 179, on effect of judgment in action against part of obligors on joint or joint and several contract to release or limit liability of other obligors.

Joint liability.

Cited in *Pope Mfg. Co. v. Charleston Cycle Co.* 55 S. C. 528, 33 S. E. 787, holding in an action on a partnership contract, no one of the partners can set up as a counterclaim or set-off, a claim due to him personally.

Merger in judgment.

Cited in reference note in 33 A. D. 686, on merger of cause of action in judgment.

Cited in note in 17 E. R. C. 366, on merger of remedy upon contract in judgment purporting to dispose of liability.

21 AM. DEC. 476, LEE v. GILES, 1 BAIL. L. 449.

Execution and action on judgment as concurrent remedies.

Cited in *Pitzer v. Russel*, 4 Or. 124, holding a judgment creditor cannot claim a strict right to sue upon his judgment as often as he may choose without showing necessity for such a course; *Solen v. Virginia & T. R. Co.* 15 Nev. 313, on right of action upon a domestic judgment when there is no necessity of bringing the suit; *Robertson v. Shannon*, 2 Strobh. L. 419, on enforcement of judgment by action thereon while final process was available; *Copeland v. Todd*, 30 S. C. 419, 9 S. E. 341, holding action of debt maintainable on judgment, no longer enforceable by execution.

Distinguished in *Parnell v. James*, 6 Rich. L. 370, holding debt against executor of defendant lies on a judgment while enforceable by *feri facias* to charge the executor with a devastavit; *Shooter v. McDuffie*, 5 Rich. L. 61, holding action by foreign attachment lies on a judgment while enforceable by execution; *Clark v. Conner*, 2 Strobh. L. 346, holding attachment may be issued on a judgment recovered in another state, before expiration of a year and a day from date of its recovery; *Pinckney v. Singleton*, 2 Hill, L. 343, holding statute permitting executions to issue and be enforced within four years does not preclude an action of debt on a judgment against an executor suggesting a devastavit within that time.

Disapproved in *Hummer v. Lamphear*, 32 Kan. 439, 49 A. R. 491, 4 Pac. 865, holding action maintainable on domestic judgment although it is in full force and the time within which an execution can issue has not expired; *Kingsland v. Forrest*, 18 Ala. 519, 52 A. D. 232, holding debt will lie on a judgment, after a year and a day, although an execution may legally issue upon it.

Accrual of right of action on judgment.

Cited in *Vandiver v. Hammet*, 4 Rich. L. 509, holding bar against action does not begin till after a year and a day; *Latimer v. Trowbridge*, 52 S. C. 193, 68 A. S. R. 893, 29 S. E. 634, on when a cause of action accrues on a judgment.

Cited in reference notes in 37 A. S. R. 48, on action on judgment; 37 A. S. R. 477, on right of action on domestic judgment; 79 A. D. 413, on common-law rule that person has right of action on judgment as soon as recovered; 67 A. S. R. 679, as to when action upon judgment is barred.

Disapproved in *Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 90 A. S. R. 748,

56 L.R.A. 812, 67 Pac. 252, holding statute of limitations begins to run against an action on a judgment from its rendition, and not from expiration of time during which execution can be issued, and citing annotation also on this point.

21 AM. DEC. 480, SINGLETARY v. CARTER, 1 BAIL. L. 467.

Collateral attack on sheriff's sale.

Cited in *Bull v. Rowe*, 13 S. C. 355, holding fact that sheriff's sale was illegal and void may be shown in any proceeding direct or collateral.

Validity of sheriff's sale.

Cited in notes in 33 A. D. 698, on necessity of levy to sustain sale; 21 L.R.A. 42, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy.

Validity of service by interested party.

Cited in *Morton v. Crane*, 39 Mich. 526, holding constable cannot serve a summons in his own action; *Dane v. Gilmore*, 51 Me. 544, holding sheriff, as such, cannot legally serve an execution on his deputy, though directed to him; *Brettell v. Deffebach*, 6 S. D. 21, 60 Mo. 167, on disqualification of plaintiff to serve his own process.

Cited in reference notes in 31 A. D. 704; 11 A. S. R. 407,—on right of officer interested in suit to serve process.

Distinguished in *Upson v. Horn*, 3 Strobb. L. 108, 49 A. D. 633, holding objection to service of summons by interested party will not avail after decree or judgment; *Mudrock v. Killips*, 65 Wis. 622, 28 N. W. 66, holding under statute, authorizing a justice to empower "any suitable person, not being party to action" to execute process, the son of one of the parties may be so empowered.

21 AM. DEC. 482, CASTON v. PERRY, 1 BAIL. L. 533.

Conclusiveness of former judgment.

Cited in *Darragh v. Kaufman*, 2 Posey Unrep. Cas. (Tex.) 97, holding estoppel extends beyond the face of the judgment to all issues covered by the case; *Hibler* use of *Glover v. Hammond*, 2 Strobb. L. 105, holding discharge of prisoner, by order of court, under the insolvent debtor's act is a release from plaintiff's capias, and the facts that plaintiff did not appear, and that no issue was made on truth of schedule, do not vary the case.

Cited in reference note in 44 A. D. 763, on conclusiveness of former recovery in tort.

— On title to land.

Cited in *Jones v. Weathersbee*, 4 Strobb. L. 50, 51 A. D. 653, holding former recovery given in evidence concluded the title to land so far as involved in that action; *McCaw v. Galbraith*, 7 Rich. Eq. 74, holding verdict for "one undivided fourth part of land," for plaintiff in trespass to try title right is conclusive as to all titles which defendants had at time of trial.

Appealability of nonsuit.

Cited in *Barwick v. Barwick*, 59 S. C. 200, 37 S. E. 774, holding order granting nonsuit at plaintiff's instance because testimony upon which he relied was held incompetent, is appealable.

21 AM. DEC. 483, HOWARD v. WILLIAMS, 1 BAIL. L. 575.

Followed without discussion in *Madden v. Day*, 1 Bail. L. 587,

Validity of gifts as to creditors.

Cited with special approval in *Izard v. Middleton*, Bail. Eq. 228, holding a voluntary conveyance void as to creditors, if donor afterwards prove to be insolvent, unless the insolvency was caused by depreciation, misfortune, and like events.

Cited in *Wilson v. Kohlheim*, 46 Miss. 346, holding voluntary conveyance by father to son in consideration of love and affection not fraudulent *per se*, as to creditors; *Ingram v. Phillips*, 5 Strobb. L. 200, holding if donor be indebted beyond his means of payment, the gift is void as to creditors, even though donor's intention was honest; *Ingram v. Phillips*, 3 Strobb. L. 565, holding gift to daughter good if existing debts have since been paid; *Caston v. Cunningham*, 3 Strobb. L. 59, holding voluntary conveyance of property void if the same property is afterwards sold for a valuable consideration to one with no notice of the gift; *Merle v. Hascall*, 11 Mo. 406, holding voluntary conveyance not *per se* fraudulent as against creditors; *Farr v. Sims*, Rich. Eq. Cas. 122, 24 A. D. 396, holding gift to a minor child void against subsequent creditors without notice.

Cited in reference notes in 21 A. D. 537, on what is necessary to constitute a gift; 28 A. D. 572, as to when voluntary conveyances are void; 29 A. S. R. 877, as to whether conveyances between parent and child are fraudulent; 29 A. D. 124, on validity of gift or voluntary conveyance by father to child; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers.

— Retention of possession as badge of fraud.

Cited in *Sewall v. Glidden*, 1 Ala. 52, holding where infant donee of personalty lived with his father, the donor, the donor's possession of the gift, is consistent with donee's right, and not presumptive evidence of fraud; *Hillebrant v. Brewer*, 6 Tex. 45, 55 A. D. 757, holding where a father procured a brand to be recorded in name of his child and branded certain cattle with such brand, with avowed object of making a gift of the cattle to the child, this was a sufficient delivery.

Cited in reference note in 26 A. D. 325, on necessity of delivery to validity of gift.

Distinguished in *Richardson v. Mounce*, 19 S. C. 477, holding retention of possession of land by judgment debtor, after sheriff's sale, not in itself sufficient notice of fraud in the sale.

21 AM. DEC. 492, WILLIAMSON v. FARROW, 1 BAIL. L. 611.**Collateral attack on judicial sale.**

Cited in *Howard v. North*, 5 Tex. 290, 51 A. D. 769, holding a defective notice or want of publication of execution sale will not vitiate title of purchaser in good faith; *Oppenheimer v. Reed*, 11 Tex. Civ. App. 367, 32 S. W. 325, holding where judgment for foreclosure requires the land to be sold in bulk, a sale by parcels renders the sale voidable and not subject to collateral attack; *Lawrence v. Grambling*, 13 S. C. 120, holding purchaser at sheriff's sale not affected by irregularities in the execution under which he purchased, especially in action to try title between purchaser and defendant in such execution; *Hunter v. Ruff*, 47 S. C. 525, 58 A. S. R. 907, 25 S. E. 65, on illegality of sheriff's sale; *Bull v. Rowe*, 13 S. C. 356, holding illegality of sheriff's sale may be shown in either direct or collateral proceedings.

— Irregularity in sheriff's return.

Cited in *Ingram v. Belk*, 2 Strobb. L. 207, 47 A. D. 591, on failure to indorse a levy on a return by sheriff, as a mere irregularity.

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Confirmation of judicial sale.

Cited in reference notes in 28 A. D. 476, on necessity of confirmation of sale; 66 A. S. R. 707, on necessity of confirmation of execution sale.

Amendment of return to writ.

Cited in note in 13 A. D. 174, on right to amend returns to writs.

Computation of time.

Cited in *McElwee v. White*, 2 Rich. L. 95, holding in computing time, forty days within which schedule should be filed under prison bounds act, the day of date of bond must be excluded; *O'Connor v. Towns*, 1 Tex. 107; *State v. Schnierle*, 5 Rich. L. 299,—holding the day from which reckoning commences, and that on which it ends, may be included or excluded, as will best preserve a right, or prevent a forfeiture; *Manning v. Dove*, 10 Rich. L. 395, on same point.

Cited in reference notes in 42 A. D. 474, on mode of computing time; 54 A. D. 300, on law's regard for fractions of day where time is essential.

Cited in notes in 78 A. S. R. 381, 382, on fraction of day in computation of time; 78 A. S. R. 373, 375, on exclusion of first day in computation of time; 49 L.R.A. 196, on rule as to first and last days in computation of time; 49 L.R.A. 206, on rule as to first and last days in computation of time with reference to contracts; 75 A. D. 708, on sufficiency of publication of notice of sale where notice is required for certain number of weeks successively.

Meaning of word "month."

Cited in *Sprague v. Norway*, 31 Cal. 173; *Guaranty Trust & S. D. Co. v. Buddington*, 27 Fla. 215, 12 L.R.A. 770, 9 So. 246,—holding "months," when used in a statute, means calendar months, and not lunar months; *Brock v. Kirkpatrick*, 72 S. C. 491, 52 S. E. 592, on same point; *Muse v. London Assur. Corp.* 108 N. C. 240, 13 S. E. 94, holding it means a calendar month in policy of insurance.

Cited in notes in 50 A. S. R. 626; 78 A. S. R. 384, 385,—on meaning of "month" in computation of time.

21 AM. DEC. 499, STATE v. MCKEE, 1 BAIL. L. 651.**Ground for mistrial and venire de novo.**

Cited in *West v. State*, 42 Fla. 244, 28 So. 430, holding in trial for felony. if a juror, the judge, or the prisoner becomes incapacitated by illness or death, after the jury is impaneled and sworn in chief, the proper course is to declare a mistrial and begin *de novo*.

Right to discharge jury.

Cited in *State v. Nelson*, 19 R. I. 467, 61 A. S. R. 780, 33 L.R.A. 559, 34 Atl. 990, holding the discretion of the trial judge in discharging the jury on criminal trial before verdict is judicial and subject to review.

Cited in reference notes in 31 A. D. 598, on what warrants discharge of jury in a criminal case; 24 A. D. 750, on illness of trial judge as ground for discharge of jury.

Discharge of disagreeing jury.

Cited in *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305, holding it discretionary with trial judge whether jury should be discharged for failure to agree, and a mistrial ordered; *State v. Shuchardt*, 18 Neb. 454, 25 N. W. 722, holding it proper against consent only after jury have been so long in consultation that there is no reasonable probability they will agree; *Powell v. State*, 17 Tex. App. 345, holding it an abuse of discretion in judge to discharge jury after being out three hours, without defendant's consent, and such exercise of discretion is ap-

pealable; *State v. Kelley*, 45 S. C. 659, 24 S. E. 45, holding new trial proper where jury is kept out for more than twenty-four hours with only two meals, and after several times stating they could not agree is sent back and then find defendant guilty.

Cited in reference notes in 61 A. S. R. 784, on discharge of jury before verdict; 44 A. D. 405, on illegal discharge of jury in criminal cases; 36 A. D. 415, on discharge of jury in absence of defendant; 21 A. S. R. 274, on effect of unauthorized discharge of jury.

Separation of jury.

Cited in *Bilansky v. State*, 3 Minn. 427, Gil. 313, holding jury may be allowed to separate during the ordinary intervals of adjournment of lengthy trials in capital cases, where no special reason exists for denying it; *State v. Belcher*, 13 S. C. 459, holding judge has discretion to permit jury to disperse in capital cases, without objection made on either side; *Cannon v. State*, 3 Tex. 31, holding in trials for minor offenses, the separation of the jury without permission of court, before rendering verdict, will not, of itself, vitiate the verdict.

Cited in reference notes in 31 A. D. 576, on separation of jury in criminal case; 41 A. D. 314, on separation or discharge of jury in criminal case before conviction; 103 A. S. R. 160, on effect of separation of jury in criminal cases during progress of the trial.

Nolle prosequi.

Cited in *State v. Thomas*, 75 S. C. 477, 55 S. E. 893, holding it not abuse of discretion to permit *nolle* of indictment for larceny with avowed purpose of sending out another charging same person with larceny, and another with receiving stolen goods.

Cited in reference note in 41 A. D. 321, on *nolle prosequi*.

Cited in note in 35 L.R.A. 704, as to when and where power of public prosecutor to dismiss prosecution is absolute.

— Effect of.

Cited in *State v. Howard*, 15 Rich. L. 274, on a *nolle prosequi* as putting an end to a criminal prosecution; *Joy v. State*, 14 Ind. 139; *Reynolds v. State*, 3 Ga. 53,—holding if after jury is sworn, a *nolle prosequi* is entered on the indictment without prisoner's consent, it amounts to an acquittal.

Former jeopardy.

Cited in *State v. Lee*, 65 Conn. 265, 48 A. S. R. 202, 27 L.R.A. 498, 30 Atl. 1110, holding by statute, after acquittal by jury, an appeal may be taken in same manner as the accused on questions of law; *Mou-t v. State*, 14 Ohio, 295, 45 A. D. 542, holding a judgment on the verdict of conviction or acquittal is not necessary in order that either may constitute a bar to another indictment for the same offense; *State v. Ray Rice*, L. 1, 33 A. D. 90, holding an acquittal upon an invalid and insufficient indictment, is no bar to second indictment for the same offense; *State v. Shirer*, 20 S. C. 392, holding defendant not entitled to discharge where there was a mistrial for larceny and at next term the former indictment was *nolled*, and new bill found; *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, holding under an indictment for murder, where the panel was exhausted without obtaining a single juror and trial was adjourned until the next week, the prisoners were not entitled to discharge for former jeopardy; *State v. Ross*, 29 Mo. 32 (dissenting opinion), on right to try prisoner a second time for murder in first degree after he has been convicted for murder in second degree and new trial is ordered at his instance; *Joy v. State*, 14 Ind. 139, holding defendant waives any constitutional right that

may have attached to a count withdrawn from jury by order for election procured by his motion where he was charged upon two counts; *Brown v. Swineford*, 44 Wis. 282, 28 A. R. 582, holding an award of punitive damages for a tort which has been punished as a crime, is not in violation of constitutional provision that no person shall be put in jeopardy of punishment; *McDonald v. State*, 79 Wis. 651, 24 A. S. R. 740, 48 N. W. 863, holding that resentence on the same verdict after remand for proper judgment is not second jeopardy.

Cited in reference notes in 25 A. D. 497; 33 A. D. 96,—on former jeopardy; 24 A. D. 463; 30 A. D. 420; 35 A. D. 72; 41 A. D. 321; 49 A. D. 705; 51 A. D. 464; 59 A. D. 229; 61 A. D. 95; 11 A. S. R. 159; 24 A. S. R. 742; 48 A. S. R. 214,—on what constitutes former jeopardy; 62 A. D. 312, as to what is "jeopardy" and when it begins; 62 A. D. 471, as to whether jeopardy occurs on defective indictment.

Cited in notes in 58 A. D. 537; 21 L. ed. U. S. 872, 873,—on what constitutes former jeopardy.

— Where jury was discharged.

Referred to as leading case in *State v. Richardson*, 47 S. C. 166, 35 L.R.A. 238, 25 S. E. 220, holding where a case was withdrawn on solicitor's motion for absence of witnesses after impaneling and swearing in the jury, the prisoner has been put in jeopardy and cannot again be tried for same offense.

Cited in *O'Brian v. Com.* 9 Bush, 333, 15 A. R. 715; *People v. Gardner*, 62 Mich. 307, 29 N. W. 19; *Poage v. State*, 3 Ohio St. 229; *Schreiber v. Clapp*, 13 Okla. 215, 74 Pac. 316; *Gillespie v. State*, 168 Ind. 298, 80 N. E. 829,—holding in a criminal prosecution, the unnecessary discharge of the jury, after it has been impaneled and sworn, without defendant's consent, operates as an acquittal; *Ex parte Glenn*, 111 Fed. 257, holding prisoner once tried before jury regularly impaneled, which failed to agree, and was discharged without prisoner's consent, and without any actual imperious necessity, cannot be retried for same offense; *Ex parte Ulrich*, 42 Fed. 587, holding adjournment after evidence received and discharge of jury against consent on adjournment day because of judge's illness, barred another trial; *Allen v. State*, 52 Fla. 1, 41 So. 593, 10 A. & E. Ann. Cas. 1085; *Mitchell v. State*, 42 Ohio St. 383; *People v. Webb*, 38 Cal. 467,—holding if a party is placed on trial before competent court and jury, upon valid indictment, jeopardy attaches, to which he cannot again be subjected, unless the jury be discharged by legal necessity or by his consent; *Dobbins v. State*, 14 Ohio St. 493; *Ex parte McLaughlin*, 41 Cal. 211, 10 A. R. 272,—holding discharge of jury without defendant's consent, because after mature deliberation, they cannot agree, does not entitle defendant to immunity from further prosecution for same offense; *State v. M'Leomore*, 2 Hill, L. 680, holding same where at trial for capital offense, the jury could not agree on a verdict before 12 o'clock at night of last day of the term; *Tervin v. State*, 37 Fla. 396, 20 So. 551, holding where judge discharged jury for misconduct and their declared inability to agree, such trial was not jeopardy; *Maden v. Emmons*, 83 Ind. 331, holding it jeopardy, where jury, after being sent out, upon discovery that one of their number was not a resident of the county, dispersed without consent of court or defendant, and court made no effort to reassemble them; *State v. Scarborough*, 2 S. C. 439, holding rule discharging jury and directing second trial for absence of a jurymen should not apply to trial of one charged with a misdemeanor; *Lester v. State*, 33 Ga. 329, holding discharge of jury in capital case because they cannot agree, not an acquittal; *State v. Lewis*, 4 Strobb. L. 47,

holding that impossibility of agreement by sufficient number of freeholders in trial of a slave and consequent mistrial was not jeopardy.

Cited in reference note in 33 A. D. 96, on right of prisoner to release on dismissal of jury impaneled to try case.

Cited in notes in 44 L.R.A. 697, on former jeopardy by reason of discharge of jury in prisoner's absence; 14 L.R.A.(N.S.) 553, on effect of discharge of jury upon discovery of prejudice, disqualification, or misconduct of one or more of their number, to sustain plea of former jeopardy.

21 AM. DEC. 508, STATE v. TUTT, 2 BAIL. L. 44.

Jurisdiction of state courts of offenses against Federal statutes.

Cited in *State v. Wells*, 2 Hill, L. 687, holding by act of Congress, state courts have concurrent jurisdiction with Federal courts to punish defendant for opening letter contrary to provisions of such act.

— **To punish counterfeiting.**

Cited in *Com. v. Fuller*, 8 Met. 313, 41 A. D. 509, holding state courts have jurisdiction to punish offense of knowingly having false current money, with intent to pass it as true; *Harlan v. People*, 1 Dougl. (Mich.) 207, holding power of Congress "to provide for punishment of counterfeiting" may be exercised by the states concurrently; *State v. Pike*, 15 N. H. 83, on same point; *Jett v. Com.* 18 Gratt. 933, holding state court has jurisdiction to punish offense of attempting to pass forged note of a national bank.

Cited in reference notes in 41 A. D. 515, on power of state courts to punish for offense of counterfeiting; 13 A. S. R. 169, on power of state to punish counterfeiting United States coins.

Sufficiency of indictment.

Cited in reference note in 71 A. S. R. 914, on sufficiency of indictment for forgery.

Opinion evidence.

Cited in reference notes in 41 A. D. 464, on opinion evidence; 58 A. D. 305, on opinions of witnesses as evidence.

— **As to counterfeit.**

Cited in *Jones v. Finch*, 37 Miss. 461, 75 A. D. 73, holding person skilled in system of detecting counterfeit bills may give his opinion as to genuineness of bank bill without acquaintance with handwriting of persons whose names appear thereon.

— **As to handwriting.**

Cited in note in 63 L.R.A. 975, on nonexpert witnesses' knowledge of handwriting from official signatures.

Other acts as evidence of guilty knowledge.

Cited in *State v. Allen*, 56 S. C. 495, 35 S. E. 204, holding in a prosecution for uttering forged instrument, the state may prove that defendant had in his possession, or had uttered other forged instruments of like kind, not connected with the particular transaction, to prove guilty knowledge and intent.

21 AM. DEC. 513, WRIGHT v. HAMILTON, 2 BAIL. L. 51.

When statute of limitations commences to run.

Cited in *Wilks v. Robinson*, 3 Rich. L. 182 (dissenting opinion), on when statute of limitations begins to run.

Cited in reference note in 25 A. D. 717, as to when statute of limitations will begin to run.

Cited in note in 16 E. R. C. 215, as to when statute of limitations runs against cause of action for conversion.

Distinguished in *Ashley v. Holman*, 13 S. C. 97, holding where referee has fixed a year as a reasonable time for one of the parties to fulfil an obligation, the statute of limitations runs from end of the year.

— **Necessity of demand.**

Cited in *Girard Bank v. Bank of Pennsylvania Twp.* 4 Phila. 104, 17 Phila. Leg. Int. 316, holding holder of bank check, marked "good" by bank on which drawn, must present it and demand payment within six years from such marking.

Cited in reference notes in 36 A. D. 107, on running of limitations where demand necessary; 99 A. D. 781, as to when statute of limitations begins when demand is necessary; 55 A. D. 587; 59 A. S. R. 159,—on necessity of demand to set statute of limitations running; 28 A. D. 468, on running of limitations from demand which is necessary to give right of action.

Cited in note in 1 L.R.A. 319, on necessity of demand to start statute of limitations running.

— **As to moneys in hands of officer of court.**

Cited in *Williams v. Sims*, 1 Rich. Eq. 53; *Williamson v. King*, M'Mull. Eq. 41,—holding where sheriff has failed to pay over money on execution, the statute of limitations runs from time of demand; *State Treasurers v. Gibson*, 3 Hill, L. 339, on necessity of demand upon sheriff who is out of the state before bringing action to recover money collected by him; *Houseal v. Gibbs*, Bail. Eq. 482, 23 A. D. 186, holding it does not run in favor of master in chancery, against an account for proceeds of property sold by him, until demand on him by party entitled, or notice by him to party that he claims adversely; *Treasurers of the State v. Taylor*, 2 Bail. L. 524, on necessity for demand on officer to charge his sureties as for his defalcation; *Vaughan v. Evans*, 1 Hill, Eq. 414, holding sureties of commissioner in equity not liable until demand of payment made upon principal; *Bryant v. Owen*, 1 Ga. 355, on surety's liability where a decree is rendered against guardian for devastavit; *State v. Lake*, 30 S. C. 43, 8 S. E. 322, holding failure by clerk of court to pay out moneys to parties in interest, constitutes breach of trust only where there were both an order to pay out and a demand under that order during clerk's term.

Distinguished in *Sims v. Anderson*, 1 Hill, L. 394, holding where sheriff asserts a right to retain money collected in opposition to plaintiff's claim, no demand is necessary; *State ex rel. Van Wyck v. Norris*, 15 S. C. 241, where commissioner in equity turned over his office, bank book, etc., to his successor the legal duty of making a complete transfer, being equivalent to a demand; *Thompson v. Central Bank*, 9 Ga. 413, holding as to sheriff who has received money on a *fieri facias*, the statute begins to run from time it was received.

Interest from demand.

Cited in *Lever v. Lever*, 2 Hill, Eq. 158, holding general agent to receive moneys and pay expenses of estate, not liable for interest until after demand of unexpended balance.

Cited in reference note in 65 A. D. 503, on sheriff's liability for not paying over money.

21 AM. DEC. 515, McMORRIS v. HERNDON, 2 BAIL. L. 56.**"Value received" as importing consideration.**

Cited in *Osborne v. Baker*, 34 Minn. 307, 57 A. R. 55, 25 N. W. 606, holding the words "for value received" in a guaranty indorsed on notes, are a sufficient expression of the consideration, within the statute of frauds.

Burden of proving consideration.

Cited in note in 62 A. D. 489, on necessity of proving consideration of contract under seal.

Sufficiency of consideration.

Cited in reference notes in 26 A. D. 109, on sufficiency of consideration for promise; 42 A. S. R. 579, on receiving benefit as consideration.

Sufficiency of moral obligation to support a contract.

Cited in *Ferguson v. Harris*, 39 S. C. 323, 39 A. S. R. 731, 17 S. E. 782, holding a written promise to pay a debt is binding on the promisor if based upon a perfect moral obligation; *Bank of Spartanburg v. Mahon*, 78 S. C. 408, 59 S. E. 31, on sufficiency of a perfect moral obligation to support a contract.

Cited in reference notes in 79 A. D. 457, as to when moral consideration will support contract; 39 A. D. 639, on moral obligation or equitable duty as consideration for promise; 47 A. S. R. 468, on promise to perform existing obligation as consideration.

Cited in notes in 53 L.R.A. 372, on moral obligation for promise arising from past legal benefit or consideration; 53 L.R.A. 373, on moral obligation as consideration for promise to repay one who voluntarily pays another's debt.

Implied promise to repay money paid to use.

Cited in *Lewis v. Lewis*, 3 Strobb. L. 530, holding one paying an account against another, can maintain no action for the amount, without promise, express or implied, by the original debtor; *Willoughby v. Willoughby*, 70 S. C. 516, 50 S. E. 208, holding mutual promise between two brothers followed by performance by one to his loss, a valuable consideration and enforceable by party for whose benefit it was made.

21 AM. DEC. 518, DE TREVILLE v. ELLIS, 1 BAIL. EQ. 35.**Committee's power to lease ward's land.**

Cited in *Woerner*, Am. Law of Guardianship, § 147, on power of committee to lease lands of insane ward.

21 AM. DEC. 522, McCLURE v. MILLER, 1 BAIL. EQ. 107.**Gift by intended spouse as a fraud on marital rights.**

Cited in *Daniher v. Daniher*, 201 Ill. 489, 66 N. E. 239, holding a conveyance upon eve of marriage not a fraud upon legal rights of intended wife, when made to carry out a previous valid contract, and with her knowledge; *Cheshire v. Payne*, 16 B. Mon. 618, holding if husband be apprised before marriage of the disposition by the intended wife of her property he cannot claim to have been defrauded by it.

Cited in reference notes in 46 A. D. 67, on voluntary conveyance on eve of marriage as fraudulent; 75 A. D. 441, on gift by woman to her children on eve of second marriage as fraud on husband's marital rights.

Conclusiveness of former probate decree.

Cited in *Waring v. Lewis*, 53 Ala. 615, holding decree of a probate court

having jurisdiction is conclusive as to facts actually litigated and facts necessarily involved in its rendition.

Purchase by trustee, etc.

Cited in reference notes in 33 A. D. 581, on power of administratrix to avoid purchase made at her own sale; 56 A. D. 93, as to whether administrator or executor may purchase property of estate for his own benefit; 42 A. D. 542, on voidability of purchase by executor of property of estate; 52 A. D. 406, on voidability of purchase made by trustees as executors, administrators, and sheriffs at their own sale.

Cited in notes in 19 A. S. R. 289, on sales and conveyances by trustees; 13 L.R.A. 492, on effect of purchase of trust property by trustee.

Equity jurisdiction.

Cited in reference notes in 50 A. D. 67; 51 A. D. 142,—on equity jurisdiction in matters of account.

Grounds for equitable relief.

Cited in reference notes in 29 A. D. 218, as to when relief will be granted in equity; 24 A. D. 274, on jurisdiction of equity where adequate remedy at law exists.

— Against judgment at law.

Cited in reference notes in 43 A. D. 288, as to when equity will decree new trial at law; 31 A. D. 642, as to when equity will interfere with judgment at law; 30 A. D. 504, on relief in equity from judgment at law; 27 A. D. 650, on power of equity to relieve against judgment at law.

Cited in notes in 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed; 31 L.R.A. 770, on injunction against judgment because of right of set-off in matters of an estate.

21 AM. DEC. 526, HENDERSON v. MITCHELL, 1 BAIL. EQ. 113.

Jurisdiction of equity over judgments at law.

Cited in *Coon v. Seymour*, 71 Wis. 340, 37 N. W. 243, holding a circuit court has no jurisdiction to vacate a judgment of a municipal court, the latter court being a court of record capable of granting the necessary relief; *Wilks v. Davis*, Rich. Eq. Cas. 390, on necessity of one having a good defense at law, in order to be relieved in equity.

Cited in reference notes in 21 A. D. 542, on relief against judgment at law, 43 A. D. 288, on when equity will decree new trial at law; 53 A. S. R. 447, on negligence in preparation for trial, barring equitable relief from judgment.

Cited in note in 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed.

Collateral attack on judgment.

Cited in note in 39 L.R.A. 781, on collateral attack on judgments against insane persons.

How jurisdiction of person of lunatic acquired.

Cited in *Ex parte Kibler*, 53 S. C. 461, 31 S. E. 274; *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66,—holding jurisdiction of the person of lunatic can only be acquired by answer of guardian *ad litem*.

Time for objection to jurisdiction.

Cited in reference note in 52 A. D. 282, as to when objection to jurisdiction of equity must be made.

21 AM. DEC. 530, BLAKE v. JONES, 1 BAIL. EQ. 141.**Validity of voluntary transfers.**

Cited in *Smith v. Smith*, 24 S. C. 304, holding under voluntary deed daughter is entitled to retain her land against subsequent creditor; *Bullitt v. Taylor*, 34 Miss. 708, 69 A. D. 412 (dissenting opinion), on voluntary conveyances as frauds on subsequent creditors.

Cited in reference notes in 26 A. D. 194, on voluntary conveyances; 28 A. D. 113, on conveyances fraudulent as to creditors; 28 A. D. 572, as to when voluntary conveyances are void; 28 A. D. 206, on validity of fraudulent conveyance as between parties; 26 A. D. 386, as to when conveyance from father to son is fraudulent; 78 A. S. R. 824, on fraudulent intent in making conveyance; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers.

Declarations as evidence of delivery.

Cited in *Etheredge v. Partain*, 10 Rich. Eq. 207, holding declarations by testator of intention to give two illegitimate sons certain choses in action, and testimony by mother that he did so give, sufficient; *Crouse v. Judson*, 41 Misc. 338, 84 N. Y. Supp. 755, holding same where father had stock certificates issued in his infant daughter's name, which were found in his safe-deposit box after his death with other property of daughter.

Cited in reference note in 93 A. S. R. 833, on proving gift by declarations of donor.

Essentials of gift.

Cited in reference note in 21 A. D. 492, on what is necessary to constitute a gift.

— Delivery.

Cited in notes in 26 A. D. 325; 51 A. D. 362,—on delivery essential to validity of gift.

Sufficiency of delivery to sustain voluntary conveyances.

Cited in *Bennett v. Cook*, 28 S. C. 353, 6 S. E. 28, holding manual delivery not necessarily requisite where donor resides with donee of chattels given away *in futuro*.

— Authority to take possession.

Cited in *Phinney v. State*, 36 Wash. 236, 68 L.R.A. 119, 78 Pac. 927, holding drawing and delivering check to drawee, with directions to forward it to bank, accompanied by statement that the amount is to be drawee's property in case of drawer's death, is a sufficient gift *causa mortis*; *Waite v. Grubbs*, 43 Or. 406, 99 A. S. R. 764, 73 Pac. 206, holding disclosure of whereabouts of money buried with positive declaration that donor gave it to donee, telling her not to let anyone else know where it was and advising her to leave it there until needed, was sufficient delivery.

Effect of retention of possession after transfer.

Cited in reference notes in 33 A. D. 165, on effect of retention of possession by vendor; 28 A. D. 114, on retention of possession by vendor or donor as evidence of fraud.

Estates by entirety.

Cited in note in 30 L.R.A. 318, on what subjects, estates, and interests estate by entirety may exist in.

Husband's rights in wife's property.

Cited in reference notes in 49 A. D. 410, on necessity for reducing wife's property to possession to vest title in husband; 71 A. D. 195, on surviving to wife and her representatives of her choses in action not reduced by husband to possession during coverture.

Fraud as a defense.

Cited in note in 3 A. S. R. 741, on administrator's right to set up fraud in gift by his intestate as defense.

Creation of trust.

Cited in reference notes in 36 A. D. 182, on establishing trust by parol; 24 A. D. 417, on parol evidence to establish trust; 43 A. D. 288, on sufficiency of declaration of trust; 2 A. S. R. 552, on divesting of equitable title by declaration of trust.

Cited in note in 34 A. S. R. 207, on donor constituting himself a trustee.

Necessity of alleging defense.

Cited in reference note in 52 A. D. 221, on necessity of denying want of notice by one relying thereon as a defense.

21 AM. DEC. 538, KENNER v. CALDWELL, 1 BAIL. EQ. 149.**Equitable relief against judgment at law.**

Cited in note in 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed.

21 AM. DEC. 543, KILBURN v. DEMMING, 2 VT. 404.**What property exempt.**

Cited in reference notes in 31 A. D. 156, on exemptions; 63 A. S. R. 381, on construction of exemption statutes; 29 A. D. 204, on exemption from execution; 96 A. S. R. 371, on what property is exempt from execution; 97 A. D. 161, on exemptions where debtor engaged in two occupations.

— "Tools."

Cited in *Ford v. Johnson*, 34 Barb. 364, holding threshing machine not a tool; *Spooner v. Fletcher*, 3 Vt. 133, 21 A. D. 579, holding types and printing press not a tool; *Henry v. Sheldon*, 35 Vt. 427, 82 A. D. 644, holding machine for splitting leather, operated by hand or by steam, of great weight and being attached to floor, not exempt.

Cited in reference notes in 39 A. D. 363; 13 A. S. R. 284; 27 A. S. R. 321; 30 A. S. R. 334; 37 A. S. R. 50; 52 A. S. R. 285; 88 A. S. R. 67,—on exemption of tools and implements of trade; 21 A. D. 581; 45 A. D. 256; 66 A. D. 581; 70 A. D. 415; 79 A. D. 797; 92 A. D. 767; 94 A. S. R. 318; 109 A. S. R. 473,—on what are tools and implements within meaning of exemption laws; 71 A. D. 611; 5 A. S. R. 666; 90 A. S. R. 736,—on what tools and implements of trade or profession are exempt; 60 A. D. 96, on property exempted from execution as tools of trade or occupation; 123 A. S. R. 141, on exemption of simple hand tools; 63 A. S. R. 72; 66 A. S. R. 64,—on exemption of farming utensils; 95 A. S. R. 166, on liability of mechanics' tools to levy; 100 A. S. R. 204, on exemption of tools of dentist; 27 A. S. R. 428, on exemption of library and tools of professional man.

Cited in note in 81 A. D. 732, on exemption of tools and implements of trade from attachment.

Action for taking exempt property.

Cited in *Dow v. Smith*, 7 Vt. 465, 29 A. D. 202, holding trespass, proper form of action for taking property exempt from execution.

Liability for levy on exempt property.

Cited in reference note in 36 A. S. R. 650, on exemplary damages for levying on exempt property.

21 AM. DEC. 554, SKINNER v. CONANT, 2 VT. 453.**Promise to answer for debt of another.**

Cited in *Walker v. Richards*, 41 N. H. 388, holding oral promise to see another paid for furnishing goods to third person within statute of fraud; *Wagner v. Hallack*, 3 Colo. 176, holding oral promise "we will see goods paid for" collateral undertaking and within statute of frauds.

Cited in reference notes in 36 A. D. 331, on promise to answer for debt of another; 45 A. D. 114, on parol undertaking to answer for default of another; 23 A. D. 155, on parol promise to pay debt of another; 26 A. D. 249, as to when promise to answer for debt of another must be in writing; 54 A. S. R. 365, on guaranty or collateral undertaking within statute of frauds.

Cited in notes in 95 A. D. 254, on necessity that collateral promises be in writing; 42 A. S. R. 194, on promise to see another paid as within statute of frauds; 15 L.R.A.(N.S.) 217, on contemporary promise to see seller paid as promise to answer for default of another within the statute of frauds.

What provable by books of account.

Cited in note in 52 L.R.A. 715, on proof of work done under special contract by books of account.

21 AM. DEC. 557, BOOGE v. PARSONS, 2 VT. 456.**Admissibility of ancient records.**

Cited in *Hutchinson v. Pratt*, 11 Vt. 402, holding record of vote of village made by secretary *pro tem.*, and placed on village records, under supervision of village clerk, legal evidence of such vote; *Northfield v. Plymouth*, 20 Vt. 582, holding certified copy of town record, unsigned by clerk at time but proved to be his handwriting, made many years before, admissible in proof of fact therein recited.

Distinguished in *Isaacs v. Shattuck*, 12 Vt. 668, holding record not in handwriting of recording officer, of recent date, and not authenticated by proper officer, inadmissible.

Ancient deeds as evidence of title.

Cited in *Williams v. Bass*, 22 Vt. 352, holding office copy of ancient deed, without appearance of being sealed by grantor, and no proof of possession thereunder, inadmissible.

21 AM. DEC. 560, STATE v. WILKINSON, 2 VT. 480.**How dedication of land for public use effected.**

Cited in *Abbott v. Mills*, 3 Vt. 521, 23 A. D. 222, holding dedication need not be by deed, but may be effected by unequivocal act showing such intention; *Abbott v. Mills*, 3 Vt. 521, 23 A. D. 222, holding enjoyment of public highway, square, or common for period of less than fifteen years, may afford conclusive evidence of right so to do; *Gardiner v. Tisdale*, 2 Wis. 153, 60 A. D. 407, holding public landing on bank of river may be dedicated by owner, whereby public may acquire ease-

ment; *Carter v. Portland*, 4 Or. 339, holding dedication of public squares and parks may be established in same manner as that of streets; *Wiggins v. Tallmadge*, 11 Barb. 457, holding user or acts and declarations sufficient if an intent to dedicate be ascertained; *Mahon v. Luzerne County*, 197 Pa. 1, 46 Atl. 894, 9 Kulp, 463, on giving land or easement therein for use of public, as constituting dedication.

Cited in reference notes in 33 A. D. 714, on establishment of street or way by dedication or uninterrupted use; 26 A. D. 102, on mode of establishing dedication of land for public square, common, or street.

Cited in notes in 6 L.R.A. 259, on dedication of land to public use; 57 A. S. R. 761, on time of user as evidence of dedication of highway; 27 A. D. 561, on purposes for which dedication to public use may be made.

Title by prescription by use and occupation.

Cited in *Stein v. Burden*, 24 Ala. 130, 60 A. D. 453, holding presumptive title raised by exclusive and uninterrupted enjoyment of water for period prescribed by statute of limitations; *Wood v. Hurd*, 34 N. J. L. 87, holding in absence of acts showing intention to dedicate, user by public to raise presumption must be for twenty years.

Cited in reference note in 23 A. D. 209, on private land set apart for public use becoming highway by use.

Cited in note in 23 A. D. 669, on establishment of highway by long use.

Limited in *Macon v. Franklin*, 12 Ga. 239, holding use necessary to imply grant should be for such time that private rights and public accommodation would suffer by interruption of enjoyment; *Post v. Pearsall*, 22 Wend. 425 (affirming 20 Wend. 111), holding public cannot, against will of owner, acquire right by prescription to use and occupation of land adjoining navigable river for public landing and place of deposit.

Rights in land dedicated to public use.

Cited in *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 A. D. 696, holding owners of land, after its dedication to public use, cannot authorize a private use thereof; *Fisher v. Beard*, 32 Iowa, 346, holding purchasers of property adjacent to property dedicated to public, acquires rights which cannot be divested by owner.

Rights in public common.

Cited in *Pomeroy v. Mills*, 3 Vt. 279, 23 A. D. 207, holding land set apart by owner as a common and used by public for period of forty years, becomes public highway, in which public has easement but not right to grant exclusive possession; *Macon v. Franklin*, 12 Ga. 239, holding public common is subject to dedication to public use which is irrevocable.

Distinguished in *Beach v. Haynes*, 12 Vt. 15, holding town may take title to land for purpose of public common, and will hold in fee, although deed states it is for purpose of public common, if such is intention of parties.

What is a public highway.

Cited in *Skinner v. Weathersfield*, 78 Vt. 410, 63 Atl. 142, holding particular description of public road as a "highway," sufficient within statute requiring notice of defect in bridge on "public highway;" *Mobile & O. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850 (reversing on other grounds 31 Ill. App. 490), holding street of incorporated town, a "public highway" within meaning of statute requiring ringing of bell on locomotive before crossing any public highway; *Cleve-*

land, *C. C. & St. L. R. Co. v. Baker*, 106 Ill. App. 500, holding "public highway" as used in statute, included much-traveled road in general use by public.

Cited in note in 26 L. ed. U. S. 1099, on what constitutes a public highway or street.

Exclusiveness of statutory remedy.

Cited in reference note in 63 A. D. 113, on statutory remedy as cumulative where remedy existed before at common law.

Indictable nuisance.

Cited in *State v. Atkinson*, 24 Vt. 448, holding obstruction to use of public common creates nuisance, against which indictment will lie.

Cited in reference notes in 26 A. D. 102, on remedies for public nuisances; 58 A. S. R. 187, on nuisance as misdemeanor also; 4 L.R.A. 298, on obstruction of highway, as misdemeanor.

Statutory penalty for act constituting common-law crime.

Distinguished in *Com. v. Rowe*, 112 Ky. 482, 66 S. W. 29, holding under statute requiring common-law offense to be punished according to mode prescribed by statute, an indictment charging common-law offense embraced in statutory offense, calls for statutory punishment; *State v. Smith*, 54 Vt. 403, holding under statute providing for payment of penalty for obstructing public highway, where such obstruction does not amount to a nuisance, indictment would not lie.

Civil remedy for criminal tort.

Cited in *Ormsby v. Gilman*, 24 Vt. 437, on right to proceed in civil action when remedy is given by statute by imposition of fine.

Province of jury in criminal cases.

Cited in *State v. Croteau*, 23 Vt. 14, 54 A. D. 90, holding jury, judge of law as well as facts; *Sparf v. United States*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273 (dissenting opinion), on same point; *Com. v. Anthes*, 5 Gray, 185 (dissenting opinion), on constitutionality of statute giving jury right to decide questions of law in criminal cases.

Overruled in effect in *State v. Burpee*, 65 Vt. 1, 36 A. S. R. 775, 19 L.R.A. 145, 25 Atl. 964, holding jury not judge of law in criminal cases.

21 AM. DEC. 566, CARPENTER v. GOOKIN, 2 VT. 495.

Review of discretionary action.

Cited in reference note in 66 A. S. R. 22, on review on appeal of discretionary action.

Discretion as to amendments.

Cited in *Pond v. Campbell*, 56 Vt. 674, holding allowance by court of amendment by sheriff of return on attachment proper as within discretion of court.

Amendments to pleading.

Cited in *Peck v. Smith*, 3 Vt. 265, holding amendment to recognizance on writ, allowing insertion of name of person recognized and amount of bond in accordance with statute, not in discretion of court and reversible error.

Cited in reference notes in 34 A. D. 105, on amendments; 35 A. D. 735, on amendment of pleadings.

— Changing form of action.

Cited in *Coggawell v. Baldwin*, 15 Vt. 404, 40 A. D. 686, holding amendment changing name of action but not the form, admissible; *Thomas v. United States*, 15 Ct. Cl. 335 (dissenting opinion), on allowance of amendment which changes cause of action.

— Changing or adding cause of action.

Cited in *Emerson v. Wilson*, 11 Vt. 357, 34 A. D. 695, holding amendment changing parties which has effect of introducing new cause of action, improper; *Busklin v. Ward*, 7 Vt. 195, holding omission of words "or bearer" in new declaration on appeal from lower court in suit on note, allowable; *Bowman v. Stowell*, 21 Vt. 309, holding description of capacity in which note was held, on appeal to higher court, admissible; *Montgomery v. Maynard*, 33 Vt. 450, holding amendment making pleading conformable with proof adduced, admissible; *Dewey v. Nicholas*, 44 Vt. 24, holding allowance of new cause of action contained in new declaration under rule of court allowing new declaration, reversible error; *Green v. Starr*, 52 Vt. 426, holding in debt on common counts, special count declaring on judgment, inadmissible; *McDermid v. Tinkham*, 53 Vt. 615, holding in debt on judgment, amendment to plead debt on promissory note could not be granted; *Brodek v. Hirschfield*, 57 Vt. 12, holding in declaration on count for goods sold, amendment adding count on contract of guaranty, improper.

Cited in reference notes in 79 A. D. 482, on allowance of amendments changing cause of action; 39 A. D. 68, on amendments varying cause or form of action.

Cited in notes in 34 A. D. 159, on how far amendments varying or altering cause of actions are allowable; 51 A. S. R. 414, on inadmissibility of amendments to pleadings because changing cause of action.

Distinguished in *Lippett v. Kelley*, 46 Vt. 516, holding under statute, amendment averring damages while in wrongful possession in suit for ejectment, admissible.

21 AM. DEC. 568, BATES v. STARR, 2 VT. 536.

Part payment as consideration for promise to remit balance.

Cited in *Barron v. Vandvert*, 13 Ala. 232, holding payment of part of note not sufficient consideration for promise to remit balance.

Cited in note in 34 L.R.A. 41, on performance of existing contract obligation in reliance on new promise as sufficient consideration therefor.

Interest on unsettled account.

Cited in *Yeartean v. Bacon*, 65 Vt. 516, 27 Atl. 198, holding in open account where payments are in monthly instalment, in absence of agreement to contrary, annual rests are allowed, and interest computed from each annual rest; *Langdon v. Castleton*, 30 Vt. 285, holding same on ordinary running accounts, not controlled by special contract or circumstances; *Raymond v. Ishams*, 8 Vt. 258, holding interest not allowable on mutual accounts, there being no stipulated period of credit and balance continually varying.

Cited in note in 14 E. R. C. 562, on right to collect interest.

21 AM. DEC. 571, BEEMAN v. BUCK, 3 VT. 53.

Scienter as element in action for false warranty.

Cited in *Pinney v. Andrus*, 41 Vt. 631, holding in case for false warranty, *scienter* need not be averred; *Goodenough v. Snow*, 27 Vt. 720, holding in case for false warranty, with averment of *scienter*, party may on failure of proof of warranty, recover for deceit on proof of *scienter*.

Cited in reference notes in 52 A. D. 343, on necessity of *scienter* as to unsoundness in case of express warranty; 34 A. D. 592, on necessity of proving *scienter* in case of warranty of soundness.

Disapproved in *Bedell v. Stevens*, 28 N. H. 118, holding in case for breach of warranty, *scienter* should be averred.

Actionable deceit in sale of goods.

Cited in *Eddy v. Sprague*, 10 Vt. 216, holding in declaration for false warranty, plaintiff may sustain his action by proof of express warranty or fraud; *Edson v. Trask*, 22 Vt. 18, holding breach of warranty actionable in absence of actual fraud.

Cited in reference note in 34 A. D. 58, on nonliability of vendor of personalty for defects in quality.

Form of action on breach of warranty.

Cited in *Carter v. Glass*, 44 Mich. 154, 38 A. R. 240, 6 N. W. 200, holding on exchange of goods, party may sue in tort for deceit and set out breach of warranty as means of injury; *West v. Emery*, 17 Vt. 583, 44 A. D. 356, holding in breach of warranty, on sale of goods, plaintiff may sue in contract or in tort; *Joy v. Hill*, 36 Vt. 333, on action on case for false warranty as sounding in tort.

What constitutes a warranty.

Cited in *Morrill v. Wallace*, 9 N. H. 111, holding any assertion respecting kind, quality, or condition of article sold, made with intention of being relied on as a fact, is warranty regardless of form of words; *Enger v. Dawley*, 62 Vt. 164, 19 Atl. 478, holding representations in catalogue not warranties unless so intended and understood by vendor and vendee; *Bond v. Clark*, 35 Vt. 577, holding simple oral affirmation not a warranty, unless made with that intention and be so understood by parties; *Foster v. Caldwell*, 18 Vt. 176, holding it for jury to determine sense in which affirmation was intended.

Cited in reference notes in 16 A. S. R. 758, on express warranties on sale of personalty; 34 A. D. 110, on what affirmations amount to a warranty; 58 A. D. 152, on warranty constituted by express affirmation of fact; 73 A. D. 181, on necessity of particular form of words to constitute warranty; 11 A. S. R. 879, on sufficiency of words to constitute warranty in contract of sale.

Distinguished in *Wason v. Rowe*, 16 Vt. 525, holding where contract is in writing, representations and assertions made previous to its execution, inadmissible to show intentions of parties.

21 AM. DEC. 573, WOODFORD v. DORWIN, 3 VT. 82.

Completion of note by delivery.

Cited in *Wells F. & Co. v. Vansickle*, 64 Fed. 944, holding promissory note not complete until delivery; *Johnson v. Franklin Bank*, 173 Mo. 171, 73 S. W. 191, holding note overdue by its terms at time of delivery is operative as demand note.

Cited in reference notes in 83 A. D. 248, on time notes take effect; 16 A. S. R. 323, on delivery of negotiable instruments; 46 A. D. 202, on delivery essential to pass title to note.

Cited in notes in 6 L.R.A. 470, on necessity for delivery to validity of note; 55 A. S. R. 47, on place of contract of guaranty.

— Presumption as to delivery.

Cited in *Purviance v. Jones*, 120 Ind. 162, 16 A. S. R. 319, 21 N. E. 1099, holding finding of note in possession of intestate maker, and his declaration of having signed and left it with bank for benefit of payee, not sufficient to warrant conclusion of delivery.

— Sufficiency of delivery.

Cited in *Tucker v. Bradley*, 33 Vt. 324, holding where partner is trustee and

loans trust funds to his firm, delivery by firm of note and mortgage to him therefor sufficient.

Validity of contracts of partner after dissolution of firm.

Cited in reference note in 26 A. D. 433, on power of partner after dissolution.

Cited in note in 40 A. S. R. 565, on rights and liabilities by virtue of new contract executed by partner after dissolution.

— Notes.

Cited in *Waters v. Harris*, 28 Jones & S. 192, 17 N. Y. Supp. 370, 28 Abb. N. C. 89, holding on dissolution of firm, one partner cannot bind other by new obligation, even though to close up past transaction; *Woodson v. Wood*, 84 Va. 478, 5 S. E. 277, holding negotiation by one partner, by indorsement of firm name, of note made to firm after dissolution, will not, in absence of authority so to do, bind other partner, although notice of dissolution contains authority to either party to use name of firm in liquidation.

21 AM. DEC. 576, BUCK v. KENT, 3 VT. 99.

Action for conversion of negotiable paper.

Cited in *Tilden v. Brown*, 14 Vt. 164, holding owner of draft, although it is not made payable to him or been negotiated to him, may maintain trover against one who has converted it to his own use; *Crews v. Garneau*, 14 Mo. App. 505, holding drawer of check may maintain action against bailee for its conversion.

Cited in reference note in 73 A. D. 106, on trover for note, writ of execution, or judgment.

Cited in note in 24 A. S. R. 819, on what personalty may be subject of conversion.

— Wrongful negotiation as conversion.

Cited in *Decker v. Mathews*, 12 N. Y. 313, holding maker can maintain trover, against one who before note has legal inception, wrongfully negotiates it to bona fide purchaser for value; *Comstock v. Hier*, 73 N. Y. 269, 29 A. R. 142, holding accommodation indorser, who indorses for particular purpose, can maintain trover against one who obtains note in violation of that purpose, without consideration as collateral security and who indorses to bona fide holder; *Boyer v. Fenn*, 19 Misc. 128, 43 N. Y. Supp. 533, holding maker may maintain action for deceit and conversion against payee who has negotiated note procured by fraud.

Cited in notes in 27 L.R.A. 519, on liability for transferring negotiable note to bona fide holder so as to cut off defenses; 27 L.R.A. 521, on form of action against one transferring negotiable note to bona fide holder so as to cut off defenses.

Measure of damage for conversion of negotiable paper.

Cited in *Memphis v. Brown*, 1 Flipp, 188, Fed. Cas. No. 9,415, on measure of damage for conversion of note of private person.

Action for recovery of paid note.

Cited in *Pierce v. Gilson*, 9 Vt. 216, holding maker may maintain trover for note in hands of holder who refuses to deliver it; *Savery v. Hays*, 20 Iowa, 25, 89 A. D. 511, holding maker may maintain replevin to obtain paid note; *Stone v. Clough*, 41 N. H. 290; *Otisfield v. Mayberry*, 63 Me. 197,—holding maker may maintain trover against payee for wrongfully withholding note or for its conversion if negotiated further.

21 AM. DEC. 579, SPOONER v. FLETCHER, 3 VT. 133.**What property is exempt.**

Cited in note in 25 A. R. 66, as to what articles are exempt from execution.

"Tools" generally.

Cited in *Allen v. Thompson*, 45 Vt. 472, holding barber's chair and foot rest, used by him in his business, within statute; *White v. Capron*, 52 Vt. 634, holding same as to grindstone used in ordinary manner on farm.

Cited in reference notes in 39 A. D. 363, on exemption of tools from execution; 92 A. D. 767, on what are tools and implements of trade within meaning of exemption laws.

— Printing presses and accessories.

Cited in *Frantz v. Dobson*, 64 Miss. 631, 60 A. R. 68, 2 So. 75, holding printing press owned by practical printer, editor, and publisher of paper, not a tool.

Cited in reference note in 123 A. S. R. 148, on exemption of apparatus for printing.

Distinguished in *Bliss v. Vedder*, 34 Kan. 57, 55 A. R. 237, 7 Pac. 599, holding printing press and materials used by one not practical printer in printing a paper, while not the only, the principal support of owner, within statute exempting "tools and implements;" *Green v. Raymond*, 58 Tex. 80, 44 A. R. 601, holding printing press, types, and cases of one not practical printer in his trade, within statute exempting "tools and apparatus of trade or profession."

Action to recover exempt property.

Cited in *Dow v. Smith*, 7 Vt. 465, 29 A. D. 202, holding trespass proper action for taking exempt property.

21 AM. DEC. 581, MEAD v. ARMS, 3 VT. 148.**Procedure on alteration of decree in chancery.**

Cited in *Blair v. Ritchie*, 73 Vt. 109, 50 Atl. 807; *Finlayson v. Lipscomb*, 15 Fla. 558,—holding relief against decree on ground of newly discovered evidence is by supplemental bill in nature of bill of review; *Lilly v. Shaw*, 59 Ill. 72, holding decree in chancery cannot be amended on motion but by bill of review.

Cited in reference note in 60 A. D. 107, on mode of obtaining relief against decree on ground of newly discovered matter.

Grounds for rehearing.

Cited in reference note in 44 A. S. R. 716, on rehearing for new evidence.

21 AM. DEC. 585, OLCOTT v. SCALES, 3 VT. 173.**Revival of barred debt—By promise or acknowledgment.**

Cited in reference notes in 25 A. D. 45; 28 A. D. 467,—on acknowledgment to remove bar of limitations; 30 A. D. 348, on new promise or acknowledgment to revive debt; 30 A. D. 117; 33 A. D. 249,—on acknowledgment taking debt out of statute of limitations; 41 A. D. 532; 46 A. D. 165,—on revival of debt barred by statute of limitations by promise of payment; 58 A. D. 155, as to when acknowledgment is sufficient to remove bar of statute on limitations.

Cited in notes in 102 A. S. R. 769, on what constitutes an express or implied promise to pay which will suspend running or remove bar of limitations; 16 E. R. C. 177, on sufficiency of acknowledgment to postpone running of statute of limitations.

— By part payment.

Cited in *Hayes v. Morse*, 8 Vt. 316, holding part payment of debt without qualification, sufficient to remove bar of statute.

21 AM. DEC. 588, BURDIOT v. MURRAY, 3 VT. 302.

Action by special owner of goods.

Cited in reference notes in 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 35 A. D. 511, on sufficiency of possession alone to maintain trespass against wrongdoer; 38 A. D. 546, on what possession is necessary to authorize maintenance of trespass; 25 A. D. 548, on sufficiency of constructive possession of absolute owner to sustain trespass; 73 A. D. 306, on right of bailee or bailor to maintain trespass.

Cited in note in 18 A. D. 550, on action of trespass by bailee.

— Against general owner.

Cited in *Clark v. Clement*, 75 Vt. 417, 56 Atl. 94, holding where vendor on conditional sale converts property before full payment made by vendee, latter can only recover value of his interest at time of conversion; *White v. Allen*, 133 Mass. 423, holding one who has special property in thing, can recover from owner who has appropriated it, value of his special interest.

Essentials to lien.

Cited in notes in 37 A. D. 523, on possession as essential to claim of lien for services; 16 E. R. C. 130, on loss of lien when inconsistent with dealings of parties.

Rights and liabilities of bailee for hire.

Cited in *Curtis v. Jones*, How. App. Cas. 137; *Morgan v. Congdon*, 4 N. Y. 552,—holding bailee for hire has lien on property whose value has been increased by his services, unless time or mode of payment is fixed; *Bergman v. Gay*, 79 Vt. 262, 64 Atl. 1106, holding one who at request of mortgagor, repairs mortgaged chattel, has lien thereon as against mortgagor; *National Surety Co. v. United States*, 63 C. C. A. 512, 129 Fed. 70, holding bailee for hire may maintain trespass or trover against wrongdoer for disturbance of his possession; *Saul v. Kruger*, 9 How. Pr. 569, holding interest of bailee subject to sale on execution.

21 AM. DEC. 589, BIGELOW v. KINNEY, 3 VT. 353.

Entire disaffirmance of entire contract by infant.

Cited in *Chandler v. Simmons*, 97 Mass. 508, 93 A. D. 117; *MacGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961,—holding infant cannot affirm as to part and disaffirm as to remainder; *Henry v. Root*, 33 N. Y. 526, holding infant cannot on arriving at full age retain property purchased and avoid payment of price; *Carpenter v. Carpenter*, 45 Ind. 142, holding on exchange of personalty, infant on disaffirming must return property, but need not make tender before suing for property given by him in exchange; *Morrill v. Aden*, 19 Vt. 505, holding on contract of sale, infant cannot on suit for purchase price plead infancy to false warranty of thing sold.

Cited in note in 18 A. S. R. 660, on disaffirmance by infant of part of transaction.

— Conveyances with mortgage for price.

Cited in *Ready v. Pinkham*, 181 Mass. 351, 63 N. E. 887; *Richardson v. Boright*, 9 Vt. 368; *Young v. McKee*, 13 Mich. 552,—holding where deed and mortgage form one transaction, infant grantee cannot affirm deed and disaffirm

mortgage; *Heath v. West*, 28 N. H. 101, applying same rule to personal property; *Newbegin v. Langley*, 39 Me. 200, 63 A. D. 612, holding deed and mortgage back, although of different dates, constitute but one transaction and must be affirmed or avoided in whole and not in part.

Cited in note in 62 A. D. 738, on right of infant to avoid mortgage while affirming deed.

Restoring benefit on disaffirmance by infant.

Cited in notes in 26 L.R.A. 178, on necessity of infant paying purchase money if property remains in his possession; 62 A. D. 735, as to whether infant who disaffirms contract executed on part of his adult contractee must restore consideration.

Time for disaffirmance by infant.

Cited in *Richardson v. Boright*, 9 Vt. 368; *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 47 A. R. 798, 18 N. W. 283,—holding minor must within reasonable time after arriving at full age disaffirm his deed or be barred of right so to do; *Sims v. Bardoner*, 86 Ind. 87, 44 A. R. 263, holding disaffirmance, thirty-three years after reaching majority, of deed made by woman during infancy and coverture, within reasonable time; *Weeks v. Wilkins*, 134 N. C. 516, 47 S. E. 24, holding three years after majority a reasonable time; *Baker v. Kennett*, 54 Mo. 82, holding attempt to disaffirm contract of purchase by infant just before arriving at age, and repeated by him a few days after that event, with offer of settlement, followed by abandonment of premises, disaffirmance within reasonable time; *Irvine v. Irvine*, 5 Minn. 61, Gil. 44, holding contract of infant cannot be disaffirmed until his arrival at full age.

Cited in note in 18 A. S. R. 675, 678, on disaffirmance of deeds within reasonable time after reaching majority.

What constitutes ratification or affirmation.

Cited in *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. 791, holding acts and declarations freely and knowingly performed and showing recognition of and intention to be bound by executory contract made during infancy, constitute ratification.

Cited in reference notes in 23 A. D. 529; 26 A. D. 254; 36 A. D. 298,—on ratification of contract by infant; 23 A. D. 361, on ratification of infant's contract by slight circumstances showing assent after majority; 64 A. D. 763, on inferring ratification of infants' contracts from acts and silence.

Void and voidable contracts of infant.

Cited in *Doc ex dem. Moore v. Abernathy*, 7 Blackf. 442, holding deed of bargain and sale of real estate executed by infant, for valuable consideration, voidable; *Stokes v. Brown*, 3 Pinney (Wis.) 311, 4 Chand. (Wis.) 39, holding note given by infant voidable and not void; *Person v. Chase*, 37 Vt. 647, 88 A. D. 630, holding absolute gift of personal property by infant, voidable.

Cited in notes in 18 A. S. R. 576, on infants' contracts as void or voidable; 18 A. S. R. 583, on validity of infant's deed of conveyance.

Effect of avoidance of contract.

Cited in *Ladd v. Wiggin*, 35 N. H. 421, 69 A. D. 551, holding on avoidance of contract, parties are restored to pre-existing rights; *Irish v. Claves*, 10 Vt. 81, holding if creditors of mortgagor who has conveyed to mortgagee avoid the deed, the mortgagee is restored to his rights under the mortgage.

Deed and mortgage as entire transaction.

Cited in *Tittamore v. Vermont Mut. F. Ins. Co.* 20 Vt. 546, holding where deed is made, and at same time another deed is given back, conditioned that if

grantee pays certain sum second deed is void, the two deeds form but one transaction.

21 AM. DEC. 594, WALLER v. ARMISTEAD, 2 LEIGH, 11.

Fraudulent disposal of property by person about to marry.

Cited in Goff v. Goff, 60 W. Va. 9, 53 S. E. 769, 9 A. & E. Ann. Cas. 1083, holding deed by man about to marry, made in contemplation of marriage, without knowledge of woman and with intent to cut off her rights, void as to her.

Distinguished in Gregory v. Winston, 23 Gratt. 102, holding disposal of property by woman with proper motives, before any declaration of intention of intended husband, and without intent to deceive, not void as to latter.

Validity of voluntary conveyances.

Cited in reference notes in 28 A. D. 572, as to when voluntary conveyances are void; 26 A. D. 386, as to when conveyance from father to son is fraudulent.

Dealings between parent and child or guardian and ward.

Cited in reference note in 46 A. D. 486, as to when guardian's settlement with ward is not binding.

Cited in note in 89 A. S. R. 303, on dealings by guardian with ward after termination of guardianship.

— Validity of release to parent or guardian.

Cited in Pye v. Jenkins, 4 Cranch, 541, Fed. Cas. No. 11,487, holding deed by child of reversion to father who was tenant by curtesy, without valuable consideration, would be set aside by equity; Ferguson v. Lowery, 54 Ala. 510, 25 A. R. 718, holding release executed by ward soon after reaching majority, considered same as gift or conveyance to guardian, and presumptively void.

Cited in reference note in 29 A. D. 89, on setting aside releases from ward to guardian made at or before time of settling accounts.

Gifts between persons occupying fiduciary relations.

Cited in note in 16 L.R.A.(N.S.) 1096, on independent advice as a condition of a valid gift *inter vivos* between parties occupying confidential relations.

21 AM. DEC. 597, KINNEY v. HARVEY, 2 LEIGH, 70.

Subrogation of personal representative paying debt of estate.

Cited in Roberts v. Bartlett, 26 Mo. App. 611, holding right of subrogation exists in favor of administrator who in good faith pays claims against estate; Morgan v. Fisher, 82 Va. 417, holding executrix who from own funds completes payment for land purchased by testator before death, entitled to be subrogated to lien of vendor; Powell v. White, 11 Leigh, 309, holding surety who pays bond after death of principal stands as specialty creditor, and on becoming administrator may retain assets in satisfaction against similar creditors; Gowing v. Bland, 2 How. (Miss.) 813, holding surety of administrator who pays debt of intestate which administrator was bound to pay, is entitled to same lien on estate administrator would have had he paid debt.

Cited in reference note in 54 A. D. 657, on right of executor or administrator paying debt to be subrogated to rights of creditors.

Cited in note in 99 A. S. R. 493, on right of executors and administrators to subrogation.

Rights of creditors to come in under decree.

Cited in Stephenson v. Taverners, 9 Gratt. 398, holding under decree for account of outstanding claims, other pending suits are suspended, and creditors must come in under decree.

21 AM. DEC. 599, LEE v. STUART, 2 LEIGH, 76.**Validity of marriage settlement by or on infant female.**

Cited in *Wetmore v. Kissam*, 3 Bosw. 321, holding marriage settlement will not be set aside during coverture because of infancy of wife at time of execution; *Temple v. Hawley*, 1 Sandf. Ch. 153, holding marriage settlement made by infant female is as to real estate, voidable.

Cited in reference note in 52 A. D. 96, on infancy of wife at time of marriage settlement as ground for setting it aside.

Distinguished in *Temple v. Hawley*, 1 Sandf. Ch. 153, holding husband not bound by marriage settlement voidable on part of wife, and by mistake not in conformity to order of court on which it was made.

Rights of husband over settled property.

Cited in *Wilson v. McCullough*, 19 Pa. 77, holding husband cannot assume power over settled estate, inconsistent with settlement agreement; *Smith v. Smith*, 107 Va. 112, 122 A. S. R. 831, 12 L.R.A.(N.S.) 1184, 57 S. E. 577, on frustration in equity of attempt by husband to aid wife in defeating marriage settlement.

Conclusiveness of accounts of administrator.

Cited in *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817, holding where administrator in answer denies bill to falsify account, in absence of evidence to sustain allegations, bill will be dismissed.

Equitable aid to guardian.

Cited in reference note in 22 A. S. R. 540, on equitable aid to guardian allowing his claims to conflict with ward's.

21 AM. DEC. 601, MCKINNEY v. PINCKARD, 2 LEIGH, 149.**Ground for equitable relief.**

Cited in reference note in 59 A. D. 615, on setting aside contract for imbecility or weakness of mind.

— Inadequacy of consideration.

Cited in *Cleere v. Cleere*, 82 Ala. 581, 60 A. R. 750, 3 So. 107, holding equity will grant relief where there is gross inadequacy of consideration, coupled with circumstances of undue influence or advantage; *Cribbins v. Markwood*, 13 Gratt. 495, 67 A. D. 775, holding in absence of fraud or imposition on part of purchaser or confidential relation, sale by one just arrived at full age of reversionary interest in land will not be set aside for mere inadequacy of consideration.

Cited in reference notes in 59 A. D. 615, on setting aside contract for inadequacy of consideration; 67 A. D. 787, on inadequate consideration as ground for rescission of contract.

Cited in note in 15 A. D. 573, on rescission of contract for gross inadequacy of consideration.

Validity of sale of expectancy.

Cited in notes in 33 L.R.A. 272, on rule in equity as to validity of sale of expectancy by prospective heir; 56 A. S. R. 348, on setting aside in equity, assignment of expectancies; 56 A. S. R. 354, on consideration, burden of proof, and terms of relief as to assignment of expectancy.

21 AM. DEC. 604, KING WILLIAM JUSTICES v. MUNDAY, 2 LEIGH, 165.**When mandamus lies.**

Cited in *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528, holding mandamus will not lie to compel court to hear cause over which it has no jurisdiction; *Page v. Clopton*, 30 Gratt. 415, holding mandamus will lie to compel trial judge to sign bill of exceptions which complies with statutes; *State ex rel. Walker v. Orphans' Ct. Judge*, 15 Ala. 740, holding mandamus will not lie to compel inferior tribunal to do that which by law it cannot do without it; *Richardson v. Farrar*, 88 Va. 760, 15 S. E. 117 (dissenting opinion), on refusal of court to grant mandamus to control and direct judicial discretion.

Cited in reference note in 63 A. D. 197, as to when mandamus lies.

Cited in note in 16 E. R. C. 783, as to when mandamus is available remedy.

—Existence of other remedy.

Cited in *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20, holding where plain and adequate remedy is given by statute, mandamus will not lie to compel justice of peace to allow appeal.

Cited in reference notes in 52 A. D. 490, on necessity that petitioner for mandamus show clear legal right and no other specific remedy; 47 A. D. 107, on showing that petitioner has no other legal remedy in application for mandamus.

Cited in notes in 89 A. D. 730, on need that no other adequate remedy exists to warrant mandamus; 98 A. S. R. 866, on what remedy sufficient to bar issuance of writ of mandamus.

21 AM. DEC. 606, BOLLING v. STOKES, 2 LEIGH, 178.**Local assessments as within covenant to pay taxes.**

Cited in *Beals v. Providence Rubber Co.* 11 R. I. 381, 23 A. R. 472, holding assessments for benefits accruing from street improvements, not within covenant to pay "taxes of every name and kind."

Cited in reference note in 34 A. D. 210, on lessee's duty to pay assessment for paving street under agreement to pay "taxes and other public dues."

Cited in notes in 51 A. D. 305, on construction and effect of lessee's covenant to pay taxes; 15 E. R. C. 714, on effect of covenant to pay assessments and taxes.

21 AM. DEC. 608, ORNDOFF v. TURMAN, 2 LEIGH, 200.**Docking of estate tail.**

Cited in *Watts v. Cole*, 2 Leigh, 653, holding in 1752, estate tail could not be docked by fine or fine and recovery, but only by act of assembly or writ ad quod damnum.

Cited in note in 7 A. S. R. 431, as to states in which estates tail may be created.

Construction of statutes.

Cited in reference note in 34 A. D. 121, on construction of doubtful or ambiguous statutes.

Cited in notes in 14 E. R. C. 831, on interpretation of statutes; 58 A. D. 600, on rules for construction of statutes.

—Giving effect to legislative intent.

Cited in reference notes in 38 A. D. 328, on intent of legislature in construing

statutes; 34 A. D. 236, on consideration shown to intention in construction of statute.

— **Liberal construction.**

Cited in reference notes in 43 A. D. 694; 65 A. D. 525; 31 A. S. R. 374,—on liberal construction of remedial statute; 74 A. D. 535, on rule that remedial statutes should be liberally construed.

21 AM. DEC. 631, NORRIS v. HUME, 2 LEIGH, 334.

Relief against judgments in equity.

Cited in *Green v. Massie*, 21 Gratt. 356, holding defendant cannot after judgment, obtain relief in equity by bill of discovery.

Cited in reference note in 28 A. D. 36, as to when equity will grant new trial after judgment at law.

Cited in notes in 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed; 54 A. S. R. 227, on equitable relief against judgments, decrees, and other judicial determinations, in case of newly discovered matters; 31 L.R.A. 772, on injunction against judgment because of payment where defense was made at law; 32 L.R.A. 324, on general equitable jurisdiction as to injunction against judgment where a legal defense was asserted at law.

21 AM. DEC. 632, WILSON v. TORBERT, 3 STEW. (ALA.) 296.

Authority of partner to bind firm after dissolution.

Cited in *Espy v. Comer*, 76 Ala. 501, holding surviving partners cannot, by any act or acknowledgment, revive any debt of firm; *Lang v. Waring*, 17 Ala. 145, holding surviving partner has not power to make a note in partnership name even in substitution of a pre-existing debt of the firm; *Demott v. Swain*, 5 Stew. & P. (Ala.) 293, holding acknowledgment by one partner in name of firm, of service of process, after a dissolution, will not authorize a joint judgment against the late partners, generally.

Cited in reference notes in 26 A. D. 433; 36 A. D. 311; 37 A. D. 612; 62 A. D. 280,—on powers of partner after dissolution of firm; 38 A. D. 771, on effect of acknowledgment by partner after dissolution to take firm debt out of statute of limitations; 36 A. D. 760, on creating new debt by partner empowered to settle affairs on dissolution.

Cited in notes in 15 L.R.A. 658, on power of partner after dissolution to interrupt statute of limitations as to firm debt; 62 A. D. 102, on promise, acknowledgment, or payment by joint debtor, partner, etc., as taking case out of statute of limitations; 40 A. S. R. 565, on rights and liabilities by virtue of new contract executed by partner after dissolution.

21 AM. DEC. 638, MORGAN v. MORGAN, 3 STEW. (ALA.) 383.

Jurisdiction of chancery to prevent multiplicity of suits.

Cited in *Kirksey v. Friend*, 48 Ala. 276, holding chancery will entertain jurisdiction to compel obligors on indemnity bond to contribute.

Cited in reference notes in 27 A. D. 441; 11 A. S. R. 355,—on equitable interference to prevent multiplicity of suits; 31 A. S. R. 327, on right of prior appropriator to join several junior appropriators in petition for injunction against interference with right.

Duty to first establish right at law.

Cited in reference note in 62 A. D. 764, on duty of party to establish his right at law before suing in equity.

When bill of peace allowed.

Cited in *Gunn v. Harrison*, 7 Ala. 585, holding in general, it cannot be sustained until complainant has ascertained his right at law; *Moses v. Mobile*, 52 Ala. 198, holding it will lie only when the right claimed affects many persons, if the right is disputed between two persons only for themselves alone, the bill will be dismissed.

Cited in note in 50 A. D. 451, on nature of bills of peace.

When equitable title prevails.

Cited in reference note in 29 A. D. 66, on prevailing of equitable title against creditors of one having naked legal title.

Recording of equitable title.

Cited in *Fash v. Raviesies*, 32 Ala. 451, holding equitable mortgage need not be recorded; *Donald v. Hewitt*, 33 Ala. 534, 73 A. D. 431, holding as to whether registration laws embrace an equitable mortgage.

Possession of land as notice.

Cited in *Tutwiler v. Montgomery*, 73 Ala. 263, holding possession of land by grantee under unrecorded deed, notice; *Powell v. Allred*, 11 Ala. 318, holding possession by another, notice; *Frame v. Frame*, 32 W. Va. 463, 5 L.R.A. 323, 9 S. E. 901, on question of possession of donee of verbal gift, as notice.

Cited in reference note in 31 A. S. R. 506, on notice of equities from possession of land.

Cited in notes in 13 L.R.A.(N.S.) 54, on possession of land as notice of title; 13 L.R.A.(N.S.) 56, on possession of land as putting purchaser on inquiry as to title.

21 AM. DEC. 641, FERGUSON v. HILL, 3 STEW. (ALA.) 485.**Oral agreement for renewal.**

Cited in reference note in 73 A. S. R. 257, on oral agreement to renew promissory note.

Right of set-off against assignee of note or bond.

Cited in *Stocking v. Toulmin*, 3 Stew. & P. (Ala.) 35, holding right of set-off against note or bond under statute does not exist for demands subsisting against intermediate assignees, through whose hands such note or bond may have passed; *Kennedy v. Manship*, 1 Ala. 43, holding set-off by maker of a promissory note against an intermediate indorser cannot be allowed, unless there is a contract between the parties, so as to allow it, founded on some new consideration.

What is discounting.

Cited in note in 16 L.R.A. 223, on purchase of bills and notes by bank as distinguished from discounting.

21 AM. DEC. 645, PREWETT v. MARSH, 1 STEW. & P. (ALA.) 17.**Right of officer to detain money received in official capacity to satisfy private debt.**

Cited in *Lowrie v. Stewart*, 8 Ala. 163, holding he has not the right.

Cited in reference note in 35 A. S. R. 908, on officers dealing with themselves as private citizens.

Competency of parties to record as witnesses.

Cited in *Duffee v. Pennington*, 1 Ala. 506, holding defendant may examine the nominal plaintiff as a witness, if the latter does not object to give evidence;

Scott v. Jones, 5 Ala. 694, holding where action is brought against several persons as partners, and one of them suffers a judgment by default, he is competent witness for the other defendants to prove that they were not his partners; *Cunningham v. Carpenter*, 10 Ala. 109, holding in suit by several partners, one of the plaintiffs consenting to be sworn as a witness is competent for the defendant although his copartners may object to him; *Graham v. Lockhart*, 8 Ala. 9, holding admissions of a trustee having no beneficial interest in the property conveyed to him, cannot be given in evidence to defeat a deed of trust executed solely for benefit of others.

Cited in reference note in 53 A. D. 659, as to when party to record may be a witness.

21 AM. DEC. 646, SCOTT v. RIVERS, 1 STEW. & P. (ALA.) 24.

Set-off of judgment.

Cited in *Zinn v. Dawson*, 47 W. Va. 45, 81 A. S. R. 772, 34 S. E. 784, on authority of courts to set off one judgment against another.

Cited in reference notes in 26 A. D. 711, on set-off of judgments; 28 A. D. 500, on set-off of judgments against each other.

— Review of discretion.

Cited in *Barbour v. National Exch. Bank*, 50 Ohio St. 90, 20 L.R.A. 192, 33 N. E. 542, holding practice of setting off one judgment against another, discretionary in court and proprietary of its exercise cannot be questioned on appeal.

Cited in note in 109 A. S. R. 140, on discretion of court as to set-off of one judgment against another.

21 AM. DEC. 649, PEDEN v. MOORE, 1 STEW. & P. (ALA.) 71.

When partial failure of consideration may be proved as partial defense.

Cited in *Evans v. Murphy*, 1 Stew. & P. (Ala.) 226, holding plea of partial failure of consideration allowable in action for rent of land and ferry; *Fisher v. Sharpe*, 5 Daly, 214, holding between the original parties to a note, a partial failure of consideration may be set up as a partial defense; *Pettillo v. Hopson*, 23 Ark. 196, holding on plea of failure of consideration, the defendant is entitled to an abatement for only so much as the consideration has failed; *Robinson v. Windham*, 9 Port. (Ala.) 397, holding under plea of general issue, in assumpsit on a note, a defense of a breach of warranty of the property for which note was given, is allowable; *Pennsylvania v. Wheeling & B. Bridge Co.* 9 How. 647, 13 L. ed. 294, on question of proof of partial failure of consideration under plea of failure of consideration.

Cited in reference note in 45 A. D. 137, as to what demands are subject to set-off.

Cited in note in 43 L.R.A. 477, on contemporaneous agreements constituting consideration for note and its breach as defense to action thereon.

— In actions for price of warranted chattel or land.

Cited in *Dunn v. White*, 1 Ala. 645, holding it is not a good defense by purchaser of land in possession with warranty, when sued for purchase money; *Wheat v. Dotson*, 12 Ark. 699, holding partial failure of consideration as to real estate is the subject of recoupment, when the partial failure is in the quantity or quality of the subject, otherwise when there is a partial failure in the title; *Wilson v. Jordan*, 3 Sted. & P. (Ala.) 92, holding it is no defense to an action on promissory notes executed in consideration of the purchase of real estate, that the

title was defective, no fraud being alleged and vendee having enjoyed possession long before the alleged encumbrance ensued; *George v. Stockton*, 1 Ala. 136, on question of partial failure of consideration as defense by vendee of land in action on note given for purchase money; *Bouker v. Randles*, 31 N. J. L. 335, holding in assumpsit on special agreement for the stipulated price of an article which has been made and delivered, the vendee can show as a defense *pro tanto* that the consideration has partially failed, although such failure may be indefinite in amount; *Craddock v. Stewart*, 6 Ala. 77, on question of breach of warranty as defense for action for purchase price.

Cited in reference notes in 30 A. D. 611, on mitigation of damages in action for price of goods; 59 A. D. 386, on breach of warranty as set-off to action for price of goods.

—In tort actions *ex contractu*.

Cited in *Bates v. Murphy*, 2 Stew. & P. (Ala.) 165, allowing defense of partial failure of consideration in action of trover; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109, holding proof of a partial failure of consideration may be given in evidence in mitigation of damages; *Jones v. Streeter*, 8 Fla. 83 (dissenting opinion), on question of admissibility of defense of partial failure of consideration in mitigation of damages.

Recoupment.

Cited in *Grisham v. Bodman*, 111 Ala. 194, 20 So. 514, holding recoupment is different from set-off in that its claim for damages is not enforced, as an independent claim or debt due the defendant, but by way of reducing or destroying plaintiff's claim; *Desha v. Robinson*, 17 Ark. 228, holding in all cases including failure of consideration, fraud, breach of warranty, etc., where the defendant is entitled to a cross action against the plaintiff, he may, instead of resorting to such cross action, recoup the damages sustained by him; *Powell v. Sammons*, 31 Ala. 552, holding garnishee entitled to recoup for any damages arising out of the contract or transaction in respect to which the plaintiff in the garnishment seeks to hold him liable; *Hatchett v. Gibson*, 13 Ala. 587, on the nature of recoupment.

Cited in reference note in 40 A. D. 320, on recoupment in case of breach of contract when fraud is involved.

Cited in notes in 40 A. D. 326, on right to recoup where cross action would lie; 40 A. D. 329, on right to recoupment for fraud or breach of contract on sale of chattel.

Necessity of offer to return upon failure of consideration.

Cited in *Morehead v. Gayle*, 2 Stew. & P. (Ala.) 224, holding maker of note given for slave which was sold with warranty of soundness could introduce evidence of unsoundness amounting to entire failure of consideration without proof of offer to return, it appearing that slave died shortly after sale; *Brown v. Freeman*, 79 Ala. 406, holding in action for price of goods purchased, the defendant may set up fraud or want of consideration, without offering to restore the goods or rescind the contract.

Necessity of setting out evidence in exceptions.

Cited in *Evans v. Keeland*, 9 Ala. 42; *Rowland v. Ladiga*, 9 Port. (Ala.) 48; *Dukes v. Leowie*, 13 Ala. 457; *Cothran v. Moore*, 1 Ala. 423,—on question of necessity of bill of exceptions showing the evidence.

Cited in reference notes in 52 A. D. 199, on construction of bill of exceptions; 44 A. D. 518; 52 A. D. 159,—on what bill of exceptions must state.

— In exceptions to instructions.

Cited in *Greene v. Tims*, 16 Ala. 541, holding where a charge as applicable to facts may or may not be correct, it is incumbent to set out in the record, so much of the evidence as is necessary to show its error; *Carter v. Doe*, 21 Ala. 72; *Kirksey v. Jones*, 7 Ala. 622,—holding when charge excepted to is affirmative, and given by court of its own motion, or at the instance of the other party, it is unnecessary to set out the evidence on which the charge is founded; *Thomas v. Ellis*, 4 Ala. 108; *Ware v. Dudley*, 16 Ala. 742; *Tharp v. State*, 15 Ala. 749,—holding when instructions actually given, are excepted to as mistaking the law, no part of the testimony need be stated.

Cited in note in 99 A. D. 134, on necessity that error in giving or refusing instructions appear of record.

21 AM. DEC. 657, TOMBECKBEE BANK v. STRONG, 1 STEW. & P. (ALA.) 187.

Appealability of order refusing to quash execution.

Cited in *Page v. Coleman*, 9 Port. (Ala.) 275, holding error will lie on a refusal to quash an execution.

Cited in reference note in 28 A. D. 244, as to when writ of error will lie.

Cited in note in 26 A. D. 37, on finality of judgment though amount is not fixed.

Judgment by reference to another judgment.

Cited in *Bonner v. Martin*, 37 Ala. 83, holding to sustain a judgment final against a defaulting garnishee, the record must show a previous conditional judgment in the form prescribed by statute; *Dickerson v. Walker*, 1 Ala. 48, holding a judgment nisi against a garnishee must be for a sum certain and cannot be rendered for an uncertain amount to be ascertained by a judgment to be afterwards rendered.

Cited in reference note in 63 A. S. R. 600, on form of judgment entry.

Sufficiency of appeal bond.

Cited in *Satterwhite v. State*, 28 Ala. 65, holding appeal bond given in bastardy proceeding sufficient, although omitting recital of days on which judgment required sums to be paid.

21 AM. DEC. 661, BELDEN v. SEYMOUR, 8 CONN. 304.

Effect of judgment against party on person who is responsible over to that party.

Cited in *Littleton v. Richardson*, 34 N. H. 179, 66 A. D. 759, holding party placing obstructions in highway is answerable to the town, and will be bound by a judgment recovered by a traveler against the town for such cause, if he has due notice of suit.

Cited in reference note in 13 A. D. 99, on estoppel by judgment.

Cited in note in 2 A. S. R. 878, on judgment as estoppel of persons in privity with litigants.

— Judgment against covenantor as binding on covenantor.

Cited in *Salle v. Light*, 4 Ala. 700, 39 A. D. 317, holding judgment in suit of which vendor had no notice, not admissible to show that title was defective but is admissible to show amount of damages recovered.

Cited in reference note in 37 A. D. 620, on judgment in ejectment as evidence against warrantor.

Cited in note in 83 A. D. 389, on conclusiveness of judgment against warrantee of land on warrantor.

Duty of covenantor to defend title.

Cited in *Butler v. Barnes*, 61 Conn. 399, 24 Atl. 328, on question of covenantor being summoned to defend title or voluntarily defending.

Conclusiveness of consideration named in deeds and other instruments.

Cited in *Fechheimer v. Trounstone*, 15 Colo. 386, 24 Pac. 882; *Harwell v. Fitts*, 20 Ga. 723; *Wolfe v. Hauver*, 1 Gill, 84; *Clapp v. Tirrell*, 20 Pick. 247; *Perry v. Central Southern R. Co.* 5 Coldw. 138; *Northington v. Tuohy*, 2 Tex. App. Civ. Cas. (Willson) 281; *Meeker v. Meeker*, 16 Conn. 383,—holding clause in deed acknowledging payment of the consideration is only prima facie evidence of the amount and liable to be varied by parol proof; *Kimball v. Walker*, 30 Ill. 482; *Kimball v. Fenner*, 12 N. H. 248; *Peck v. Vandenberg*, 30 Cal. 11,—holding parol evidence admissible to show that consideration named in deed did not pass; *Windsor v. St. Paul, M. & M. R. Co.* 37 Wash. 156, 79 Pac. 613, 3 A. & E. Ann. Cas. 62; *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34, 60 A. R. 831, 31 N. W. 471,—holding consideration in addition to that expressed in a deed may be shown by parol; *Byers v. Locke*, 93 Cal. 493, 27 A. S. R. 212, 29 Pac. 119; *Collins v. Tillou*, 26 Conn. 368, 68 A. D. 398; *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498; *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572; *Bingham v. Weiderwax*, 1 N. Y. 509; *M'Crea v. Purmort*, 16 Wend. 460, 30 A. D. 103; *Rhine v. Ellen*, 36 Cal. 362,—holding real consideration may be proved by parol; *Houston v. Blackman*, 66 Ala. 559, 41 A. R. 756, holding when voluntary conveyance is assailed by creditors, parol evidence is admissible to show that it was founded on a valuable consideration; *Goward v. Waters*, 98 Mass. 596, holding proof of facts which make out consideration does not vary a written contract; *McGehee v. Rump*, 37 Ala. 651, holding parol evidence admissible to vary bill of sale and show contract was in fact an exchange; *Harrison v. Castner*, 11 Ohio St. 339, holding grantee not concluded by recital of consideration in deed; *Harwood v. Harwood*, 22 Vt. 507, holding parol evidence admissible to show that sum expressed in deed to be the consideration for the conveyance was received by grantor as consideration for the conveyance and also as payment of a debt due him from grantee; *Eckles v. Carter*, 26 Ala. 563, holding consideration clause in bill of sale of slave though under seal, open to explanation by parol evidence; *McKusick v. Washington County*, 16 Minn. 151, Gil. 135, holding parol evidence is not admissible to contradict the receipt of a valuable consideration in deed or show an intent different from that apparent on it; *Ogden State Bank v. Barker*, 12 Utah, 13, 40 Pac. 765, holding recital in a debtor's deed to his children that it was made for a nominal consideration is conclusive against him in an action by creditors to set aside deed for fraud; *Grout v. Townsend*, 2 Denio, 336; *Bever v. North*, 107 Ind. 544, 8 N. E. 576,—holding consideration expressed in deed cannot be disproved for purpose of defeating the conveyance; *Whiting v. Gould*, 2 Wis. 552, holding in absence of fraud, mistake, or surprise, parol proof of a want of consideration in order to render an instrument inoperative, as a mere voluntary conveyance, is inadmissible; *Roe v. Jerome*, 18 Conn. 138; *King v. Woodruff*, 23 Conn. 56, 60 A. D. 625; *Cox v. Henry*, 32 Pa. 18; *Adams v. Hull*, 2 Denio, 306 (dissenting opinion); *Clarke v. Tappin*, 32 Conn. 56,—on question of conclusiveness of consideration named in deed.

Cited in reference note in 54 A. D. 503, on right to explain, control, etc., consideration in deed by parol.

Cited in notes in 14 E. R. C. 752, 753, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed; 30 A. D. 117, on parol evidence as to consideration for deed; 3 A. D. 306, on parol evidence to vary consideration; 20 L.R.A. 107, on parol evidence as to consideration of deed in action for breach of covenant; 99 A. D. 74, on proof of real consideration by parol in action for breach of covenant of seisin; 90 A. D. 270, on contradiction by parol evidence of consideration clause in deed; 68 L.R.A. 927, on recital of money consideration in deed as authorizing assumpsit for consideration.

Estoppel by consideration recited from claim of resulting trust.

Cited in *Arthur v. Arthur*, 10 Barb. 9, holding consideration of one dollar expressed in deed, sufficient to prevent resulting trust in grantor; *Francis Gowdy Distilling Co. v. Grant*, 65 Conn. 473, 32 Atl. 936; *Haussman v. Burnham*, 59 Conn. 117, 21 A. S. R. 74, 22 Atl. 1065,—on question of grantor being estopped by his deed from claiming resulting trust by consideration named in deed.

Right of parties and privies to deed to avoid it because of their own fraud.

Cited in *Henderson v. Henderson*, 13 Mo. 151, holding they cannot allege their own fraud as ground for varying or avoiding a deed.

21 AM. DEC. 674, HOLLISTER v. GOODALE, 8 CONN. 332.

Nature of attachment lien.

Cited in reference note in 39 A. D. 618, on general nature of attachment liens.

Cited in note in 39 A. D. 607, on origin and nature of attachment lien.

Sufficiency of levy.

Cited in reference notes in 5 A. S. R. 41, on validity of levy of attachment; 51 A. S. R. 61, on sufficiency of levy in attachment; 66 A. S. R. 739, on essentials of levy of execution; 67 A. S. R. 928, on what constitutes valid levy of attachment; 30 A. D. 168, on what necessary to constitute attachment of property; 73 A. D. 615, as to how levy of attachment is effected.

Cited in notes in 25 A. D. 413; 55 A. S. R. 819,—on what is necessary to attach personality.

—Necessity of actual custody and control of property.

Cited in *Adler v. Roth*, 2 McCrary, 445, 5 Fed. 895; *Lyon v. Rood*, 12 Vt. 233,—holding actual custody and control are necessary; *Pennsylvania R. Co. v. Pennock*, 51 Pa. 244, 23 Phila. Leg. Int. 36, holding there must be an actual seizure of goods intended to be attached although seizure of part of a thing in name of the whole might bind remainder when it came to hand; *Mills v. Camp*, 14 Conn. 219, 36 A. D. 488, holding where removal of the property attached would be attended with great waste and expense, it may be dispensed with; *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, holding to constitute a valid levy on personal property, the property must be so described that it can be claimed and taken possession of by levying officer; *Gates v. Bushnell*, 9 Conn. 530, holding nothing short of an actual attachment can create a lien; *Tomlinson v. Collins*, 20 Conn. 364, holding that law requires no act of notoriety to constitute an attachment and nothing more is required than that the officer should so take the property as to have it in his power and custody; *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 78 A. S. R. 743, 57 N. E. 446, as to meaning of term attachment.

Cited in reference notes in 99 A. D. 561, on what possession is necessary to constitute valid attachment; 36 A. D. 738, on keeping possession of personalty attached.

Disapproved in *Gaines v. Becker*, 7 Ill. App. 315, holding it is not necessary to constitute a valid levy that the officer should remove the property or touch it.

21 AM. DEC. 680, FRENCH v. PEAROE, 8 CONN. 439.

What constitutes adverse possession.

Cited in *Sherwood v. Waller*, 20 Conn. 262, holding actual exclusive possession as owner, is sufficient; *Smith v. Hitchcock*, 38 Neb. 104, 56 N. W. 791, holding party claiming title by adverse possession must have actually held the land as his own during statutory period in opposition to constructive possession of legal proprietor; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230, holding defendant in ejectment who relies on adverse possession during statutory period as a defense must show actual possession and exclusive possession; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 16 A. S. R. 185, 5 L.R.A. 236, 21 Pac. 925, holding entry made on public mineral land was but an entry under license of government and by sale by government to another, license is revoked and the licensee cannot set up his previous possession as adverse; *McAllister v. Hartzell*, 60 Ohio St. 69, 53 N. E. 715; *Metcalfe v. McCutchen*, 60 Miss. 145,—holding it is the fact that possession is held and title claimed which makes a possession adverse, without reference to the cause thereof; *Worcester v. Lord*, 56 Me. 265, 96 A. D. 456, holding possession of disseisor must be adverse in character, importing a denial of the true owner's title in the specific parcel of land claimed; *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610, holding actual possession and use of the land cultivating and improving the same and exercising acts of ownership over it for statutory period should be submitted to jury.

Cited in reference notes in 27 A. D. 401, on adverse possession; 26 A. D. 103, on requisites to title by adverse possession; 64 A. D. 175, on taking possession of land in adverse possession; 80 A. S. R. 67, on title acquired by mere naked possession for prescribed term.

Cited in notes in 15 L.R.A.(N.S.) 1185, on meaning of term "adverse possession;" 5 A. D. 142, on question of adverse possession; 15 L.R.A.(N.S.) 1205, 1207, on intent as essential element in adverse possession; 15 L.R.A.(N.S.) 1187, on necessity of entry and disseisin to found title by adverse possession.

— Entry by mistake.

Cited in *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546, holding an occupant who by mistake takes actual, visible, and exclusive possession of another's land by mistake and holds same for twenty years as his own, acquires a title in fee simple; *Jennings v. Gorman*, 19 Mont. 545, 48 Pac. 1111, on question of adverse possession of property occupied by mistake.

Cited in reference note in 11 A. S. R. 848, on adverse possession as affected by fact that it commenced under mistake.

— Occupation under mistake as to boundary.

Cited in *Seymour S. & Co. v. Carli*, 31 Minn. 81, 16 N. W. 495; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 A. D. 122; *Ramsey v. Ogden*, 23 Or. 347, 31 Pac. 778; *Erek v. Church*, 87 Tenn. 575, 4 L.R.A. 641, 11 S. W. 794; *Spaulding v. Warren*, 25 Vt. 316; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781,—holding occupation of land under mistake as to boundaries, may ripen into adverse possession; *Brown v. Cockerell*, 33 Ala. 38, holding where a dividing fence is run beyond the true line, whether from inadvertence, ignorance, or convenience, on the part of the owner, and with no intention to claim up to it as the dividing line, his possession is not adverse to adjoining proprietor; *Loundes v. Wicks*, 69 Conn. 15, 36 Atl.

1072, holding when a boundary line between riparian proprietors upon tide water depends upon conveyances, the legal effect of which is uncertain, the acquiescence of one in a line claimed by the other is presumptive evidence that such line is the true one; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919, holding notorious, uninterrupted, and unexplained possession of land up to a division fence for twenty years will thereafter be presumed to have been adverse to all the world; *Abbott v. Abbott*, 51 Me. 575, holding exclusive possession under a mutual agreement upon a boundary line, though it be erroneous, is such possession as is requisite to constitute disseisin.

Cited in notes in 62 A. D. 528, on statute of limitations founded on mistake of boundary; 21 L.R.A. 832, on effect of belief as to true boundary line based on mistake.

— **Certainty as to bounds of possession.**

Cited in *Humphries v. Huffman*, 33 Ohio St. 395, holding one who holds tax title void for want of description, cannot survey off to himself the quantity called for and by an entry and actual possession and improvement of part only, claim to hold by constructive possession, to the boundaries of his survey; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6, holding grantee of a strip lacking defined lateral boundaries may, by inclosure, establish a practical location supporting his possession.

Disapproved in *Preble v. Maine C. R. Co.* 85 Me. 260, 35 A. S. R. 366, 21 L.R.A. 829, 27 Atl. 149, holding one who occupies for twenty years, or more, land not covered by his deed, with no intention to claim title beyond his actual boundary, does not thereby acquire title by adverse possession to land beyond true line.

— **Color or claim of title.**

Cited in *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. 475; *Carney v. Hennessey*, 74 Conn. 107, 92 A. S. R. 199, 53 L.R.A. 699, 49 Atl. 910,—holding adverse possession need not be taken and held under claim of title or ownership; *Johnson v. Gorham*, 38 Conn. 513, holding claim of ownership, not an indispensable element of adverse possession; *South School Dist. v. Blakeslee*, 13 Conn. 227, holding party may acquire a title to land by an uninterrupted and adverse possession of more than fifteen years and it makes no difference whether he entered under an invalid conveyance or without one; *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184, holding inclosure and occupancy of land lapping another claim was presumably under claim of right after thirty-five years' possession.

Cited in notes in 88 A. S. R. 714, on good faith as essential of color of title; 9 L.R.A. 772, on effect of possession under color of tax title; 15 L.R.A. (N.S.) 1253, on necessity of color of title when not expressly made a condition by statute to found title by adverse possession in good faith.

Disapproved in *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446, holding possession to be adverse must be consistent with idea of deed or raise the presumption of one.

Settlement of boundary line.

Cited in reference notes in 60 A. D. 731, on what controls in determining boundary; 28 A. D. 358, on actual occupation as presumptive evidence of true place of line where boundary is doubtful; 39 A. D. 697, as to when establishment of boundary line by agreement between adjacent owners is conclusive; 64 A. D. 579, on acquiescence as evidence establishing boundary line; 27 A. D. 121, on settlement of disputed boundary by express or implied agreement.

Construction of contracts by practice of parties.

Cited in *Michael v. Kronthal*, 13 Misc. 428, 34 N. Y. Supp. 681; *Construction Information Co. v. Cass*, 74 Conn. 213, 50 Atl. 563, holding courts may look for assistance to the practical construction which the parties have themselves, by acts or otherwise, given to their language.

Cited in note in 35 A. D. 374, on construction of uncertain description in deed by subsequent acts of parties.

21 AM. DEC. 686, LOUNSBURY v. PROTECTION INS. CO. 8 CONN. 459.

Exceptions in policy of fire insurance.

Cited in *Kingsley v. New England Mut. F. Ins. Co.* 8 Cush. 393, holding words "on condition that applicants take all risk from cotton waste" do not constitute exception; *Woodbury Sav. Bank & Bldg. Asso. v. Charter Oak F. & M. Ins. Co.* 31 Conn. 517, on question as to how exceptions are construed.

Necessity of negating exceptions in declaring on insurance policy.

Cited in *Supreme Lodge K. P. v. Foster*, 26 Ind. App. 333, 59 N. E. 877; *Robinson v. Palatine Ins. Co.* 11 N. M. 162, 66 Pac. 535; *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 16, 55 L.R.A. 193, 42 Atl. 1063; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 49 A. S. R. 699, 26 L.R.A. 313, 38 N. E. 1011; *Whipple v. United F. Ins. Co.* 20 R. I. 260, 38 Atl. 498; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453; *Blasingame v. Home Ins. Co.* 75 Cal. 633, 17 Pac. 925,—holding it unnecessary.

Distinguished in *Simmons v. West Virginia Ins. Co.* 8 W. Va. 474, holding where declaration fails to state all the exceptions contained in the policy which materially qualify the defendant's liability, or exempts the defendant from all responsibility absolutely in certain cases, the variance is fatal.

Provisions suspending or avoiding policy.

Cited in *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, holding provision in policy declaring it to be void if house should remain vacant for ten days, merely suspended policy during period of violation and policy revived upon reoccupancy of house.

Cited in note in 10 L.R.A.(N.S.) 743, on effect of temporary condition ceasing before loss under specific provisions against certain conditions.

When increase of risk avoids policy.

Cited in *New York v. Hamilton F. Ins. Co.* 10 Bosw. 537, holding when policy of insurance specifies the uses to which the premises are applied, a mere increase of risk does not avoid the policy unless it arises from something else than their appropriation to the uses which are contemplated and covered by the policy; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257, on question of contract of parties settling question of increased risk.

Cited in reference notes in 81 A. D. 530, as to when exception as to extrahazardous risks does not protect insurer; 77 A. D. 416, as to whether insurance policy is void because including hazardous articles prohibited by policy.

21 AM. DEC. 689, BARNUM v. BARNUM, 8 CONN. 469.

Inadequacy of consideration in contract.

Cited in *Johnston v. Smith*, 86 N. C. 498; *Johnson v. Titus*, 2 Hill, 606; *Oakley v. Boorman*, 21 Wend. 588; *Clark's Appeal*, 57 Conn. 565, 19 Atl. 332,—holding where there is a legal consideration for a contract, the court will not, in the absence of fraud, inquire into its adequacy.

Cited in note in 56 A. R. 335, on promise of extra compensation for services as consideration for duebill.

Worthless specific thing as consideration.

Cited in *Clark v. Sigourney*, 17 Conn. 511, on question whether contract for payment of money for release of one's right, title, and interest in land, can be impugned on ground that no interest was acquired by the conveyance.

Unprofitable consideration.

Cited in *Pottle v. Thomas*, 12 Conn. 565, holding right to use patent in certain territory, a valuable consideration although purchaser could make no profit by use of it; *Wolford v. Powers*, 85 Ind. 294, 44 A. R. 16, holding promissory note executed in consideration of parent naming a child for the maker of the note and in pursuance of promise made by him that if child were so named, he would provide generously for its education and support, is based upon a sufficient consideration.

21 AM. DEC. 691, SKINNER v. JUDSON, 8 CONN. 528.

Right to discovery.

Cited in reference notes in 93 A. S. R. 550, on bills of discovery; 22 A. D. 292; 32 A. D. 172; 57 A. D. 381,—as to when right to discovery exists; 45 A. D. 307, on right to discovery in equity to aid action or defense at law; 42 A. D. 175, on right to discovery where leading circumstances rest in defendant's knowledge.

Cited in note in 9 E. R. C. 554, on right of party to discovery.

— In aid of tort action at law.

Cited in *Shaw v. Van Rensselaer*, 60 How. Pr. 143, holding in action for damages for personal injuries, a defendant may examine a plaintiff before answer, if it appear that the facts stated in the affidavit upon which application is based would tend to support a defense.

Cited in reference note in 60 A. D. 635, on right to discovery to detect fraud and imposition.

Privilege of witnesses.

Cited in reference notes in 42 A. D. 175, on right to compel answer to scandalous matter in bill for discovery; 75 A. D. 229, on duty of defendant in equity as to making discovery in answer to bill, which would subject him to criminal prosecution.

Cited in note in 11 L.R.A. 592, on protection of witness from self-incrimination.

Interrogatories as to privileged matter.

Cited in *Moloney v. Dows*, 2 Hilt. 247, holding where a verified complaint alleges matter to the truth of which the defendant, if a witness, would be privileged, an answer denying such allegations may be served without being verified; *Philadelphia v. Keyser*, 10 Phila. 50, 30 Phila. Leg. Int. 168, holding if answer of defendant cannot by act of assembly be admissible in evidence against him, he will be compelled to answer complainant's bill.

21 AM. DEC. 695, CARTER v. CHAMPION, 8 CONN. 549.

Reformation of deeds for mistake.

Cited in *Segee v. Thomas*, 3 Blatchf. 11, Fed. Cas. No. 12,633, holding it will aid grantee when there is no countervailing equity; *Wooden v. Haviland*, 18 Conn. 101, holding omission in deed made by scrivener may be corrected by court of chancery; *Miller v. Davis*, 10 Kan. 541, holding equity will reform a mortgage where names of mortgagor are interchanged by mistake.

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— As against subsequent creditors and purchasers.

Cited in *Chamberlain v. Thompson*, 10 Conn. 243, 26 A. D. 390, holding it will correct mistake as to attaching creditors with notice.

Distinguished in *Holabird v. Burr*, 17 Conn. 556, holding a mistake in the draft of a deed may be corrected in a court of chancery not only as against the party himself and his heirs, but against others.

Priority of liens.

Cited in *Donald v. Hewitt*, 33 Ala. 534, 73 A. D. 431, holding lien of equitable mortgage on steamboat created in another state, superior to that of an attachment or libel levied on boat here, at suit of creditors who are not entitled to protection as innocent purchasers; *Adler v. Anderson*, 42 Mo. App. 189, on question of priorities of liens of attaching creditors.

Cited in reference note in 99 A. D. 268, on priority as between liens by levy and judgment liens.

Notice of unrecorded deed after attachment or accrual of right.

Cited in *Wheaton v. Dyer*, 15 Conn. 307, holding subsequent notice of encumbrance does not defeat lien of attachment; *Northwestern Forwarding Co. v. Mahaffey*, 36 Kan. 152, 12 Pac. 705, holding lien of mortgage executed before levying an order of attachment but not recorded until afterward is prior to the lien of the attachment although attaching creditor may not at time of levy have had any notice of mortgage.

Cited in reference note in 38 A. D. 130, on effect of actual or constructive notice of unrecorded deed.

Disapproved in *Hackett v. Callender*, 32 Vt. 97, holding if an attaching creditor has notice after his attachment but before levy that the land attached does not belong to the debtor but to another person, though the record title is in the debtor, such notice will be sufficient to protect the equitable interest of the real owner against the levy.

Validity of unrecorded conveyance against subsequent purchasers and encumbrancers.

Cited in *Stafford Nat. Bank v. Sprague*, 21 Blatch. 473, 17 Fed. 784, holding by law of Connecticut, unrecorded deed void as against creditors of grantor without notice; *Bush v. Golden*, 17 Conn. 594, on priority of subsequent mortgage over unrecorded conveyance; *Newton Sav. Bank v. Lawrence*, 71 Conn. 353, 41 Atl. 1054, on question of superiority of lien of attaching creditor over unrecorded conveyance; *Meade v. New York, H. & N. R. Co.* 45 Conn. 199, on question of attaching creditors being bound by notice of an unrecorded mortgage.

Cited in reference notes in 1 A. S. R. 257, on effect of unrecorded deed of which attaching creditor had no notice; 39 A. D. 618, on priority of unrecorded deed over subsequent attachment.

Defective or improper record as notice.

Cited in *Strong v. Smith*, 3 McLean, 362, Fed. Cas. No. 13,544; *Montgomery v. Dorion*, 6 N. H. 250; *Gardiner v. Tisdale*, 2 Wis. 153, 60 A. D. 407; *Sumner v. Rhodes*, 14 Conn. 135,—holding record of deed defective in statute requisite not constructive notice; *Johnston v. Slater*, 11 Gratt. 321, holding deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded; *Swift v. Thompson*, 9 Conn. 63, on question of notice of record of instruments not required to be recorded; *Moore v. Thomas*, 1 Or. 201, on question of record of deed without acknowledgment as notice; *Carpenter v. Dexter*, 8 Wall. 513, 19

L. ed. 426, on question of constructive notice to creditors by record of deed improperly acknowledged; *Reed v. Kemp*, 16 Ill. 445, on question of recording act in Connecticut being limited to such instruments as will convey title.

Cited in reference notes in 28 A. D. 309, on unauthorized recording of instruments; 50 A. D. 407, on record of defectively acknowledged deed as notice to subsequent purchasers and encumbrancers.

Specific lien of attachment of real estate.

Cited in *Kittredge v. Emerson*, 15 N. H. 227; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841,—holding attachment issued on mesne process, a specific lien; *Myers v. Mott*, 29 Cal. 359, 89 A. D. 49 (dissenting opinion); *Bagley v. Ward*, 37 Cal. 121, 99 A. D. 256; *Baird v. Trice*, 51 Tex. 555; *Harrison v. Trader*, 29 Ark. 85,—on question of lien being as specific as if acquired by voluntary act of debtor.

Cited in reference notes in 57 A. D. 371, on lien of attachment; 39 A. D. 618, on general nature of attachment liens.

Cited in note in 39 A. D. 607, on origin and nature of attachment lien.

Competent witnesses to deeds.

Cited in *Winsted Sav. Bank & Bldg. Asso. v. Spencer*, 26 Conn. 195, holding statute which requires that conveyance of land shall be attested by two witnesses, intends an attestation by witnesses who are at the time disinterested.

Estoppel in pais from silence.

Cited in *Bigelow v. Topliff*, 25 Vt. 273, 60 A. D. 264; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307, 11 S. W. 891,—holding mere silence or some act done where means of knowledge is equally open to both parties will not estop party doing the act or remaining silent; *Moore v. Bowman*, 47 N. H. 494; *Neal v. Gregory*, 19 Fla. 356,—on question of record of instrument preventing fraudulent grantor being estopped by silence from asserting it; *Wurmser v. Frederick*, 62 Mo. App. 634, holding silence will not estop a party from asserting a title of record.

21 AM. DEC. 703, ALSOP v. MATHER, 8 CONN. 584.

Relation of administrator *de bonis non* to predecessor.

Cited in *Re American Bd. of Comrs. for Foreign Missions*, 27 Conn. 344, holding he has authority as the immediate successor of the deceased and not as the successor of former administrator with whom he has no privity; *Taylor v. Benham*, 5 How. 233, 12 L. ed. 130, holding under statute in Alabama, he is liable for assets in hands of a former executor; *Chamberlin's Appeal*, 70 Conn. 363, 41 L.R.A. 204, 39 Atl. 734, holding that if it appears that property which has been disposed of as testate estate is really intestate, an administrator *de bonis non* may by statute be appointed to recover, hold, and administer such estate; *Pease v. Phelps*, 10 Conn. 62, on question of privity between administrator *de bonis non* and executor.

Cited in reference notes in 44 A. D. 472, on powers and liabilities of administrator *de bonis non*; 50 A. D. 540, on nonliability of administrator *de bonis non* for default or devastavit of prior administrator or executor.

Cited in notes in 108 A. S. R. 432, on liabilities of administrators *de bonis non*; 40 L.R.A. 72, on what assets pass to administrator *de bonis non* where there has been a devastavit; 2 E. R. C. 190, on liability of administrator *de bonis non* for loss of predecessor's default; 40 L.R.A. 37, on claims against predecessor for accounting, balance, conversion, or devastavit passing to administrator *de bonis non*.

— Judgment for or against predecessor.

Cited in *Graves v. Flowers*, 51 Ala. 402, 23 A. R. 555, holding judgment against an executor, not binding on administrator *de bonis non*; *Ives v. Beecher*, 75 Conn. 153, 52 Atl. 746, holding under statute, administrator *de bonis non* as such takes the legal title to a judgment rendered in favor of his predecessor.

Continuation of business after death of one partner.

Cited in reference note in 45 A. S. R. 318, on effect of executors and administrators carrying on partnership.

Cited in notes in 79 A. S. R. 714, on continuation of partnership after death of one partner under direction in will; 86 A. D. 601, on carrying on of partnership by representative of deceased partner.

Liability of estate of deceased partner for partnership debts.

Cited in *Voorhis v. Childs*, 17 N. Y. 354; *Lawrence v. Leake & W. Orphan House*, 2 Denio, 577; *Troy Iron & Nail Factory v. Winslow*, 11 Blatchf. 513, Fed. Cas. No. 14,199,—holding it not liable if the surviving partners are solvent and assets of firm are sufficient; *Van Riper v. Poppenhausen*, 43 N. Y. 68, holding action may be maintained against the representatives of a deceased partner upon partnership liability, when it is proved that the surviving partner is wholly insolvent without first exhausting the remedy at law against him; *Camp v. Grant*, 21 Conn. 41, 54 A. D. 321, holding person having a debt against a partnership, may upon the death of one of the partners come immediately against the estate of that partner and have his claim allowed though the surviving partner be solvent and within the jurisdiction of the court; *Edgar v. Cook*, 4 Ala. 588, holding clause in partnership articles providing that business should continue for a certain time notwithstanding death of one or more of the partners, has not the effect to render administrators of estate of deceased partner liable at law upon a contract made by the surviving partners; *Gibson v. Stevens*, 7 N. H. 352; *Filley v. Phelps*, 18 Conn. 294,—on question of liability of estate of deceased partner for debts of the firm.

Cited in reference notes in 32 A. D. 190, on rights of surviving partner in partnership property for payment of partnership debts; 54 A. D. 203, on rights of separate and partnership creditors as to priority of payment out of deceased partner's estate.

Cited in note in 43 A. S. R. 367, on rights of partnership creditors to separate property of partner in equitable proceedings.

Liability of personal representatives of deceased partner who carry on business.

Cited in reference note in 23 A. D. 790, as to when deceased partner's representatives may be sued.

Distinguished in *Owens v. Mackall*, 33 Md. 382, holding executor was not a partner in the particular case.

Right of executor to continue business.

Cited in notes in 12 E. R. C. 46, on executor's right to carry on business of testator; 78 A. S. R. 196, on power of executors to carry on decedent's business.

Liability of personal representative carrying on business of estate.

Cited in *Stedman v. Feidler*, 20 N. Y. 437, holding administrator of a deceased owner of vessel, though he may render himself personally responsible for supplies furnished to her, cannot bind estate of intestate; *Mathews v. Sheehan*, 76 Conn. 654, 100 A. S. R. 1017, 57 Atl. 694, holding it duty of administrator to close up speculative margin account in stocks opened by decedent within a

reasonable time after his death else he will be liable for losses resulting therefrom.

Cited in reference note in 37 A. D. 37, on personal liability of executor of deceased partner on contracts affecting estate.

21 AM. DEC. 707, CHAPMAN v. KIMBALL, 9 CONN. 38.

Riparian rights on navigable rivers.

Cited in *Gough v. Bell*, 22 N. J. L. 441; *Providence Steam-Engine v. Providence & S. S. S. Co.* 12 R. I. 348, 34 A. R. 652,—holding riparian owner has right to wharf out below high-water mark.

Cited in note in 54 A. D. 584, on alluvion.

— Right to seaweed and the like.

Cited in *Church v. Meeker*, 34 Conn. 421, as to ownership of seaweed cast on land of a proprietor at or above high-water mark; *Clement v. Burns*, 43 N. H. 609, holding riparian owner upon navigable waters may maintain trespass for entry upon the shore unconnected with the right of navigation or fishery and removing therefrom manure mixed with the soil between high and low water mark; *Anthony v. Gifford*, 2 Allen, 549, holding under statute, seaweed adrift belongs to public although the bottom of the mass may touch the beach.

Cited in note in 23 E. R. C. 853, on right to seaweed.

— Rights in waters of navigable stream.

Cited in *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 22 A. S. R. 195, 8 L.R.A. 559, 13 S. W. 931; *Hollister v. Union Co.* 9 Conn. 436, 25 A. D. 36; *Kellogg v. Union Co.* 12 Conn. 7,—as to ownership of navigable streams; *Hickey v. Hazard*, 3 Mo. App. 480, holding one having surveyed marked and staked off ice, unappropriated by another upon navigable river, has a possession sufficient to support an action for trespass.

Cited in reference note in 58 A. D. 54, on ownership or property in water course.

— Right to land under water.

Cited in *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *New York v. Hart*, 95 N. Y. 443; *McManus v. Carmichael*, 3 Iowa, 1,—holding at common law, proprietors of land bounded on navigable stream own soil to high-water mark; *Shaw v. Oswego Iron Co.* 10 Or. 371, 45 A. R. 146, holding in rivers in which the tide does not ebb and flow, the title to the bed of the stream is in the riparian owners.

Cited in reference notes in 77 A. D. 444, on question of ownership of bed of rivers; 84 A. D. 540, on state's ownership of land under navigable rivers; 6 A. D. 252, as to public proprietorship in navigable waters below high-water mark.

Cited in note in 45 L.R.A. 238, on title to land between high and low water mark.

— Stream as boundary.

Cited in reference notes in 30 A. D. 286; 72 A. D. 368,—on water courses as boundaries.

Cited in note in 10 A. D. 386, on navigable river as boundary.

21 AM. DEC. 712, STATE v. WATKINS, 9 CONN. 47.

Reversible misconduct of juror.

Cited in *Pettibone v. Phelps*, 13 Conn. 445, 35 A. D. 88, holding misconduct not occasioned by prevailing party or in his behalf, not indicating any improper

bias upon the juror's mind and without any unfavorable effect to party moving for new trial, it is not sufficient; *Armleder v. Lieberman*, 33 Ohio St. 77, 31 A. R. 530, holding separation of jurors after jury had retired to consider the verdict, induced by a sudden alarm of fire, not such misconduct as will vitiate the verdict made on reassembling.

Cited in reference note in 53 A. D. 102, on effect of juror's discussing case and other misconduct.

— **Technical violations of rules.**

Cited in *State v. Brockhaus*, 72 Conn. 109, 43 Atl. 850, holding it does not avoid verdict.

— **Communications with counsel.**

Cited in *Ensign v. Harney*, 15 Neb. 330, 48 A. R. 344, 18 N. W. 73, holding use by jurors of attorney's horse and buggy, sufficient ground for new trial; *Tomlinson v. Derby*, 41 Conn. 268, on question as to when conversation by juror with one not of panel is sufficient to set aside verdict.

Presumption of jury obeying instructions of court.

Cited in *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *Southern P. Co. v. Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690,—holding that jury obeyed the instructions of the court is a presumption of law.

Admissibility of evidence to prove or rebut conjugal affection.

Cited in *Boyle v. State*, 61 Wis. 440, 21 N. W. 289, holding evidence of previous ill-treatment, admissible.

Distinguished in *Austin v. Austin*, 10 Conn. 221, holding in action for divorce by husband, against wife, evidence of husband's unkindness toward wife not admissible to prove innocence of wife or to prove collusion between husband and third party with whom husband charged wife with committing adultery.

— **In prosecution for murder of spouse.**

Cited in *State v. Cole*, 63 Iowa, 695, 17 N. W. 183, holding where prisoner is on trial for murder of his wife, evidence of his loss of affection for her is admissible; *State v. Green*, 35 Conn. 203, holding state allowed to prove that prisoner charged with murder of wife had former wife living; *State v. Leabo*, 84 Mo. 168, 54 A. R. 91; *State v. Punshon*, 124 Mo. 448, 27 S. W. 1111,—holding on trial of one for murder of his wife, it is competent for him to show that their domestic relations were of an affectionate character.

Proof of existing meretricious relations of one accused of wife murder.

Cited in *People v. Montgomery*, 176 N. Y. 219, 68 N. E. 258, 17 N. Y. Crim. Rep. 503; *Stout v. People*, 4 Park. Crim. Rep. 71; *State v. Legg*, 59 W. Va. 315, 3 L.R.A. (N.S.) 1152, 53 S. C. 545; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65, 10 N. Y. Crim. Rep. 260,—holding on trial of defendant for murder of wife or husband, it was proper to show his illicit relations with other women or men; *Johnson v. State*, 17 Ala. 618, holding on trial of prisoner for murder of his wife, proof that he had during year preceding the homicide applied to the mother of a single woman for permission to visit her daughter, admissible.

Cited in reference note in 42 A. S. R. 333, on proof of adulterous intercourse in homicide.

Admissibility of evidence of motive to commit crime.

Cited in *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698, holding it admissible.

Cited in reference note in 38 A. S. R. 150, on evidence of motive in homicide.

— **Collateral crimes evincing motive.**

Cited in *People v. Stout*, 4 Park. Crim. Rep. 71; *State v. Larkin*, 11 Nev. 314;

Com. v. Hutchinson, 42 W. N. C. 137, 6 Pa. Super. Ct. 405; **State v. Kent** (**State v. Pancoast**), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052,—holding proof of collateral crime which furnished motive, admissible.

Cited in note in 62 L.R.A. 201, on evidence of other crimes to show motive on trial for murder.

Admissibility of evidence of other crimes.

Cited in **People v. Seaman**, 107 Mich. 348, 61 A. S. R. 326, 65 N. W. 203, holding evidence of other similar crimes, admissible; **State v. Lapage**, 57 N. H. 245, 24 A. R. 69, on question as to when proof of similar crimes admissible.

Distinguished in **State v. O'Donnell**, 36 Or. 222, 61 Pac. 892, holding in prosecution for larceny, it is error to admit evidence that the defendant had stolen other property in his possession, it not appearing that such larceny was part of the transaction for which defendant was on trial.

Weight of circumstantial evidence.

Cited in **State v. Rome**, 64 Conn. 329, 30 Atl. 57, holding jury is judge of its weight.

21 AM. DEC. 718, SWIFT v. THOMPSON, 9 CONN. 63.

Fixtures.

Cited in **Dubois v. Kelly**, 10 Barb. 496; **Providence Gas Co. v. Thurber**, 2 R. I. 15, 55 A. D. 621; **Wade v. Johnston**, 25 Ga. 331,—holding as a general rule when an article can be removed without essential injury to the freehold, or the article itself, it is a chattel, and not a fixture; **Eaves v. Estes**, 10 Kan. 314, 15 A. R. 345; **Keeler v. Keeler**, 31 N. J. Eq. 181; **Potter v. Cromwell**, 40 N. Y. 287, 100 A. D. 485; **Capen v. Peckham**, 35 Conn. 88,—holding to constitute a fixture, it is necessary that it should appear that a permanent annexation to the freehold was intended; **Hamilton v. Huntley**, 78 Ind. 521, 41 A. R. 593; **Walker v. Sherman**, 20 Wend. 636,—on question as to what are fixtures.

Cited in reference notes in 19 A. D. 205; 23 A. D. 219; 28 A. D. 293; 30 A. D. 367,—on what are fixtures.

—Machinery.

Cited in **Despatch Line of Packets v. Bellamy Mfg. Co.** 12 N. H. 205, 37 A. D. 203, holding machines and other articles essential to the occupation of a building, or to the business carried on in it, and which are affixed to freehold and used with it, are fixtures; **Murdock v. Gifford**, 18 N. Y. 28; **Vanderpoel v. Van Allen**, 10 Barb. 167; **Teaff v. Hewitt**, 1 Ohio St. 511, 59 A. D. 634; **Hill v. Wentworth**, 28 Vt. 428; **M'Kim v. Mason**, 3 Md. Ch. 186,—holding machinery in mill used for purpose of manufacturing cotton and fastened to the building so as to secure their steady and uniform operation, are not fixtures; **People ex rel. National Starch Mfg. Co. v. Waldron**, 26 App. Div. 527, 50 N. Y. Supp. 523, holding machinery, consisting in part of machines standing on brick or wooden foundations, fastened with bolts, in part of machines slightly fastened with screws and in part of shafting, all capable of being removed without injury to building, taxable as land under statute; **Voorhees v. McGinnis**, 48 N. Y. 278 (reversing 46 Barb. 242), holding boilers, engines, shafting, and gearing erected in mill in substantial manner without any intention of removing them at future time, fixtures; **Baldwin v. Walker**, 21 Conn. 168, on question as to when machinery in factory are fixtures.

Cited in reference note in 59 A. D. 658, on machinery as fixture.

Cited in note in 11 A. R. 315, as to when machinery is a fixture.

Retention of possession of chattels by seller as badge of fraud.

Cited in *Crouch v. Carrier*, 16 Conn. 505, 41 A. D. 156; *Rood v. Welch*, 28 Conn. 157; *Gaylor v. Harding*, 37 Conn. 508; *Talcott v. Wilcox*, 9 Conn. 134,—holding if vendor of personal property be permitted, after the sale, to retain the actual and visible possession, it is, if not explained, conclusive evidence of fraud; *Blocker v. Burness*, 2 Ala. 354; *Osborne v. Tuller*, 14 Conn. 529,—holding possession by assignor of personal property after assignment, presumptive but not conclusive evidence of fraud; *Toby v. Reed*, 9 Conn. 216, holding bill of sale where vendor retains possession of the property prima facie void; *Hewitt v. Griswold*, 43 Ill. App. 43, holding sale of personal property without transfer of possession, fraudulent and void as to creditors.

Cited in reference notes in 26 A. D. 284; 31 A. D. 450,—on possession by vendor on sale of chattels; 23 A. D. 62; 29 A. D. 363,—on retention of possession of personal property by vendor; 53 A. D. 94, on vendor's retention of goods sold as evidence of fraud; 28 A. D. 45; 30 A. D. 262,—on retention of possession by vendor or mortgagor as evidence of fraud; 57 A. D. 216, on effect of retention of possession of personal property by mortgagor or vendor.

Change of possession essential to pledge or mortgage.

Cited in *Western Nat. Bank v. Brooks*, 17 Phila. 141, 42 Phila. Leg. Int. 26, holding change of possession essential to create a valid pledge; *American Surety Co. v. Worcester Cycle Mfg. Co.* 100 Fed. 40, holding under law of Connecticut, a chattel mortgage is invalid as to after-acquired property, as against third parties, unless the mortgagee has actually taken possession of such property before other rights intervene.

Cited in note in 12 A. D. 471, on necessity of change of possession on transfer of property.

Disapproved in *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256, holding possession of machinery by mortgagor not evidence of fraud.

—In transfers by operation of law.

Cited in *Ward v. Connecticut Pipe Mfg. Co.* 71 Conn. 345, 71 A. S. R. 207, 42 L.R.A. 706, 41 Atl. 1057, holding the rule imputing fraud where possession is not taken under voluntary conveyance of goods, does not apply to a conveyance to a receiver as fully as to those made to an ordinary vendee or assignee; *Mills v. Camp*, 14 Conn. 219, 36 A. D. 488, holding in attachment of property where the removal of the property attached would be attended with great waste and expense, it may be dispensed with.

Assignees for benefit of creditors as bona fide purchasers and creditors.

Cited in *Shipman v. Aetna Ins. Co.* 29 Conn. 245; *Shaw v. Smith*, 48 Conn. 306, 40 A. R. 170; *Re Wilcox & H. Co.* 70 Conn. 220, 39 Atl. 163; *Newtown Sav. Bank v. Lawrence*, 71 Conn. 358, 41 Atl. 1054; *Pillsbury v. Kingon*, 33 N. J. Eq. 287, 36 A. R. 556; *Chamberlain v. Thompson*, 10 Conn. 243, 26 A. D. 390,—holding he is a bona fide creditor and has all rights of creditor; *Palmer v. Thayer*, 28 Conn. 237, on question of assignee in insolvency being bona fide purchaser; *City F. Ins. Co. v. Olmsted*, 33 Conn. 476, on rights of assignee in property of insolvent.

Cited in reference note in 28 A. D. 206, on right of assignee for creditors to impeach validity of conveyance.

Disapproved in *Thompson v. Esty*, 69 N. H. 55, 45 Atl. 566, holding assignee in insolvency not a bona fide purchaser.

Necessity of record of agreements about personal property.

Cited in *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256, on question of necessity of record of such agreement when it is not a mortgage.

21 AM. DEC. 732, KINNE v. KINNE, 9 CONN. 102.**Verdict against evidence as ground for new trial.**

Cited in *Witter v. Latham*, 12 Conn. 392, holding new trial will be granted when the verdict is manifestly against the weight of evidence; *Laffin v. Pomeroy*, 11 Conn. 440, holding if it does not clearly appear that the finding of the jury is against the weight of evidence, or that is necessary to the justice of the cause, or that the result would or ought to be different, a new trial will not be granted.

Cited in reference notes in 24 A. D. 319, as to when new trial may be granted; 23 A. D. 336; 38 A. S. R. 186,—on granting new trial when verdict is against weight of evidence; 39 A. D. 592; 79 A. D. 523,—as to when new trial will be granted because verdict is against evidence.

Testamentary capacity.

Cited in *St. Leger's Appeal*, 34 Conn. 434, 91 A. D. 735; *Cromwell v. Riker*, 2 Dem. 354; *Re Bush*, 1 Connolly, 330, 5 N. Y. Supp. 23; *Dunham's Appeal*, 27 Conn. 192,—holding if testator has mind enough to know and appreciate his relations to the natural objects of his bounty and the character and effect of the dispositions of his will, he has sufficient capacity to make a will; *Stubbs v. Houston*, 33 Ala. 555, holding person may be competent to make a will without possessing such capacity as would enable him to transact the ordinary business of life; *Holden v. Meadows*, 31 Wis. 284, holding allegation that testator's "memory and mental faculties had become almost wholly obliterated" sufficient allegation of lack of such capacity; *Delafield v. Parish*, 25 N. Y. 9, holding question on contest of will is whether testator had capacity to make a will, not whether he had capacity to make the will produced; *Yoe v. McCord*, 74 Ill. 33, holding if mind and memory of testator are sufficiently sound to enable him to know and understand the business in which he is engaged at the time of executing his will, he is of sound mind and memory; *Clark v. Ellis*, 9 Or. 128, holding testamentary capacity implies that testator fully understands what he is doing and how he is doing it; *Lancaster v. Alden*, 26 R. I. 170, 68 Atl. 638; *Beaubien v. Cicotte*, 12 Mich. 459,—on question what constitutes sufficient testamentary capacity.

Cited in reference notes in 52 A. D. 60; 31 A. S. R. 426,—on testamentary capacity; 25 A. D. 301, on what constitutes testamentary capacity; 49 A. D. 650, on capacity of testator.

Cited in note in 2 L.R.A. 670, on proof of testamentary capacity.

—Eccentricities and delusions.

Cited in *Kimberly's Appeal*, 68 Conn. 428, 57 A. S. R. 101, 37 L.R.A. 261, 36 Atl. 847, upholding instruction defining insane delusion as a false belief for which there is no reasonable foundation and concerning which the mind of testator was not open to permanent correction; *Hine's Appeal*, 68 Conn. 551, 37 Atl. 384, holding that person is eccentric or odd is not sufficient to avoid will.

Cited in reference note in 61 A. D. 84, on eccentricity of testator as no ground for invalidating will.

—Mental condition before or after time of will.

Cited in *McDaniel v. Crosby*, 19 Ark. 533; *Toomes Estate*, 54 Cal. 509, 35 A. R. 83, holding evidence as to insanity of testator before or subsequent to execution of will, admissible.

Cited in reference note in 56 A. D. 429, on mental capacity at time of making will determining testamentary capacity.

Declarations admissible as showing mental state of declarant.

Cited in *Herster v. Herster*, 122 Pa. 239, 9 A. S. R. 95, 23 W. N. C. 117, 16 Atl.

342, 46 Phila. Leg. Int. 291; *Robinson v. Hutchinson*, 26 Vt. 38, 60 A. D. 298; *Dinges v. Branson*, 14 W. Va. 100,—holding such declarations made either before or after the execution of the instrument are admissible where the issue involves the mental capacity of the testator or grantor or undue influence exerted over him at the time.

Opinion evidence as to sanity.

Cited in reference note in 41 A. D. 464, on opinions of witnesses as evidence of insanity.

Cited in note in 21 L. ed. U. S. 73, on opinion evidence as to sanity.

— Of testator.

Cited in *Dewitt v. Barley*, 9 N. Y. 371, holding subscribing witnesses to a will or deed may give their opinions as to mental capacity of grantor or testator.

Cited in reference note in 90 A. D. 689, on competency of opinions of nonprofessional witnesses as to sanity or testamentary capacity of testator.

— Basis for nonexpert opinion as to sanity.

Cited in *Sydleman v. Beckwith*, 43 Conn. 9; *Stewart v. Conner*, 13 Ala. 94,—holding nonexpert witnesses must give facts upon which opinion is based; *Re Dolbur*, 149 Cal. 227, 86 Pac. 695, 9 A. & E. Ann. Cas. 795, holding nonexpert witness as to sanity of testator must give facts upon which opinion is based; *Culver v. Haslam*, 7 Barb. 314, holding opinion of intimate friend of grantor of deed may give his opinion as to his mental capacity based upon facts and circumstances within his own knowledge and disclosed by him in his testimony as the foundation of his opinion; *Beaubien v. Cicotte*, 12 Mich. 459, holding in inquiry concerning mental capacity to perform a certain act witnesses who are not experts may testify to their opinions upon the question in controversy, based upon their own observations; *DeWitt v. Barley*, 13 Barb. 550; *Dunham's Appeal*, 27 Conn. 192,—holding nonexpert witness may give opinion as to sanity of testator accompanied by statement of facts within his own knowledge upon which he bases his opinion; *State v. Pike*, 49 N. H. 399, 6 A. R. 533 (dissenting opinion), on admissibility of nonexpert testimony as to mental capacity of defendant.

Cited in note in 38 L.R.A. 747, on weight of nonexpert opinion as to sanity or insanity as affected by facts and reasons stated.

Test of insanity generally.

Cited in *Cochran v. Amsden*, 104 Ind. 282, 3 N. E. 934, holding under statute, if a person under guardianship as an insane person is not so far restored to reason as to be capable of understanding the ordinary affairs of life, the guardianship should be continued.

Age and decrepitude as evidence of insanity.

Cited in *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891, holding it cannot be inferred from the fact of extreme old age that a grantor was mentally incapacitated to execute a conveyance.

Admissibility of evidence of previous or subsequent insanity.

Cited in *Clinton v. Estes*, 20 Ark. 216, holding to determine mental capacity of individual at particular time, it is often necessary to inquire into state of his health, conduct, etc., some time before and after period in question; *State v. Hays*, 22 La. Ann. 39, holding evidence of previous or subsequent insanity is properly admissible for purpose of aiding jury in forming a conclusion whether insanity existed at time alleged crime was committed.

21 AM. DEC. 737, WEST v. ANDERSON, 9 CONN. 107.**False representations of vendor.**

Cited in *Bartholomew v. Bushnell*, 20 Conn. 271, holding effect of false representation of vendor not destroyed by refusal to warrant.

Cited in reference notes in 34 A. D. 503, on effect of representations of vendor; 90 A. D. 426, on misrepresentation by vendor as fraud; 52 A. D. 343, on vendor's liability for fraud in absence of warranty; 52 A. D. 343, on evidence of fraud in action for breach of warranty; 44 A. D. 358, on liability of vendor of personal property for breach of warranty of soundness.

Measure of damages for breach of warranty of goods sold.

Cited in *Voorhees v. Earl*, 2 Hill, 288, 38 A. D. 588, holding measure of damages for breach of warranty as to quality is the difference between the value of the goods as they really were and what their value would have been had they answered the warranty.

Cited in reference notes in 59 A. D. 741, on measure of damages for breach of warranty of soundness; 38 A. S. 'R. 396, on seller's rights on buyer's refusal to accept goods.

Remarks of judge as error.

Cited in *Black v. Griggs*, 74 Conn. 582, 51 Atl. 523, on question as to when such remarks are reviewable on appeal.

Cited in reference note in 99 A. D. 130, on erroneous instructions as ground for reversal or new trial.

Presumption as equivalent to proof.

Cited in *Reynolds v. Schweinefus*, 1 Cin. Sup. Ct. Rep. 215; *Ward v. Barrows*, 2 Ohio St. 241,—on presumption of acts done from proofs of acts presupposing them.

21 AM. DEC. 742, TOLEN v. TOLEN, 2 BLACKF. 407.**Domicil of married woman.**

Cited in note in 9 E. R. C. 728, on husband's domicil as that of wife.

Jurisdiction of divorce suit generally.

Cited in reference notes in 87 A. D. 711, on jurisdiction to decree divorce; 87 A. D. 340, as to how jurisdiction in divorce cases is determined; 51 A. S. R. 819, on jurisdiction of courts of another state to grant divorce.

Cited in notes in 76 A. D. 672; 59 L.R.A. 154,—on jurisdiction of subject-matter of divorce at place of marital offense; 59 L.R.A. 152, on jurisdiction of subject-matter of divorce at place of marriage and of original matrimonial domicil.

Jurisdictional domicil in divorce.

Cited in *Ditson v. Ditson*, 4 R. I. 87; *Leith v. Leith*, 39 N. H. 20,—holding it depends upon the domicil of the parties; *Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091, on question of assumption of jurisdiction by courts of Indiana before domicil of one of the parties; *Watkins v. Watkins*, 125 Ind. 163, 21 A. S. R. 217, 25 N. E. 175, holding where neither plaintiff nor defendant is a resident of the state or territory in which decree of divorce is pronounced, the courts have no jurisdiction, and their decree is void; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1, on question of validity of decree of divorce rendered in Indiana where only the plaintiff was domiciled.

Cited in notes in 16 L.R.A. 498, 499, on domicil of wife for purpose of divorce

suit; 59 L.R.A. 155, on time of marital offense relatively to acquisition of domicile at forum as affecting jurisdiction of subject-matter of divorce.

— **Against defendant temporarily absent from jurisdiction.**

Cited in *Baker v. People*, 15 Hun, 256; *Hunt v. Hunt*, 72 N. Y. 217, 28 A. R. 129 (affirming 9 Hun, 622)—holding such decree rendered upon substituted service as provided by statute, valid.

Capacity of wife to acquire separate domicile for purpose of divorce.

Cited in *Derby v. Derby*, 14 Ill. App. 645; *Jenness v. Jenness*, 24 Ind. 355, 87 A. D. 335; *Hanberry v. Hanberry*, 29 Ala. 719,—holding she may acquire such a domicile.

Conflict of laws.

Cited in reference note in 28 A. D. 135, on *lex domicilii*.

— **As to validity of marriage.**

Cited in *Thompson v. State*, 28 Ala. 12, holding law of place where marriage was solemnized, governs.

Cited in reference note in 64 A. S. R. 482, on conflict of laws as to marriage and divorce.

— **As to divorce generally.**

Cited in reference note in 34 A. D. 173, on law governing divorce proceedings.

— **Extraterritorial effect of decree of divorce against nonresident.**

Cited in *Cox v. Cox*, 19 Ohio St. 502, 2 A. R. 415, holding decree of divorce against a nonresident in suit in which she was served by constructive service and had no actual notice, void; *Prosser v. Warner*, 47 Vt. 667, 19 A. R. 132, on question of extraterritorial effect of decree of divorce.

Cited in reference notes in 26 A. D. 732; 70 A. S. R. 810,—on validity of foreign divorce; 44 A. S. R. 473; 63 A. S. R. 655,—on validity of divorce obtained in another state; 16 A. S. R. 786, on effect of foreign divorces; 34 A. S. R. 254, on effect of divorce procured in another state; 23 A. D. 557, on effect of divorce granted in another state or country; 51 A. S. R. 653, on effect of divorce granted in one state on property rights in another; 96 A. D. 741, on effect and impeachment of foreign divorce; 61 A. D. 459, on proceedings to vacate and annul divorces and effect on parties and on marriages which they have contracted; 96 A. D. 787, on proof in second action that the same point was raised and decided in former action.

Validity of divorce decree.

Cited in *Hood v. State*, 56 Ind. 263, 26 A. R. 21, on validity of divorce on published service; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604, on validity of decree of divorce according to laws of Indiana.

Cited in reference notes in 42 A. S. R. 398, on right to inquire into jurisdiction of court of another state to grant divorce; 2 A. S. R. 454, on validity of divorce rendered without personal service on defendant; 33 A. S. R. 54, on validity of divorce decree when neither party resides in jurisdiction; 62 A. D. 705, on validity of divorces granted in one state when marriage and cause of action occurred in different state.

Cited in notes in 19 L.R.A. 818, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear; 25 A. D. 377, on validity of divorce granted against one residing in another state and not personally served with process.

Impairment of obligation of contracts.

Cited in reference note in 30 A. D. 274, on statutes impairing vested rights or obligation of contracts.

— Divorce as.

Cited in reference note in 34 A. D. 173, on divorce as impairment of obligation of contracts.

21 AM. DEC. 752, DAGGETT v. ROBINS, 2 BLACKF. 415.**Nonsuit as bar to subsequent action in replevin.**

Cited in *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080; *Westcott v. Bock*, 2 Colo. 335,—holding it no bar.

Cited in note in 49 A. S. R. 833, on nonsuit as bar to judgment on merits.

When replevin lies.

Cited in reference notes in 26 A. D. 688, as to when replevin lies; 23 A. D. 333, on replevin for tortious and unlawful taking.

Cited in note in 80 A. S. R. 742, 743, as to when replevin or claim and delivery is sustainable.

— Against officer attaching stranger's goods.

Cited in *Samuel v. Agnew*, 80 Ill. 553, holding it will lie.

Nature of action of replevin.

Cited in *Webber v. Underhill*, 19 Wend. 447, on question of replevin being partly proceeding *in personam* and partly *in rem*; *Moore v. Kepner*, 7 Neb. 291, holding under Code, gist of action is the unlawful detention of the property.

Writ of recordari facias loquelam.

Cited in note in 67 A. D. 248, on writ of recordari facias loquelam.

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 22 AM. DEC.

22 AM. DEC. 33, DORSEY v. DORSEY, 5 J. J. MARSH. 280.

Powers and rights of personal representative.

Cited in reference note in 32 A. D. 106, on limitation of authority of executor, administrator, or curator.

— Of administrator *de bonis non*.

Cited in reference notes in 39 A. D. 724, on powers of administrator *de bonis non*; 44 A. D. 472, on powers and liabilities of administrator *de bonis non*.

Cited in note in 108 A. S. R. 421, on property which vests in administrator *de bonis non*.

Right to sue executor or administrator appointed in another state.

Cited in *Achison v. Lindsey*, 6 B. Mon. 86, 43 A. D. 153, holding that distributees may enforce distribution in courts of state to which administrator has removed; *Manion v. Titworth*, 18 B. Mon. 582; *Hussey v. Sargent*, 116 Ky. 53, 75 S. W. 211,—holding executor appointed in one state but domiciled in another may be required to account in latter; *Courtney v. Pradt*, 160 Fed. 561, holding executor or administrator appointed in one state not liable to be sued in another unless he has removed thereto.

Cited in note in 27 L.R.A. 112, 113, on judgments of another state of country rendered against executor or administrator.

Law governing distribution.

Cited in reference notes in 28 A. D. 590, on law of decedent's domicile governing in distribution of personal estate; 33 A. D. 152, on law governing succession to decedent's estate.

Cited in note in 43 A. D. 518, on what law governs distribution or descent of personalty.

Judicial notice of foreign law.

Cited in notes in 11 A. D. 782; 4 L.R.A. 42,—on judicial notice of laws of sister state.

22 AM. DEC. 37, McCLAIN v. TODD, 5 J. J. MARSH. 335.**Necessity of possession to maintenance of action of trespass.**

Cited in *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185, holding actual possession essential to maintenance of action for trespass upon realty.

Cited in reference notes in 60 A. S. R. 538, on who may maintain trespass; 26 A. D. 178; 31 A. D. 65; 39 A. S. R. 795,—on necessity for possession to maintain action for trespass; 51 A. D. 646, on possession alone sufficient for maintenance of trespass *quare clausum fregit*; 38 A. D. 546; 53 A. D. 207,—on possession required to maintain trespass *quare clausum fregit*; 25 A. D. 548, on sufficiency of constructive possession of absolute owner to sustain trespass; 59 A. D. 244, on maintenance of trespass by owner not in possession for removal of wood severed from the freehold; 72 A. D. 123, on necessity of trees being an actual possession to maintain trespass for cutting.

Disapproved in *Butler v. Tayloe*, 86 Me. 17, 29 Atl. 923, holding one in constructive possession may maintain action of trespass *quare clausum fregit*.

Right of intruder to maintain action of trespass.

Cited in *Stillwell v. Duncan*, 103 Ky. 59, 39 L.R.A. 863, 44 S. W. 357, holding plea of *liberum tenementum* good defense to action of trespass *quare clausum fregit* brought by person in actual possession.

What constitutes a trespass.

Cited in reference note in 56 A. S. R. 37, on trespass by disturbing remains of the dead.

22 AM. DEC. 41, SNEED v. EWING, 5 J. J. MARSH. 460.**Revocability of ex parte probate of will.**

Cited in reference note in 27 A. D. 225, on revocability of *ex parte* probate of will.

Extraterritorial effect of decree or statute.

Cited in *Poindexter v. Burwell*, 82 Va. 507, holding land in one state not subject to decree made in another; *Leonard v. Braswell*, 99 Ky. 528, 36 L.R.A. 707, 36 S. W. 684, holding offspring of bigamous marriage which was void where contracted may inherit in another state under statute which legitimates them.

Cited in reference notes in 61 A. D. 622, on nonoperation *per se* of foreign laws extraterritorially; 63 A. S. R. 736, on extraterritorial effect of mechanics' liens.

Effect of foreign will or probate.

Cited in *Chidsey v. Brookes*, 130 Ga. 218, 60 S. E. 529, holding foreign will not probated in state insufficient to pass title.

Cited in reference note in 7 A. S. R. 817, on record and probate of foreign will.

Cited in notes in 48 L.R.A. 145, on effect of probate of will in another state; 48 L.R.A. 133, on effect of probate of will of real estate in another state; 73 A. D. 58, on statutory provisions as to effect of wills probated in another state; 115 A. S. R. 519, on conclusiveness of foreign probate of will; 6 L.R.A. (N.S.) 620, on conclusiveness of foreign probate as affecting real property; 48 L.R.A. 142, on conclusiveness of probate of will from another state after filing for record.

Limited in *Mahorner v. Hooe*, 9 Smedes & M. 247, 48 A. D. 706, holding foreign will contravening policy of state inoperative.

Necessity of recording foreign will or probate.

Cited in *Olney v. Angell*, 5 R. I. 198, 73 A. D. 62, holding foreign will inop-

erative in another state unless filed and recorded there; *Smith v. Shackelford*, 9 Dana, 452, holding will not recorded or proved in state not competent evidence of title to land.

Cited in reference note in 43 A. D. 518, on admission to record of foreign will and effect thereof.

Cited in note in 113 A. S. R. 213, on necessity of recording foreign probate of will.

Rights of foreign administrators.

Cited in reference note in 26 A. D. 309, on rights of foreign administrators.

Contesting probate of will.

Cited in reference note in 90 A. D. 331, on contesting probate of will.

Contesting foreign will.

Distinguished in *McCall v. Vallandingham*, 9 B. Mon. 449, holding bill to contest validity of will cognizable only in county where will was probated.

Proof of foreign will.

Cited in reference note in 43 A. D. 518, on proof of foreign wills.

Implied revocation of will.

Cited in *Tyler v. Tyler*, 19 Ill. 151, holding marriage revokes prior will of husband; *McCullum v. McKenzie*, 26 Iowa, 510, holding will impliedly revoked by subsequent birth of child.

Cited in reference notes in 51 A. D. 386, on revocation of wills; 34 A. D. 139, on what amounts to revocation of will; 90 A. D. 331, on implied revocation of will.

Cited in notes in 28 A. S. R. 356, on implied revocation of will; 15 A. D. 661; 80 A. D. 518; 28 A. S. R. 359, 360,—on marriage and birth of issue as revocation of will.

Right of bastard to inherit.

Cited in reference notes in 11 A. S. R. 173; 48 A. S. R. 244,—on right of bastards to inherit; 40 A. D. 495, on right of bastard to inherit at common law; 75 A. D. 642, on right of bastard to inherit or transmit property; 40 A. D. 58, as to whether illegitimate child could inherit father's estate; 27 A. D. 537, on right of inheritance by or from illegitimate children.

Cited in notes in 23 L.R.A. 753, on inheritance by children of marriage null in law; 12 A. S. R. 101, on rights of illegitimate children to inheritance.

Conflict of laws.

Cited in notes in 2 L.R.A. (N.S.) 425, on conflict of laws as to formal validity of will of real property; 2 L.R.A. (N.S.) 465, on conflict of laws as to revocation of wills; 65 L.R.A. 178, 180, on conflict of laws as to legitimacy dependent on acts subsequent to birth.

— As to validity of marriage.

Cited in reference notes in 34 A. D. 164, as to when foreign marriages are valid; 36 A. D. 166, on what law determines validity of marriage; 53 A. D. 167, on *lex loci contractus* as determining validity of marriage contract.

Cited in note in 57 L.R.A. 161, on conflict of laws as to polygamous marriages and temporary marital unions.

— As to distribution or descent of property.

Cited in *Swift v. Wiley*, 1 B. Mon. 114, holding title to real estate must pass according to the law of the situs; *Garland v. Rowan*, 2 Smedes & M. 617, holding slaves pass according to law of decedent's domicile.

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Cited in reference notes in 43 A. D. 158, on what law governs descent of personal property; 48 A. S. R. 244, on what law governs descent of real property; 32 A. D. 627, on *lex rei sitæ* governing disposition of realty.

Cited in notes in 43 A. D. 518, on what law governs distribution or descent of personalty; 28 A. D. 460, on law of *lex domicilii* governing as to personalty; 85 A. S. R. 563, on law governing succession and distribution of personal property to married women.

Legal character of movable property.

Cited in reference notes in 44 A. D. 243, on slaves as personal property only; 46 A. D. 549, on slaves as personal property in Kentucky.

Criticized in *Jones v. Marable*, 6 Humph. 116, holding state may impress upon movable property any character it may choose.

Cohabitation and repute to show marriage.

Cited in *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276, holding evidence of cohabitation and repute admissible to show marriage where question of public offense not involved.

Cited in reference note in 26 A. D. 484, on cohabitation as presumptive evidence of marriage relation.

Proof of marriage.

Cited in notes in 7 L.R.A. 800, on sufficiency of proof of marriage; 17 E. R. C. 176, on sufficiency in prosecutions for bigamy of showing that first marriage was valid common-law marriage.

Question for jury.

Cited in *State v. Goodrich*, 14 W. Va. 834, holding presumption of innocence of accused and of continuance of life of first wife presumptions of fact on trial for bigamy.

Right to jury trial.

Cited in note in 1 L.R.A. 481, on constitutional right to trial by jury.

22 AM. DEC. 72, WALL v. SIMPSON, 6 J. J. MARSH. 155.

Time of performance of contract.

See *Pressed Steel Car Co. v. Eastern Ry. Co.* 121 Fed. 609, 57 C. C. A. 635, holding that where manufacturer agreed to deliver cars on or before April 1st subject to delay from unavoidable causes under penalty of \$5 for each day's delay if not delivered "within time specified," penalty does not accrue during unavoidable delay; *Lever v. Read*, 54 Ala. 529, holding that word "within," when used as to time in a statute means "not beyond;" *Vandegriff v. Cowles Engineering Co.* 161 N. Y. 435, 48 L.R.A. 685, 55 N. E. 941, holding that where contractor agrees to complete boat on or before August 22d and to forfeit \$100 for each day's delay and if not completed within two months thereafter buyer may then accept or reject, contractor has until Oct. 22d to complete subject to the penalty.

22 AM. DEC. 74, PAXTON v. FREEMAN, 6 J. J. MARSH. 234.

Exemption from execution.

Cited in reference notes in 31 A. D. 156, on exemptions; 20 A. S. R. 685, as to when debtor may claim exemption; 60 A. S. R. 240, on waiver of exemption; 25 A. D. 610, on vesting of title in purchaser at sheriff's sale.

22 AM. DEC. 75, HELM v. BOONE, 6 J. J. MARSH. 351.**Effect of appeal on proceedings in lower court.**

Cited in McGarrahan v. Maxwell, 28 Cal. 75, holding appeal suspends all proceedings in court below; Hudson v. Smith, 9 Wis. 122, holding appeal effects stay of proceedings in absence of statutory provision to the contrary; Holland v. State, 15 Fla. 549, holding dismissal of bill by lower court, a nullity when made pending appeal; State ex rel. Shrader v. Phillips, 32 Fla. 403, 13 So. 920, holding lower court cannot award alimony pending appeal from order overruling demurrer to bill to vacate decree of divorce; Clarke v. Manchester, 56 N. H. 502, sustaining discontinuance of highway pending appeal from assessment of damages.

Cited in reference notes in 62 A. S. R. 261, on effect of appeal while pending; 59 A. D. 572, on effect of appeal on proceedings of lower court; 49 A. D. 596, on power of lower court in case appealed by consent.

— On judgment.

Cited in State v. Johnson, 13 Fla. 33, holding pending appeal renders judgment inoperative; Glenn v. Brush, 3 Colo. 26, holding judgment not evidence of title during pendency of writ of error operating as a supersedeas; Aetna L. Ins. Co. v. McCormick, 20 Wis. 265, holding order vacating judgment suspended during appeal.

Jurisdiction by consent.

Cited in Portwood v. Outon, 1 B. Mon. 149; Overby v. Gay, 17 B. Mon. 144,—holding parties may by consent, make interlocutory decree final for purposes of appeal.

22 AM. DEC. 82, JENKINS v. RICHARDSON, 6 J. J. MARSH. 441.**When set-off available.**

Cited in Smith v. Huie, 14 Ala. 201, holding open account for merchandise available as offset although price of goods has not been agreed on.

Cited in reference notes in 26 A. D. 711, on law of set-off; 27 A. D. 131, as to when set-off is allowable; 34 A. D. 671; 45 A. D. 137,—as to what demands are subject to set-off.

Necessity of proving value.

Cited in Skillman v. Muir, 4 Met. (Ky.) 282, holding proof of value of goods must be made in absence of assumpsit, express or implied.

Use of deposition as evidence.

Cited in reference note in 29 A. D. 567, on admissibility of depositions as evidence.

Conformity of judgment to verdict.

Cited in Holliday v. McKinne, 22 Fla. 153, holding judgment authorizing writ of possession erroneous where verdict does not show what property is subject to the writ.

Cited in reference notes in 34 A. D. 218, on necessity that verdict pass on all material issues submitted to jury; 52 A. D. 398, on setting aside on motion verdict not covering issues made by pleadings.

22 AM. DEC. 84, HIGDON'S WILL, 6 J. J. MARSH. 444.**Execution, publication, and attestation of will.**

Cited in reference notes in 37 A. D. 260, on necessity and sufficiency of pub-

lication of will; 35 A. D. 370; 30 A. S. R. 882,—on sufficiency of attestation of will.

Cited in note in 40 A. D. 231, on execution, publication, and attestation of wills.

—Necessity of informing witness as to contents of will.

Cited in *Simmons v. Leonard*, 91 Tenn. 183, 30 A. S. R. 875, 18 S. W. 280, holding witness need not be informed of provisions of will; *Flood v. Pragoff*, 79 Ky. 607, holding subscribing witness need not read will or have it read to him.

Cited in reference notes in 39 A. S. R. 94; 45 A. S. R. 158,—on necessity of knowledge of contents of will by subscribing witnesses.

Testamentary capacity.

Cited in reference notes in 52 A. D. 60, on testamentary capacity; 25 A. D. 301, on what constitutes testamentary capacity; 68 A. D. 159, on extreme old age as testamentary incapacity.

22 AM. DEC. 86, SANDERS v. BLAIN, 6 J. J. MARSH. 446.

Right of executor or administrator to transfer note.

Cited in *Owen v. Moody*, 29 Miss. 79, holding executor or administrator of payee may transfer promissory note so as to enable indorsee to maintain action thereon; *Clark v. Gramling*, 54 Ark. 525, 16 S. W. 475, holding release of note by one of two joint administrators invalid.

Cited in reference note in 44 A. D. 585, on right of any administrator to assign note executed to intestate.

Distinguished in *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 A. S. R. 881, 23 Atl. 108, holding note given to two joint administrators may be transferred by one of them.

Limited in *Stagg v. Linnenfeller*, 59 Mo. 336, denying right of executor or administrator to transfer note except in discharge of claims.

Suit by administrator.

Cited in reference notes in 25 A. D. 276, on suits by executors and administrators; 63 A. D. 522, on who may sue on note executed to one as administrator.

Indorsement by part of joint obligees.

Cited in note in 18 L.R.A.(N.S.) 631n, on indorsement by one of two joint payees or indorsees of a bill or note.

22 AM. DEC. 88, BELT v. WILSON, 6 J. J. MARSH. 495.

Requiring attorney to show authority to prosecute.

Cited in *Low v. Settle*, 22 W. Va. 387, holding attorney may be required to produce evidence of his authority to prosecute.

Cited in reference notes in 35 A. D. 448, 449, on appearance of attorney; 31 A. D. 744, on authority of attorney; 38 A. D. 566, on requiring attorney to show his authority to appear.

Rights of possessor of instrument.

Cited in reference note in 100 A. D. 351, on rights of possessor of unindorsed negotiable paper, not payable to bearer.

22 AM. DEC. 92, LETCHER v. BATES, 6 J. J. MARSH. 524.

Alteration of written instrument.

Cited in reference notes in 29 A. D. 400; 46 A. D. 167,—on alteration of instruments; 36 A. D. 769, on material alteration of negotiable instrument.

— Time.

Cited in note in 86 A. S. R. 133, on presumption as to time of apparent alteration of instrument.

— Effect.

Cited in *Cotton v. Edwards*, 2 Dana, 106, holding unauthorized insertion and erasure from note of stipulation as to interest invalidates it.

Cited in reference notes in 23 A. D. 677; 28 A. D. 622,—on effect of alteration of written instruments; 38 A. D. 501, on effect of alteration of negotiable instruments; 65 A. D. 129, on effect of immaterial alterations and those made by stranger; 27 A. S. R. 886, on effect of interlineations; 61 A. D. 204, on interlineations, erasures, or alterations in deeds as affecting their validity.

Cited in note in 86 A. S. R. 103, on effect of alteration of written instrument by stranger.

Overruled in *Lee v. Alexander*, 9 B. Mon. 25, 48 A. D. 412, holding mutilation or alteration of written instrument by stranger does not invalidate it.

22 AM. DEC. 95, SINGLETON v. CARROLL, 6 J. J. MARSH. 527.**Construction of written instruments.**

Cited in reference notes in 30 A. D. 699; 40 A. D. 224; 78 A. D. 486,—on construction of contracts according to intent of parties; 44 A. D. 626, on construction depending on intention as gathered from whole instrument.

Cited in note in 56 A. D. 618, on how written instrument construed.

Subsequent events rendering performance of covenants impossible.

Cited in *Krause v. Crothersville*, 162 Ind. 278, 102 A. S. R. 203, 65 L.R.A. 111, 70 N. E. 264, 1 A. & E. Ann. Cas. 460, holding covenant to repair building and construct annex discharged where building destroyed by lightning when work practically completed; *Perkins v. Reeds*, 8 Mo. 33, holding performance of hirer's covenant to return slave excused by latter's escape without hirer's fault; *Keas v. Yewell*, 2 Dana, 249, holding performance of covenant to return slave on specified date excused where latter has absconded without hirer's fault.

Cited in reference notes in 31 A. D. 707, on what will excuse performance of express covenant; 68 A. D. 375; 71 A. D. 156,—as to whether act of God excuses performance of contract; 37 A. D. 68, on act of God or inevitable accident as excusing nonperformance of covenant.

Cited in notes in 59 A. S. R. 282, on full performance of entire contract; 22 L.R.A. 616, on liability of tenant to rebuild on destruction of leased building; 1 E. R. C. 350, on *vis major* or inevitable accident as excusing performance of contract.

Distinguished in *Curray v. Gaulden*, 17 Ga. 72, holding hirer covenanting to return slave on specified date, not excused by escape of slave.

Denied in *Alston v. Balls*, 12 Ark. 664, holding hirer covenanting to return slave, not excused where slave absconds without hirer's fault.

22 AM. DEC. 100, BARNETT v. SHACKLEFORD, 6 J. J. MARSH. 532.**Necessity of recording certificate.**

Cited in *Applegate v. Gracy*, 9 Dana, 215, holding deed of married woman inadmissible in evidence where certificate of acknowledgment not recorded with deed within statutory period.

Validity of instrument executed by married woman — Deed.

Cited in *Miller v. Shackelford*, 3 Dana, 289, holding deed of *feme covert* not

executed in conformity with statute, void; *Rhea v. Iseley*, 1 Shannon Cas. 220, holding deed of married woman must be acknowledged in strict compliance with statute; *Chauvin v. Wagner*, 18 Mo. 531, holding deed defectively acknowledged ineffectual to pass title; *Lane v. Dollick*, 6 McLean, 200, Fed. Cas. No. 8,049, holding deed of *feme covert* insufficient to pass fee where acknowledgment only contains relinquishment of dower.

Cited in reference notes in 23 A. D. 777, as to when conveyances by married women are void; 57 A. D. 197, on necessity and character of acknowledgments in deed; 11 A. S. R. 244, on acknowledgments by married women; 47 A. D. 115, on execution and acknowledgment of conveyance by *feme covert*; 36 A. D. 90, on sufficiency of married woman's certificate of acknowledgment to deed; 52 A. D. 519, on invalidity of deed of married woman not acknowledged in statutory mode; 67 A. D. 288, on necessity that acknowledgment of deed of *feme covert* show she was separately examined.

Cited in note in 54 A. S. R. 155, on effect of appearance before officer on conclusiveness of certificates of acknowledgment of deeds.

— Lease.

Cited in *George v. Goldsby*, 23 Ala. 326, holding lease of wife's interest in lands void if not acknowledged by her on private examination.

Parol evidence as to execution or acknowledgment of deed.

Cited in reference notes in 80 A. D. 440, on evidence to explain or vary certificate of acknowledgment; 40 A. S. R. 89, on parol evidence to impeach certificate of acknowledgment.

— By married woman.

Cited in *Miller v. Shackelford*, 4 Dana, 263, holding parol proof of mistake or fraud in authentication of deed of *feme covert* inadmissible; *Shackelford v. Smith*, 5 Dana, 232, holding parol proof that *feme covert* acknowledged deed in such manner as to bind her incompetent; *McCormack v. Woods*, 14 Bush, 78, holding proof of due execution of deed of *feme covert* can only be made by recorded acknowledgment; *Chauvin v. Wagner*, 18 Mo. 531, holding certificate of acknowledgment of deed of *feme covert* cannot be aided by proof that the facts were different; *Leftwich v. Neal*, 7 W. Va. 569, holding parol evidence inadmissible to cure defective acknowledgment of married woman's deed; *Central Land Co. v. Laidley*, 32 W. Va. 134, 25 A. S. R. 797, 3 L.R.A. 826, 9 S. E. 61, holding evidence of ratification of married woman's void deed inadmissible.

Cited in reference note in 52 A. D. 520, on amendment by parol evidence of defective acknowledgment of married woman.

22 AM. DEC. 102, ORCHARD v. WILLIAMSON, 6 J. J. MARSH. 558.

Lien of execution.

Cited in State use of *Beazley v. Blundin*, 32 Mo. 387, holding execution lien on debtor's personalty from time of receipt of execution by officer.

22 AM. DEC. 108, WATERS v. GOOCH, 6 J. J. MARSH. 586.

Jurisdiction in dower cases.

Cited in note in 79 A. D. 604, on concurrent jurisdiction of equity and law in dower cases.

Damages in action of dower.

Cited in *Marshall v. Anderson*, 1 B. Mon. 198, holding damages for detention of dower not recoverable where husband parted with title in his lifetime.

Cited in note in 21 L.R.A. 182, on right of doweress to meane profits or damages for detention of dower.

Dower in what property.

Cited in reference notes in 28 A. D. 116, on assignment of dower in aliened lands; 47 A. S. R. 753, on quantity of dower as depending upon value of land at time of alienation.

Cited in notes in 39 A. S. R. 36, on assignment of dower out of lands which husband has alienated; 39 A. S. R. 39, on dower rights in rents and profits.

Right to costs.

Cited in reference note in 33 A. D. 475, as to when costs are not allowed.

22 AM. DEC. 113, DEBARD v. CROW, 7 J. J. MARSH. 7.

Same person as obligor and obligee.

Cited in Allin v. Shadburne, 1 Dana, 68, 25 A. D. 121, holding same person cannot be both obligor and obligee in same undertaking; Muhling v. Sattler, 3 Met. (Ky.) 285, 77 A. D. 172, holding obligation made payable by a person to himself creates, of itself, no legal liability; Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675, holding liability of joint obligor on note extinguished by its assignment to firm of which he is member.

Cited in reference notes in 29 A. D. 631, on obligation incurred by obligees in bond becoming surety to themselves; 42 A. D. 406, on right of same person to be both obligor and obligee in same undertaking or both plaintiff and defendant in the same action.

Cited in note in 25 A. D. 134, on right of same person to be both plaintiff and defendant, or obligor and obligee.

Common-law bond.

Cited in reference note in 30 A. D. 341, on validity as common-law obligation of bond taken without statutory authority.

Sale bond.

Cited in American Asso. v. Hurst, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1, holding sale bond has force and effect of a judgment against principal and sureties.

22 AM. DEC. 116, MITCHERSON v. DOZIER, 7 J. J. MARSH. 53.

Defenses.

Cited in note in 43 L.R.A. 484, on contemporaneous executed agreements as defense to note.

— Partial failure of consideration.

Cited in Schaffner v. Kober, 2 Ind. App. 409, 28 N. E. 871, holding partial failure of consideration uncertain in character will not affect recovery.

Cited in reference note in 52 A. D. 558, on right of action by party who is ready to perform and offers to perform his part of the contract.

Cited in note in 25 A. D. 393, on failure or want of consideration of note as defense.

22 AM. DEC. 120, GARRISON v. COMBS, 7 J. J. MARSH. 84.

Necessity of use of corporate seal.

Cited in Butts v. Cuthbertson, 6 Ga. 166, holding corporate seal not essential to validity of contract of corporation.

Cited in reference notes in 71 A. D. 181, on necessity of corporate seal to make contract binding; 33 A. D. 494, as to when acts of corporation are valid without corporate seal; 48 A. D. 364, on liability of corporation on contracts made by its agents, not under seal.

Cited in note in 50 A. S. R. 152, on necessity for corporate seal in the United States.

Power of agent.

Cited in *McIntire v. Preston*, 10 Ill. 48, 48 A. D. 321, holding assignment by secretary of note payable to corporation, valid; *Durnall v. McIlroy*, 3 Dana, 407, holding assignment of note signed by agent "per" his principal sufficient to pass title.

Cited in reference notes in 33 A. D. 727, on form of execution of contract by agent; 56 A. D. 142, as to when deed made by attorney will bind principal; 34 A. D. 178, as to when deed by agent binds principal; 25 A. D. 563, on contract of corporation's agent; 34 A. D. 329, on corporate liability for acts of agents; 54 A. D. 345; 72 A. D. 148,—on liability of corporation for acts of authorized agents; 35 A. D. 174, as to when corporation is bound by acts of its officers and agents.

Cited in note in 54 A. D. 720, on sufficiency of agent's contract to bind principal.

Personal liability of agent.

Cited in reference notes in 26 A. D. 524, on personal liability of agent on sealed contracts; 13 A. S. R. 632, giving instances where agents were held personally liable on contracts executed by them.

Cited in note in 2 A. D. 515, on personal liability of agent signing by addition of descriptive title merely.

Appointment of corporate agents.

Cited in reference note in 54 A. D. 345, on requisites of appointment of corporate agents.

22 AM. DEC. 126, NEWSON v. ADAMS, 2 LA. 153.

Proof of foreign law.

Cited in *Bonneau v. Poydras*, 2 Rob. (La.) 1, holding in absence of proof of foreign law, local law governs; *Wetmore v. Merrifield*, 17 La. 573, holding law of foreign state may be shown by parol without proving there is no statute on subject.

Cited in reference notes in 32 A. D. 148; 44 A. D. 502,—on mode of proving foreign law.

Cited in notes in 25 L.R.A. 452, on oral proof of foreign unwritten or common law; 66 A. D. 233, on proof of laws by expert testimony.

22 AM. DEC. 127, TEETZMAN v. CLAMAGERAN, 2 LA. 195.

General average.

Cited in reference notes in 28 A. D. 172; 33 A. D. 73,—on general average; 25 A. D. 357, as to when application of principle of general average is warranted; 29 A. D. 505, on what losses are proper subjects for general average.

Cited in note in 14 E. R. C. 383, on loss incurred by extraordinary circumstances as general average loss.

22 AM. DEC. 129, THOMPSON v. MISSISSIPPI & F. INS. CO. 2 LA. 228.**Continuance.**

Cited in reference notes in 79 A. D. 523, on continuance on ground of absent witness; 37 A. S. R. 846, on right to continuance for absence of witness; 55 A. D. 743, as to when continuance will be granted for absence of witness or failure to obtain his testimony; 67 A. D. 639, on necessity for due diligence in procuring presence of witness to entitle party to postponement of trial.

Cited in note in 74 A. D. 145, on duty to procure attendance or testimony of absent witness, on part of one seeking continuance therefor.

Right to abandon vessel.

Cited in *Graham v. Ledda*, 17 La. Ann. 45, upholding abandonment and sale of boats and cargoes in perilous condition.

Cited in reference note in 29 A. D. 576, on abandonment of insured vessel.

Cited in note in 1 E. R. C. 20, on right to abandon vessel if difficulty of recovering her great.

22 AM. DEC. 136, ARANZAMENDI v. LOUISIANA INS. CO. 2 LA. 432.**Total or partial loss.**

Cited in *Gould v. Louisiana Mut. Ins. Co.* 20 La. Ann. 259, holding sale for salvage not an absolute total loss; *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 59 A. S. R. 797, 35 L.R.A. 672, 37 S. W. 1068, holding proof of cost of repairing building partly burned, admissible on issue of total or partial loss.

Cited in notes in 35 A. D. 243; 59 A. S. R. 814; 22 L. ed. U. S. 217,—on what is a total loss within marine insurance policy.

22 AM. DEC. 141, WORKMAN v. INSURANCE CO. 2 LA. 507.**Construction of contracts.**

Cited in reference notes in 13 A. S. R. 563, on construction of contracts; 78 A. D. 486, on construction of contracts according to intent of parties.

Cited in note in 56 A. D. 619, on how written instrument drawn by nonprofessional man construed.

Meaning of word house or building.

Cited in *Brown v. Turner*, 113 Mo. 27, 20 S. W. 660, holding word house includes land on which it is built.

Cited in reference notes in 52 A. D. 338, on meaning of word "house" in arson cases; 86 A. D. 111, as to what constitutes dwelling house in sense to make unlawful breaking burglary.

Cited in notes in 81 A. D. 72, as to what constitutes arson; 2 A. S. R. 389, on what constitutes a dwelling house in burglary.

— In insurance policy.

Cited in *North British & Mercantile Ins. Co. v. Tye*, 1 Ga. App. 380, 58 S. E. 110, holding policy insuring frame building and additions does not include servant's house 150 feet distant; *Allen v. Lafayette Ins. Co.* 34 La. Ann. 763, holding policy insuring house or building includes building appurtenant and necessary to main building and connected therewith; *Monteleone v. Royal Ins. Co.* 47 La. Ann. 1563, 56 L.R.A. 784, 18 So. 472, holding insurance on front and rear buildings covers connecting walls.

Cited in reference note in 62 A. D. 717, on meaning of word "house" or "dwelling house" within meaning of insurance policies, indictments for burglary, etc.

22 AM. DEC. 151, LABBE v. ABAT, 2 LA. 553.**Contract between husband and wife.**

Cited in *Fuller v. Ferguson*, 26 Cal. 546, holding contract between husband and wife valid under Spanish and Mexican law.

Cited in reference note in 62 A. D. 284, on construction of contract between husband and wife under laws of Spain.

— Separation agreement.

Cited in *Wells v. Stout*, 9 Cal. 479, holding contract for voluntary separation between husband and wife legal under civil law.

Cited in reference notes in 35 A. D. 668, on contracts of voluntary separation of husband and wife; 26 A. S. R. 268, on validity of agreements of husband and wife to separate.

Cited in notes in 27 A. D. 87, on construction of articles of separation; 12 L.R.A. (N.S.) 851, on validity of agreement between husband and wife renouncing marital rights.

Distinguished in *Jones v. Lamont*, 118 Cal. 499, 62 A. S. R. 251, 50 Pac. 766, holding separation agreement not containing mutual release does not preclude husband or wife from inheriting from each other.

Community property.

Cited in reference notes in 65 A. D. 168, on rights of spouses in community property; 86 A. D. 643, on conveyances of community property from husband to wife.

Cited in note in 86 A. D. 636, on presumption of community property

22 AM. DEC. 156, TAYLOR v. SWETT, 3 LA. 23.**Proof of marriage.**

Cited in reference notes in 20 A. S. R. 320, on evidence of marriage; 34 A. D. 164, on mode of proving marriage; 69 A. D. 117, on proof of marriage by declarations and admissions.

— Cohabitation and reputation as.

Cited in *Fortier's Succession*, 51 La. Ann. 1562, 26 So. 554, holding cohabitation presumptive evidence of preceding marriage; *Imboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263, holding marriage may be shown by cohabitation and repute.

Cited in reference notes in 91 A. D. 203, on reputation as husband and wife defined; 51 A. D. 115, on proof of marriage by cohabitation and reputation; 91 A. D. 203, on establishing relation of husband and wife by evidence of cohabitation and repute; 74 A. D. 413, on reputation and cohabitation as evidence to established relation of husband and wife; 26 A. D. 484, on cohabitation as presumptive evidence of marriage relation.

Validity of marriage.

Cited in reference notes in 36 A. D. 166, on proof and validity of foreign marriage; 22 A. D. 567, on marriage *per verba de presenti*; 69 A. D. 618, on validity of contract of marriage *per verba de futuro*, followed by cohabitation; 16 A. S. R. 572, on necessity of consent to valid marriage.

— Law governing.

Cited in reference notes in 36 A. D. 166, on what law determines validity of marriage; 2 A. S. R. 117, on recognition by one state of marriage void by its laws

but valid where solemnized; 53 A. D. 167, on *lex loci contractus* as determining validity of marriage contract.

Proof of foreign law.

Cited in reference note in 36 A. D. 166, on proof of foreign laws.

22 AM. DEC. 163, JOHNSTON v. QUARLES, 3 LA. 90.

Sale per aversionem.

Cited in *Williams v. Bernstein*, 51 La. Ann. 115, 25 So. 411, on act of sale as sale *per aversionem*; *Harman v. O'Moran*, 18 La. 526, holding sale by specific or fixed boundaries is sale *per aversionem*; *Brown v. Broussard*, 43 La. Ann. 962, 9 So. 911, holding sale for gross sum and by specific boundaries is sale *per aversionem*.

Cited in note in 37 A. D. 390, on grantee's right to equitable relief for deficiency in quantity of land.

— Specified boundaries as controlling enumeration of quantity.

Cited in *Gormley v. Oakey*, 7 La. 452; *Prejean v. Giroir*, 19 La. 422,—holding on sale *per aversionem* specified boundaries control enumeration of quantity; *La-biche v. Jahan*, 9 Rob. (La.) 30, holding on sale of fraction of town lot bounded by specified streets and fence call for boundary controls enumeration of quantity.

— Diminution of price for deficiency.

Cited in *Saulet v. Trepagnier*, 2 Rob. (La.) 357; *Grafton v. Wells*, 4 La. 534; *Nichols v. Adams*, 9 La. Ann. 117; *Brazeale v. Bordelon*, 16 La. 333,—holding on sale *per aversionem* purchaser cannot demand diminution of price for deficiency.

Distinguished in *Phelps v. Wilson*, 16 La. 185, holding sale of section of land not sale *per aversionem* and purchaser entitled to diminution of price for deficiency.

22 AM. DEC. 165, HUNTER v. SPURLOCK, 3 LA. 97.

Note payable in merchandise.

Cited in reference note in 25 A. D. 455, on note payable in merchandise.

Sufficiency of letter to put party in default.

Cited in *Petit v. Laville*, 5 Rob. (La.) 117, holding letter sufficient to put in default one failing to comply with terms of sale; *Woodstock Iron Works v. Standard Pulley Mfg. Co.* 115 La. 829, 40 So. 236, holding letter sufficient notice to put party failing to accept goods contracted for in default.

Cited in reference note in 35 A. D. 495, on sufficiency of demand in writing left at debtor's domicil.

Necessity of putting demand in reconvention in issue.

Cited in *Hobson v. Woolfolk*, 23 La. Ann. 384, holding law raises issue on demand in reconvention without answer in writing; *Bayly v. Stacey*, 30 La. Ann. 1210, holding plea in reconvention requires no service and need not be put in issue by answer or default; *Lamorere v. Avery*, 32 La. Ann. 1008, holding law supplies denial of all matters set up by way of compensation or reconvention.

22 AM. DEC. 167, COMPTON v. MATHEWS, 3 LA. 128.

Necessity of showing legal title.

Cited in *Rowson v. Barbe*, 51 La. Ann. 347, 25 So. 139, holding plaintiff in petitory action must show legal title to premises in dispute; *De Armas v. New*

Orleans, 5 La. 132 (dissenting opinion), on necessity that plaintiff in petitory action recover on strength of his own title.

Cited in reference note in 50 A. S. R. 453, on title necessary to maintain ejectment.

Recovery by joint heir or joint owner.

Cited in *Glasscock v. Clark*, 33 La. Ann. 584, holding heir can sue for his share in a succession without making his coheirs parties; *Burney v. Ludeling*, 41 La. Ann. 627, 6 So. 248, holding heir can sue for undivided interest in property without citing coheirs; *Tugwell v. Tugwell*, 32 La. Ann. 848, holding heirs of wife suing for recognition of their interest in community property need not make coheirs parties; *Denton v. Woods*, 19 La. Ann. 356, holding joint owner may maintain action for partition whether in possession or not; *Lafourche v. Robichaux*, 116 La. 286, 40 So. 705, holding police jury as joint owner of bridge and tolls may enjoin acts of trespass without making co-owner party; *Myers v. Will*, 6 La. Ann. 33, holding partner cannot sue copartner for half of particular items of partnership.

— Against mere possessor.

Cited in *Gordon v. Fahrenberg*, 26 La. Ann. 366, holding joint heir or joint owner can maintain petitory action against mere possessor without title; *Mays v. Witkowski*, 46 La. Ann. 1475, 16 So. 478, holding joint proprietor can maintain petitory action against mere possessor without title for whole property.

Secondary evidence of lost instrument.

Cited in reference notes in 56 A. D. 107, on secondary evidence of contents of lost instruments; 34 A. D. 53, on parol evidence to prove contents of lost writing; 65 A. D. 418, on proof of contents by oral testimony where loss of written instrument has been proved.

Validity of parol partition.

Cited in reference notes in 37 A. D. 245, on validity of parol partition; 24 A. D. 345, on validity of parol partition followed by possession; 24 A. D. 345, on right to make partition on map; 34 A. D. 682, as to when division accompanied by long possession is equivalent to partition.

Cited in note in 92 A. D. 122, on parol partition valid notwithstanding statute of frauds.

22 AM. DEC. 179, VALSAIN v. CLOUTIER, 3 LA. 170.

Conclusiveness of judgment.

Cited in reference notes in 24 A. D. 615, as to when former judgment is a bar; 52 A. D. 225, as to when judgments are not a bar to subsequent actions.

Cited in notes in 26 A. D. 609, as to when former judgment is a bar or estoppel; 21 L.R.A. 680, on nature of probate decree.

Parties to suit to invalidate will.

Cited in *Grubb v. Henderson*, 6 La. 51, holding will cannot be annulled without making persons in interest parties to suit.

Relationship as affecting property rights.

Cited in *Fortune v. Burk*, 23 Conn. 1 (dissenting opinion), on admissibility of evidence that witness to will is wife of devisee.

Effect of re-enacting general provision.

Cited in *Nixon v. Piffet*, 16 La. Ann. 379, holding re-enactment of general provision does not repeal exception which accompanied it; *Peters v. Jones*, 26 Nev.

259, 67 Pac. 466 (dissenting opinion), on effect of re-enactment of general provision on exception thereto.

Cited in note in 15 A. D. 157, on effect of re-enacting general provisions of statute on exception thereto.

Effect of repeal of statute.

Cited in reference note in 34 A. D. 493, on effect of repeal of statute.

22 AM. DEC. 184, READ v. CUTTS, 7 ME. 186.

Joint liability of guarantors.

Cited in *Smith v. Loomis*, 72 Me. 51, holding action not maintainable against principal and guarantor jointly.

Necessity of demand and notice.

Cited in *Lane v. Levillian*, 4 Ark. 76, 37 A. D. 769, holding guarantor of debt due and payable not entitled to notice; *Globe Bank v. Small*, 25 Me. 366, holding guarantor of accepted bill discharged when injured by want of notice; *Donley v. Camp*, 22 Ala. 659, 58 A. D. 274; *True v. Harding*, 12 Me. 193; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Simons v. Steele*, 36 N. H. 73; *Redfield v. Haight*, 27 Conn. 31,—holding guarantor absolutely guaranteeing payment not entitled to notice.

Cited in reference note in 60 A. D. 505, as to whether and when guarantor is entitled to notice of principal's default.

Cited in note in 20 L.R.A. 262, on necessity of notice of default to bind guarantor of payment of note.

—Demand.

Cited in *Knight v. Dunsmore*, 12 Iowa, 35, holding demand on principal unnecessary to bind guarantor of promissory note.

Cited in note in 4 E. R. C. 488, on discharge of guarantor of note not presented for payment.

—Demand and notice.

Cited in *Braddock v. Wertheimer*, 68 Ark. 423, 59 S. W. 761, holding demand and notice to guarantor unnecessary where nothing remains to be done by guarantee to perfect his rights; *Cooper v. Page*, 24 Me. 73, 41 A. D. 371; *Thrasher v. Ely*, 2 Smedes & M. 139; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Clay v. Edgerton*, 19 Ohio St. 549, 2 A. R. 422,—holding neither demand nor notice necessary to fix liability of absolute guarantor of payment; *Jenness v. Barron*, 95 Me. 531, 50 Atl. 712, raising but not deciding question whether averment of demand and notice is necessary in assumpsit against guarantor of note.

Cited in reference notes in 37 A. D. 773, as to when guarantor is entitled to demand and notice; and when not; 45 A. D. 47, as to when demand must be made upon principal debtor and notice given to guarantor in order to hold the latter.

Cited in note in 5 L.R.A. 535, on necessity of presentment and demand, and notice of default on demand notes.

Consideration for guaranty or suretyship.

Cited in reference notes in 53 A. D. 289, on sufficiency of expression of consideration in guaranty; 30 A. S. R. 726, on consideration for suretyship.

Distinction between guarantor and surety.

Cited in note in 105 A. S. R. 503, on distinction between guaranty and suretyship.

Liability of guarantor generally.

Cited in reference note in 48 A. S. R. 509, on liability of guarantors.

Discharge of guarantor generally.

Cited in reference notes in 57 A. S. R. 286, on discharge of guarantor; 94 A. S. R. 639, on discharge of guarantor by delay in proceedings.

— By delay to sue or pursue principal.

Cited in *Friend v. Smith Gin Co.* 59 Ark. 86, 26 S. W. 374, holding mere delay to bring suit does not release guarantor; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161, holding guarantor of note not discharged by neglect to pursue maker.

22 AM. DEC. 191, SAYWARD v. SAYWARD, 7 ME. 210.**Contingent remainders and limitations over.**

Cited in reference notes in 62 A. D. 316, on contingent remainders; 41 A. D. 714, as to when limitation over on failure of issue is valid as an executory devise.

Cited in note in 48 A. D. 569, on limitations over if devisee die "under twenty-one or without issue" or "under twenty-one and without issue."

Construing "and" and "or" to effectuate intent.

Cited in *Harris v. Parker*, 41 Ala. 604, holding "or" may be construed to mean "and;" *Ward v. Barrows*, 2 Ohio St. 241, construing "or" in will as "and" to effectuate testator's intention; *Chrystie v. Phye*, 19 N. Y. 344, construing "and" to mean "or" to effectuate testator's intent; *Butterfield v. Haskins*, 33 Me. 392, refusing to change "and" in will to "or" where testator's intent did not require it; *Harkness v. Corning*, 24 Ohio St. 416, 7 Legal Gaz. 21, refusing to construe "and" as "or" so that devise over might take effect.

Condition subsequent.

Cited in *Lindsey v. Lindsey*, 45 Ind. 552,—holding testamentary provision for support of wife and legacies to daughters charged on land conditions subsequent.

22 AM. DEC. 199, FROST v. BUTLER, 7 ME. 225.**Validity of conditions.**

Cited in note in 24 A. D. 298, on validity of conditions in conveyances.

Re-entry after breach of condition.

Cited in *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698, holding grantor's continuance in possession after condition broken by grantee equivalent to re-entry; *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415 (dissenting opinion), on re-entry by one in possession for condition broken; *Frost v. Frost*, 11 Me. 235, holding after entry for condition broken, grantor cannot recover unpaid consideration nor grantee recover sums paid.

Cited in reference notes in 28 A. D. 393, on re-entry for condition broken; 4 A. S. R. 364, on necessity of re-entry for condition broken; 32 A. S. R. 558, on necessity for re-entry for breach of condition subsequent to defeat freehold; 93 A. D. 80, on effect of breach of condition to revest title in grantor.

Cited in notes in 44 A. D. 755, on re-entry for breach of condition subsequent; 44 A. D. 754, on effect of breach of condition subsequent to revest estate; 44 A. D. 756, on necessity of formal entry by grantor in possession for breach of condition subsequent; 14 L.R.A.(N.S.) 1189, on necessity of entry or formal declaration of forfeiture as condition of maintaining action, other than

for damages, based on condition subsequent in conveyance of freehold; 93 A. S. R. 578, on what is a sufficient re-entry for breach of conditions subsequent.

Distinguished in *Tallman v. Snow*, 35 Me. 342, holding entry necessary after breach of condition subsequent to re-vest title unless estate determined by limitation in deed.

Waiver of right of forfeiture.

Cited in *Rowell v. Jewett*, 69 Me. 293, holding receipt of part of consideration not a waiver of right of forfeiture for condition broken.

Distinguished in *Andrews v. Senter*, 32 Me. 394, holding receipt of supplies from owner of estate waiver of right of forfeiture for condition broken.

Limitation of equity jurisdiction.

Cited in *Galvin v. Shaw*, 12 Me. 454, holding equity powers of supreme judicial court not general but limited and specific; *Kennebec & P. R. Co. v. Portland & K. R. Co.* 59 Me. 9, holding equity powers of supreme judicial court enumerated by statute.

22 AM. DEC. 203, JOHNSON v. FARWELL, 7 ME. 370.

When suit commenced.

Cited in *Day v. Lamb*, 7 Vt. 426, holding suit commenced on date of writ; *Badger v. Gilmore*, 37 N. H. 457, holding action of review not pending prior to suing out of process; *Haskell v. Brewer*, 11 Me. 258, holding time of making writ not necessarily commencement of suit; *Biddeford Sav. Bank v. Mosher*, 79 Me. 242, 9 Atl. 614; *Dodge v. Hunter*, 85 Me. 121, 26 Atl. 1055; *Cross v. Barber*, 16 R. I. 266, 15 Atl. 69,—holding issuing writ with intention of service is commencement of suit; *West v. Engel*, 101 Ala. 509, 14 So. 333, holding summons not sued out so as to constitute commencement of suit until delivered by clerk to officer for service; *Spinning v. Ohio L. Ins. & T. Co.* 2 Disney (Ohio), 336, holding filing petition and issuing summons commencement of suit; *Bentley v. Reid*, 66 C. C. A. 528, 133 Fed. 698, holding filing petition date of commencement of action where irregularity waived by appearance and plea.

Cited in reference notes in 65 A. S. R. 615, as to when action is deemed commenced; 34 A. S. R. 744, as to how and when actions are commenced.

Cited in note in 15 A. D. 346, 347, on issuance of writ as commencement of action.

Presumptions and parol proof in rebuttal.

Cited in *Biddeford Sav. Bank v. Mosher*, 79 Me. 242, 9 Atl. 614, holding date of writ presumed to be time when action brought; *Trafton v. Rogers*, 13 Me. 315, holding parol proof that writ dated on Sunday was not made that day admissible; *Gray v. Brown*, 49 Me. 544, holding parol proof admissible to rebut presumption that undated indorsement was made when note was given.

Measure of damages.

Cited in reference note in 48 A. D. 158, on measure of damages in trespass.

22 AM. DEC. 208, HAVEN v. BROWN, 7 ME. 421.

Parol testimony to vary written contract.

Cited in *Bolton v. Bolton*, 73 Me. 299, holding parol testimony inadmissible to vary unambiguous writing; *Arthur v. Roberts*, 60 Barb. 580, holding person who made and read note to maker may testify as to date intended by disputed figure; *Stoops v. Smith*, 100 Mass. 63. 97 A. D. 76, 1 A. R. 85, holding

parol testimony of what was before parties by sample or otherwise admissible to identify subject-matter of written contract.

Admissions or declarations of agent.

Cited in *Franklin Bank v. Steward*, 37 Me. 519, holding admissions of agent as to act previously done inadmissible as against principal; *Demeritt v. Meserve*, 39 N. H. 521, holding admissions of agent not in reference to depending transaction inadmissible; *Vail v. Judson*, 4 E. D. Smith, 165, holding admission made by agent after termination of his authority not admissible against principal; *Rothschild v. Schuberth*, 8 Bosw. 289, raising but not determining question whether admission of agent with power to indorse of genuineness of indorsement admissible; *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752, holding declarations of agent inadmissible against principal unless part of *res gestæ*; *Maine Bank v. Smith*, 18 Me. 99, holding declarations of agent inadmissible to qualify his act, when made after the act has been completed; *Stiles v. Western R. Corp.* 8 Met. 44, 41 A. D. 486; *Horner v. Fellows*, 1 Dougl. (Mich.) 51; *Maxson v. Michigan C. R. Co.* 117 Mich. 218, 75 N. W. 459; *Klotz v. Butler*, 56 Miss. 333,—holding declaration of agent in reference to past transaction inadmissible; *Polleys v. Ocean Ins. Co.* 14 Me. 141, holding declarations of agent when not acting in that character inadmissible.

Cited in reference notes in 18 A. S. R. 370, on admissibility of agent's representations; 41 A. D. 487, on admissibility against principal of declarations of agent; 95 A. D. 73, on admissibility of agent's declarations as part of *res gestæ*; 13 A. S. R. 22, on admissions of agent as evidence against principal; 25 A. D. 139, as to when agents' declarations are evidence against principal; 39 A. D. 656, on agent's declarations after transaction to which agency extends as evidence against principal; 52 A. D. 232, as to when confessions of agent are admissible against the principal.

Cited in note in 46 A. D. 612, on representations made by agent at time of contract as part thereof.

Abatement of action by death of party.

Cited in reference notes in 56 A. D. 421, on abatement of action by death of party; 27 A. S. R. 542, on abatement by plaintiff's death; 64 A. D. 370, on abatement of action by death of one of several plaintiffs.

Cited in note in 2 E. R. C. 17, on survival of actions of tort and contract.

Grounds for new trial or reversal.

Cited in note in 66 A. D. 717, on admission of irrelevant or immaterial evidence as ground for new trial or reversal.

22 AM. DEC. 212, HALE v. JEWELL, 7 ME. 435.

Character of conveyance.

Cited in *Reed v Reed*, 75 Me. 264, holding character of conveyance is fixed at its inception; *Bennock v. Whipple*, 12 Me. 346, 28 A. D. 186, holding absolute conveyance and bond to reconvey not mortgage unless of even date and parts of same transaction.

Cited in note in 4 A. S. R. 700, on conditional sale as an equitable mortgage.

Parol evidence as to writing.

Cited in reference notes in 25 A. D. 213; 27 A. D. 295; 28 A. D. 259,—on parol evidence to vary written agreement; 53 A. D. 187, on parol evidence to add to, vary, or explain contracts and other writings; 42 A. D. 395, on inadmissibility of parol evidence to contradict, vary, or materially affect written in-

struments; 45 A. D. 242, on parol evidence to vary writing or annex conditions thereto; 68 A. D. 382, on parol evidence to control unambiguous instrument.

Cited in notes in 11 E. R. C. 227, on parol evidence to show mistake in written contract; 32 A. D. 190, on exclusion of parol evidence of prior verbal agreement where contract is written.

— To show nature of deed.

Cited in *Larrabee v. Lumbert*, 36 Me. 440, holding parol evidence inadmissible to show deed intended as security for loan.

Cited in reference notes in 34 A. D. 213, on parol evidence to show that absolute deed was intended as a mortgage; 82 A. S. R. 229, on showing that deed absolute is a mortgage.

Distinguished in *Ferguson v. Sutphen*, 8 Ill. 547, holding parol evidence admissible in equity to show deed intended as a mortgage.

Deed given in consideration of usurious debt.

Distinguished in *Davison v. Smith*, 60 W. Va. 413, 55 S. E. 466, upholding jurisdiction of equity to set aside deed made in consideration of usurious debt.

22 AM. DEC. 216, ERSKINE v. PLUMMER, 7 ME. 447.

Applicability of statute of frauds to executed contract.

Cited in reference notes in 30 A. D. 271, on inapplicability of statute of frauds to contract fully executed; 33 A. D. 604, on effect of statute of frauds on contract fully or partially performed.

Parol sale of standing timber.

Cited in *Banton v. Shorey*, 77 Me. 48; *Clafin v. Carpenter*, 4 Met. 580, 38 A. D. 381; *Leonard v. Medford*, 85 Md. 666, 37 L.R.A. 449, 37 Atl. 365,—holding parol sale of growing timber not within statute of frauds; *Spalding v. Archibald*, 52 Mich. 365, 50 A. R. 253, 17 N. W. 940, holding oral sale of standing timber void under statute of frauds valid as license.

Cited in reference note in 38 A. D. 384, on sale of growing timber.

Cited in notes in 19 L.R.A. 722, on validity of oral sale of standing timber; 86 A. D. 182, as to whether sale of growing trees is sale of interest in land within statute of frauds.

Explained in *Owens v. Lewis*, 46 Ind. 488, 15 A. R. 295, holding sale of trees contract for sale of real estate which must be in writing.

Disapproved in *Buck v. Pickwell*, 27 Vt. 157; *Hirth v. Graham*, 50 Ohio St. 57, 40 A. S. R. 641, 19 L.R.A. 721, 33 N. E. 90,—holding parol sale of standing timber contract concerning interest in lands within statute of frauds.

Crops as personalty.

Cited in *Cudworth v. Scott*, 41 N. H. 456, holding mortgage on hay and grain to be grown during year covers only crops already sown.

Cited in note in 23 L.R.A. 449, on sale of future crops as personalty.

22 AM. DEC. 218, GREEN v. YOUNG, 8 ME. 14.

Liability of estate of surety or guarantor.

Cited in *Hecht v. Weaver*, 34 Fed. 111, holding estate of surety on bond for repayment of advances liable for sums loaned after surety's death; *Fewlass v. Keeshan*, 32 C. C. A. 8, 60 U. S. App. 133, 88 Fed. 573; *McClaskey v. Barr*, 79 Fed. 408,—holding that death of surety does not release liability on bond stating "I hereby acknowledge myself security for costs;" *Hecht v. Skaggs*, 53 Ark. 294, 22 A. S. R. 192, 13 S. W. 930, holding devisee of cosurety on administrator's

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bond liable for contribution on latter's default; *Rapp v. Phoenix Ins. Co.* 113 Ill. 390, 55 A. R. 427, holding estate of surety on bond to procure appointment of insurance agent, liable for sums received after surety's death; *Home Sav. Bank v. Hosie*, 119 Mich. 116, 77 N. W. 625, holding estate of corporate director liable on continuing guaranty for company's unpaid notes; *Faust v. Murphy*, 71 Miss. 120, 13 So. 862, holding estate liable for default of chancery clerk, although new sureties were substituted; *Stevens v. Stevens*, 2 Dem. 469, holding estate of surety on official bond liable for principal's default subsequent to death of surety; *Holthausen v. Kells*, 18 App. Div. 80, 45 N. Y. Supp. 471, holding surety's estate liable for default in payments on lease.

Cited in reference notes in 22 A. S. R. 194, on liability of surety's estate; 63 A. S. R. 63, on liability of estate of deceased surety on official bond.

Cited in notes in 21 E. R. C. 670, on death of guarantor as revocation of guaranty; 22 A. S. R. 814, on nontermination of contract of suretyship by surety's death; 2 L.R.A. 183, on effect upon contract of guaranty of death of guarantor.

Distinguished in *Pond v. United States*, 49 C. C. A. 582, 111 Fed. 989, holding estate of surety on revenue collector's bond binding "heirs, executors, and assigns," liable for default; *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115, holding sureties' guaranty to pay promissory notes maturing at different times terminated at death.

22 AM. DEC. 220, PARSONS v. WEBB, 8 ME. 38.

Powers of agents.

Cited in notes in 24 A. D. 66, as to when acts of agent bind principal; 25 A. D. 616, on sales and pledges by bailees and agents; 21 E. R. C. 37, on necessity that agent with authority to receive payment receive money; 80 A. S. R. 558, on right of agent to purchase property of principal.

— Sale, pledge, or mortgage by agent or bailee for own benefit.

Cited in *Rodick v. Coburn*, 68 Me. 170; *Holton v. Smith*, 7 N. H. 446; *Gould v. Blodgett*, 61 N. H. 115,—holding selling agent without authority to dispose of goods in payment of his own debt; *Glover v. Ames*, 8 Fed. 351, holding sale of vessel by agent to pay debt for which he was individually liable, invalid; *Hotchkiss v. Hunt*, 49 Me. 213, holding bailee of property for special purpose not entitled to pledge it for advances made to himself; *Stanley v. Gaylord*, 1 Cush. 536, 48 A. D. 643, holding bailee without right to mortgage chattel as security for his own debt.

Validity of unauthorized sale.

Cited in *Fisk v. Ewen*, 46 N. H. 173; *Kimball v. Jackman*, 42 N. H. 242,—holding owner not bound by unauthorized sale although property has been resold by vendee; *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547, holding innocent purchaser from agent protected where owner invested agent with apparent authority to sell.

Terms or manner of payment.

Cited in *Payne v. Potter*, 9 Iowa, 549, holding agent authorized to sell horse cannot sell on credit except in conformity with trade usage; *Hook v. Crowe*, 100 Me. 399, 61 Atl. 1080, holding selling agent without implied authority to contract that payment be made in goods or services to be rendered on his personal account.

Demand as prerequisite to action.

Cited in *Farley v. Lincoln*, 51 N. H. 577, 12 A. R. 182, holding trover without

a demand lies in favor of owner of chattel against purchaser from one not authorized to sell; *Velsian v. Lewis*, 15 Or. 539, 3 A. S. R. 184. 16 Pac. 631, holding trover maintainable without demand by owner of property against purchaser from one without title.

22 AM. DEC. 223, BROWN v. GILMORE, 8 ME. 107.

Sufficiency of tender.

Cited in reference notes in 24 A. D. 455, 467, on subject of tender; 26 A. D. 265, on sufficiency of tender; 41 A. D. 715, on effect of and essential to tender.

Cited in notes in 77 A. D. 475, giving illustrations of insufficient tender; 77 A. D. 470, on general requisites of good tender and effect thereof.

—Necessity that it be unconditional.

Cited in *McGehee v. Jones*, 10 Ga. 127; *Cothran v. Scanlan*, 34 Ga. 555; *Beardsley v. Beardsley*, 29 C. C. A. 538, 56 U. S. App. 437, 86 Fed. 16,—holding tender must be unconditional.

Cited in notes in 35 A. D. 571; 46 A. D. 150; 87 A. D. 523,—on necessity that tender be unconditional; 77 A. D. 476, on necessity of a tender being unconditional and unqualified.

22 AM. DEC. 225, FISHER v. BARTLETT, 8 ME. 123.

Sufficiency of consideration.

Cited in reference notes in 37 A. D. 69, on sufficiency of legal consideration; 42 A. D. 511, on benefit to promisor, or loss or damage to promisee, as sufficient consideration to support promise; 26 A. D. 109, on sufficiency of consideration for promise.

What receptor of property may show.

Cited in *Burt v. Perkins*, 9 Gray, 317, holding receptor for attached property may show it was not the property of the defendant in attachment; *Terry v. Allis*, 20 Wis. 33, holding parties receiving city order under promise to return it cannot show ownership in third person; *Drew v. Livermore*, 40 Me. 266, holding one giving accountable receipt cannot show informality or invalidity in attachment or judgment.

Cited in reference note in 28 A. D. 698, on admissibility of claim of property by defendant in action on forthcoming bond on receipt given for goods seized on execution or attachment.

Cited in note in 25 A. D. 428, on right of receptor for attached property to show that it was not defendant's, or not subject to attachment.

—Estoppel by giving receipt.

Cited in *Bleven v. Freer*, 10 Cal. 172, holding owner of property attached as that of another not estopped from setting up title by giving accountable receipt; *Barron v. Cobleigh*, 11 N. H. 557, 35 A. D. 505, holding receptor of attached goods may show they were his property in action of trespass by defendant in attachment; *Mackay v. Holland*, 4 Met. 69, holding maker of accommodation note not estopped by admission of liability made in ignorance of defense.

Cited in reference note in 26 A. D. 421, on estoppel by giving receipt on attachment.

Distinguished in *Cooper v. Davis Mill Co.* 48 Neb. 420, 67 N. W. 178, holding one giving redelivery bond estopped from setting up title to attached property; *Colbath v. Hoefer*, 43 Or. 366, 73 Pac. 10, holding garnishee receipting for property estopped from denying officers possession or debtor's ownership.

Disapproved in *Case v. Steele*, 34 Kan. 90, 8 Pac. 242, holding one giving forthcoming bond for property attached as belonging to another estopped from setting up title in himself.

Restoration to true owner by receiptor.

Cited in *Lathrop v. Cook*, 14 Me. 414, 31 A. D. 62; *Perry v. Williams*, 39 Wis. 339,—holding true owner and receiptor of property levied on as belonging to another not liable on receipt; *Penobscot Boom Corp. v. Wilkins*, 27 Me. 345, holding delivery of goods to true owner defense to action on accountable receipt.

Conclusiveness of sheriff's return.

Cited in reference note in 47 A. D. 730, on conclusiveness of sheriff's return.

22 AM. DEC. 228, SIMPSON v. SEAVEY, 8 ME. 138.

Liability for tort.

Cited in *Washburn v. Gilman*, 64 Me. 163, 18 A. R. 246, holding mill owner responsible for damages arising from deposit of waste stuff in stream; *Veazie v. Dwinel*, 50 Me. 479, holding lower proprietor cannot flow mill wheels of prior occupant above him; *Lincoln v. Chadbourne*, 56 Me. 197, holding it is no defense to suit for flowing wheels of mill that plaintiff flowed wheels of third party's mill.

— Joint liability.

Cited in *Magee v. Pennsylvania S. Valley R. Co.* 13 Pa. Super. Ct. 187, holding party constructing common ditch not liable for pollution of water in it by independent act of another; *Anderson v. Hubble*, 93 Ind. 570, 47 A. R. 394, holding joint verdict erroneous where wrongs are distinct and several.

Cited in reference note in 25 A. S. R. 707, on individual liability for nuisance committed by several independently.

Cited in note in 10 L.R.A. (N.S.) 170, on character of the liability of several persons whose independent wrongs of the same kind contribute to enhance the degree or extent of the injury sustained by plaintiff.

Mode of objecting for nonjoinder.

Cited in reference notes in 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of; 67 A. D. 258, on taking advantage of nonjoinder of party plaintiff in *ex delicto* action.

What constitutes a nuisance.

Cited in reference note in 44 A. D. 114, on erection of obstruction in navigable stream or other highway as a nuisance.

Cited in note in 107 A. S. R. 251, on obstructions to navigation as public nuisances.

Rights in tidal waters.

Cited in *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 87 N. W. 117 (dissenting opinion), on extent of privileges of public in tide waters.

Cited in note in 9 L.R.A. 807, on common and paramount right of navigation.

Navigability of waters.

Cited in note in 42 L.R.A. 313, on what waters are navigable.

Recovery of costs as dependent on amount of recovery.

Cited in *Wendall v. Groaton*, 63 Me. 267, holding in action of the case for nuisance to real estate full costs recoverable although damages less than \$20.

22 AM. DEC. 233, DOAK v. SWANN, 8 ME. 170.**What constitutes partnership.**

Followed in *Thomas v. Harding*, 8 Me. 417, holding persons voluntarily uniting to carry on business on joint account or for their common benefit are partners; *Barrett v. Swann*, 17 Me. 180, holding associates in business under agreement for purchase of stock and sale of product are partners.

Cited in note in 18 L.R.A. (N.S.) 1085, 1087, on joint ownership and tenancies in common as partnerships.

22 AM. DEC. 236, COOMBS v. JORDAN, 3 BLAND, CH. 284.**Proceeding against trustee.**

Cited in *Maddox v. Dent*, 4 Md. Ch. 543, holding trustee or his executor may on petition be directed to bring trust fund into court; *Dent v. Maddox*, 4 Ind. 522, holding application for accounting by trustee may be made in cause in which original decree was passed.

Compelling account by trustee's administrator.

Cited in reference note in 89 A. D. 147, on right to compel trustee's administrator to account.

Lien of judgment.

Cited in reference notes in 22 A. D. 668; 23 A. D. 596, 778,—on judgment liens; 22 A. D. 328, on law as to judgment lien; 38 A. D. 455, on operation of judgment liens in equity; 64 A. S. R. 785, as to what judgment lien extends to; 92 A. D. 426, on judgment lien being confined to actual interest of debtor; 38 A. D. 455, on extent of judgment lien; 28 A. S. R. 566, on extent and scope of judgment lien.

Cited in notes in 93 A. D. 346, on nature of judgment lien; 39 A. D. 162, on nature of judgment lien at common law; 31 A. D. 256, as to what judgment lien attaches to; 93 A. D. 346, on interests of debtor to which judgment lien attaches; 93 A. D. 346, on subjection of judgment lien to equities of third person; 117 A. S. R. 788, on judgment lien as affecting property sold under executory contract.

—On lands generally.

Cited in *Hayden v. Stewart*, 1 Md. Ch. 459, holding judgment general lien on land owned by debtor at time of its rendition as well as that subsequently acquired; *Warfield v. Owens*, 4 Gill, 364, holding lands of deceased debtor answerable for simple contract debts only in default of personalty; *Cape Sable Co.'s Case*, 3 Bland, Ch. 606, holding under statute of 1732 execution may be levied on either real or personal estate.

Cited in reference note in 84 A. D. 510, on lien of judgments on land in England.

Cited in notes in 93 A. D. 350, on applicability of judgment lien to land conveyed to trustees; 93 A. D. 357, on effect of judgment liens on dower.

—On permanent improvements.

Cited in *Lessert v. Sieberling*, 59 Neb. 309, 80 N. W. 900, holding judgment lien on permanent improvements made on land by debtor or his vendees.

Cited in note in 93 A. D. 347, on effect of judgment lien on fixtures.

—On leasehold property.

Cited in *Davidson v. Myers*, 24 Ind. 538, holding interlocutory judgment not lien on real or leasehold property.

When judgment lien attaches.

Cited in reference notes in 47 A. D. 717, when judgment lien attaches; 32 A. D. 683, on relation back of lien of judgment to beginning of term; 41 A. D. 625, as to when judgment lien attaches; 28 A. D. 441, as to when docketed judgment becomes a general lien on all debtor's realty.

Cited in note in 38 L.R.A. 249, on lien of judgment from time of entry as to conveyance made after beginning of term.

Bar of action on judgment.

Cited in reference note in 67 A. S. R. 679, as to when action upon judgment is barred.

Priority of liens.

Cited in *Anderson v. Tuck*, 33 Md. 225, holding judgments recovered at same term entitled to priority in accordance with date of rendition; *Dyson v. Simmons*, 48 Md. 207, holding lien of judgment general and subordinate to prior specific equitable mortgage.

Cited in note in 18 E. R. C. 530, as to acquisition of legal estate by mortgagee so as to entitle him to priority to separate equitable charge in his favor upon same property, and to postpone securities of intermediate encumbrancers.

Tacking bond debt to mortgage.

Cited in reference note in 23 A. D. 596, on tacking bond debt to mortgage or other lien to prejudice of other creditors.

Property subject to levy and sale.

Cited in *Mertz v. Berry*, 101 Mich. 32, 45 A. S. R. 379, 24 L.R.A. 789, 59 N. W. 445; *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044,—holding only property alienable by debtor subject to sale on execution; *Lerew v. Rinehart*, 3 Pa. Co. Ct. 50, holding leasehold estates subject to seizure and sale.

Cited in reference notes in 49 A. D. 233, on liability of lands to execution at common law; 32 A. D. 167, on equitable interests as not subject to execution; 76 A. D. 748, on right to sell equitable rights under execution; 53 A. D. 258, on liability of stock to execution; 81 A. D. 169, as to whether shares of stock are subject to execution; 35 A. S. R. 696, on execution against corporate stock; 36 A. S. R. 270, on exemption of corporate stock from execution; 45 A. D. 641, on liability to execution of husband's estate in lands of wife; 55 A. D. 250, as to whether interest of *cestui que trust* in lands is subject to execution; 38 A. D. 147; 49 A. D. 786,—on leasehold estates as subject to execution; 59 A. D. 566, on sale of lease for years under justice's execution; 41 A. D. 241, on right to levy upon and sell growing crops; 24 A. D. 342; 28 A. D. 567,—on liability of growing crops to be sold under execution; 32 A. S. R. 574, as to what crops are subject to execution.

Cited in notes in 23 L.R.A. 259, on crops as personal property for purpose of levy and sale; 55 A. D. 162, on what growths or crops are subject to execution as personalty.

Interest passing by execution sale.

Cited in reference note in 40 A. S. R. 828, as to what interest of debtor passes by execution sale.

Right of purchaser of crop at execution sale.

Cited in reference note in 83 A. D. 215, on right of purchaser on execution of growing crop to enter premises to gather it.

Limit of time to issue execution.

Cited in reference note in 47 A. D. 596, on effect of execution issued more than year and day after rendition of judgment.

Revival of judgment.

Cited in note in 94 A. D. 226, on scire facias to revive judgment against heirs, devisees, and personal representatives.

— Time for revival.

Cited in note in 94 A. D. 230, as to time within which scire facias to revive judgment must be sued out.

— Effect of revival.

Cited in *Post v. Mackall*, 3 Bland, Ch. 486; *Woodward v. Woodward*, 39 S. C. 259, 39 A. S. R. 716, 17 S. E. 638,—holding revival of lapsed judgment operates prospectively and does not impair intermediate conveyance; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831, holding lapsed judgment cannot be revived so as to affect rights of intervening purchasers.

Cited in reference notes in 39 A. S. R. 721, on effect of revival of judgment liens; 42 A. D. 331, as to how lien of judgment is affected by revival on scire facias; 29 A. D. 754, on judgment lien after revival of judgment; 51 A. D. 567, on effect of revival of judgment by scire facias to continue lien.

Cited in note in 53 L.R.A. 703, on effect, upon existing judgment lien, of proceedings to renew, revive, or extend the judgment.

Enforcement of bidder's liability.

Cited in note in 69 A. D. 370, 371, on modes of enforcement of liability of bidder at equity sale.

Satisfaction of judgment.

Cited in reference notes in 41 A. D. 625; 44 A. D. 738,—on what constitutes satisfaction of judgment.

What are fixtures.

Cited in reference notes in 36 A. D. 557; 37 A. D. 219,—on what constitutes fixtures; 59 A. D. 657, on annexation to realty as criterion of fixtures; 55 A. D. 417, on rule that whatever is annexed to the freehold becomes part thereof and cannot be removed.

Removability of fixtures.

Cited in *L. A. Thompson Scenic R. Co. v. Young*, 90 Md. 278, 44 Atl. 1024, upholding right of tenant to remove trade fixture consisting of scenic railway.

Cited in reference note in 64 A. D. 75, on removal of fixtures affixed by tenant for purpose of trade or ornament and furniture.

Cited in notes in 12 E. R. C. 224, on right of tenant to remove fixtures placed on land; 69 A. D. 515, on tenant's right to remove fixtures after expiration of his term.

Rights as to growing crops.

Cited in *Wootton v. White*, 90 Md. 64, 78 A. S. R. 425, 44 Atl. 1026, holding growing crops pass to purchaser on foreclosure sale as against mortgagor's vendee by bill of sale; *McClellan v. Krall*, 43 Kan. 216, 23 Pac. 100, holding purchaser of growing crop at judicial sale not liable for use of land while crop ripening.

Cited in reference note in 32 A. D. 689, on ownership of crops growing on land at time of testator's death.

Cited in note in 35 A. D. 742, on right to growing crops

Nature of crops.

Cited in reference notes in 82 A. S. R. 770, on severed crops as part of realty; 32 A. S. R. 574, on vegetable productions as part of realty; 50 A. D. 420, on vegetable products becoming personality on severance from realty; 35 A. S. R. 656; 37 A. S. R. 569,—on fruit trees, perennial bushes, and grasses as part of realty.

Nature of vendee's interest in land.

Cited in note in 57 L.R.A. 644, on nature of interest of vendor or vendee in land contract as real or personal property where judgment has been entered against vendee.

Effect of death of party.

Cited in reference notes in 56 A. D. 421, on abatement of action by death of party; 56 A. D. 436, on effect on sheriff's power to levy or sell on death of judgment debtor before or after execution issued.

— On judgment lien.

Cited in reference note in 52 A. D. 378, on effect of death of defendant on judgment lien.

Cited in note in 89 A. D. 242, on judgment lien after defendant's death.

Application of purchase money.

Cited in *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490, holding purchaser of infant's realty sold under decree not required to see to application of purchase money.

Resort to equity to reach assets.

Cited in reference note in 25 A. D. 313, on creditor's right to resort to equity to reach assets.

Necessity of doing equity.

Cited in *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530, holding one seeking to redeem from mortgage must do equity; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263 (dissenting opinion), on necessity that one seeking to recover a legal title must do equity.

22 AM. DEC. 279, PRICE v. TYSON, 3 BLAND, CH. 392.**Right to discovery.**

Cited in reference notes in 45 A. D. 307, on right to discovery in equity to aid action or defense at law; 52 A. D. 132, as to when bill of discovery will be retained.

Cited in notes in 9 E. R. C. 554, on right of party to discovery; 9 E. R. C. 570, on right of court to compel discovery of books or papers.

Answer to bill of discovery.

Cited in reference note in 31 A. D. 197, on answer to bill of discovery.

Necessity of fully answering.

Cited in *Robinson v. Moseley*, 93 Ala. 70, 9 So. 372, holding answer should put in issue all facts relied on in bar of relief sought by bill.

Cited in reference note in 71 A. D. 607, on plaintiff's right to full answer in chancery.

What must be submitted to jury.

Cited in reference note in 50 A. D. 435, on necessity of submitting to jury evidence tending to prove material fact in issue.

Relevancy of evidence.

Cited in reference note in 9 A. S. R. 547, on inadmissibility of circumstances having no direct connection with case.

When matter in answer not scandalous.

Cited in reference note in 98 A. D. 89, on rule that pertinent matter, though scandalous in itself, is not to be so considered.

22 AM. DEC. 293, RICHARDSON v. JONES, 3 GILL & J. 163.**Purchase by person acting in fiduciary capacity.**

Cited in *Mason v. Martin*, 4 Md. 124, holding trustee cannot purchase for himself at his own sale directly or indirectly; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 117; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 A. D. 311,—holding director of corporation not competent to become purchaser of its property.

Cited in reference notes in 64 A. D. 784, on purchase of trust estate on sale by trustee; 44 A. D. 723, on right of trustee to purchase trust property at his own sale for his own benefit; 25 A. D. 399; 39 A. D. 187,—on validity of trustee's purchase at sale of trust property; 53 A. D. 125, on right of agents, trustees, executors, administrators, guardians, and attorneys to purchase for their own benefit.

Right of trustee to avoid his own purchase.

Cited in *Peay v. Capps*, 27 Ark. 160, holding trustee purchasing trust property cannot question the contract; *Benson v. Benson*, 97 Mo. App. 460, 71 S. W. 360, holding purchase of trust property by trustee will not be set aside at his instance.

Accounting by fiduciary.

Cited in reference note in 59 A. D. 423, on liability of director to account for secret profits.

Appeal from interlocutory order.

Cited in reference note in 49 A. D. 595, on appeal from interlocutory order.

Compelling purchaser to complete purchase.

Cited in *Wood v. Mann*, 3 Sumn. 318, Fed. Cas. No. 17,954, sustaining right of court of equity to compel purchaser at master's sale to complete contract; *Warfield v. Dorsey*, 39 Md. 299, 17 A. R. 562.

Cited in reference note in 56 A. S. R. 878, on enforcement of judicial sales.

Cited in note in 69 A. D. 369, 370, 371, on modes of enforcement of liability of bidder at equity sale.

Action to enforce chancery decree.

Cited in *Boyle v. Schindel*, 52 Md. 1, holding action at law not maintainable to recover money decreed to be paid by court of equity within same jurisdiction.

Distinguished in *McKim v. Odom*, 12 Me. 94, holding action for payment of money only maintainable on chancery decree rendered in another state.

Effect of order ratifying sale.

Cited in *Berry v. Foley*, 92 Md. 311, 48 Atl. 146, holding order ratifying sale by trustee entitles purchaser to deed on payment of purchase money.

Cited in reference note in 41 A. D. 633, on confirmation of judicial sales.

Contempt of court.

Cited in reference note in 42 A. D. 162, on what is contempt of court.

Enforcement of bond.

Cited in *Stephens v. Magruder*, 31 Md. 168, holding decree requiring purchaser

to give bond operates to enforce payment of it; *Clagett v. Worthington*, 3 Gill, 83, holding remedy against surety of trustee action at law rather than application of his distributive share.

Distinguished in *Ridgely v. Iglehart*, 6 Gill & J. 49, 25 A. D. 322, holding bond for purchase money lien on land enforceable in equity.

Applicability of statute of limitations.

Cited in *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. 635, holding laches commences from date of discovery of fraud.

Cited in reference note in 30 A. D. 107, on how far fraud prevents running of statute of limitations.

Cited in notes in 51 A. D. 584, on statute of limitations in case of fraud; 25 L.R.A. 567, on how far statutes of limitation will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Resale.

Cited in *Farmers & P. Bank v. Martin*, 7 Md. 342, 61 A. D. 350, holding trustee not entitled to allowance in addition to commissions on resale.

Distinguished in *Clarkson v. Read*, 15 Gratt. 288, holding on failure of purchaser to comply with his bond, court may order a resale.

Criticized in *Rout v. King*, 103 Ind. 555, 3 N. E. 249, holding surety for purchase money may petition for resale.

Ratification by acquiescence.

Cited in *Boeger v. Langenberg*, 42 Mo. App. 7, holding sale or pledge of assets by administrator in payment of his own debt may become binding by acquiescence.

Authoritativeness of decision.

Cited in *Alexander v. Worthington*, 5 Md. 471, holding decision on point supposed to be involved authoritative although not called for by record.

22 AM. DEC. 302, ARNOLD v. COST, 3 GILL & J. 219.

What constitutes forgery.

Cited in *State v. Humphreys*, 10 Humph. 442, holding making with fraudulent intent, instrument which may be prejudicial to rights of another, constitutes forgery; *State v. Woodered*, 20 Iowa, 541, holding material alteration giving new operation to genuine instrument forgery of whole.

Cited in reference notes in 22 A. D. 776; 44 A. D. 67; 65 A. D. 205; 85 A. S. R. 758; 96 A. S. R. 797, 812; 100 A. S. R. 840,—on crime of forgery; 53 A. D. 694; 59 A. D. 155; 60 A. D. 92; 70 A. D. 176; 71 A. D. 706; 74 A. D. 52; 96 A. D. 164; 4 A. S. R. 765; 23 A. S. R. 123, 124; 25 A. S. R. 531; 30 A. S. R. 139; 32 A. S. R. 361; 48 A. S. R. 464; 74 A. S. R. 38; 94 A. S. R. 802; 115 A. S. R. 837; 120 A. S. R. 784,—on what constitutes forgery; 34 A. D. 675, on what is forgery and indictment for; 24 A. D. 443, on nature of crime of forgery; 60 A. S. R. 51, on elements of forgery; 38 A. S. R. 279, on intent as element of forgery; 32 A. S. R. 683, on intent to defraud as essential element of forgery; 32 A. S. R. 683, on similitude necessary to constitute forgery; 28 A. S. R. 930, on use of genuine signature as forgery; 32 A. S. R. 683; 40 A. S. R. 761,—on signing fictitious name as forgery; 4 A. S. R. 765, as to whether forgery may be committed by fraudulently making or altering writing signed by one's self; 52 A. S. R. 191, on instrument signed by agent as forgery; 49 A. S. R. 353, on forgery by signing as agent with pretense of authority; 60 A. D. 92, on writing note for person, inserting excessive amount, as forgery; 66 A. S. R. 323, on forged indorse-

ments of negotiable instruments; 78 A. D. 490, on effect of failure to accomplish fraud on crime of forgery.

Cited in note in 75 A. D. 571, 572, on false entries in pass and account books as forgery.

Subjects of forgery.

Cited in *Smith v. State*, 29 Fla. 408, 10 So. 894, holding writing which if genuine might be of legal efficiency or give rise to legal liability such an instrument as can be forged; *Norton v. State*, 129 Wis. 659, 116 A. S. R. 979, 109 N. W. 531, holding check payable to order of another subject of forgery.

Annotation cited in *State v. Dunn*, 23 Or. 562, 37 A. S. R. 704, 32 Pac. 621, holding note barred by statute of limitations may be subject of forgery.

Cited in reference notes in 96 A. D. 164; 38 A. S. R. 329; 61 A. S. R. 846; 76 A. S. R. 745; 80 A. S. R. 147,—as to what instruments are subjects of forgery; 37 A. S. R. 709; 48 A. S. R. 705,—on writings invalid on their face as subjects of forgery; 76 A. S. R. 742, on forgery of unstamped instrument; 74 A. S. R. 437, on order for merchandise as subject of forgery; 108 A. S. R. 980, on forgery of will of living person.

Cited in notes in 8 A. S. R. 466; 67 A. S. R. 393,—on instruments which may be subject to forgery; 24 L.R.A. 41, on necessity that instrument be subject of legal proceedings to be subject of forgery.

Sufficiency of indictment for forgery.

Cited in reference notes in 47 A. S. R. 258; 77 A. S. R. 636,—on sufficiency of indictment for forgery; 25 A. D. 596, on necessity of showing prejudice by forgery in indictment therefor.

—Averment of extrinsic facts.

Annotation cited in *State v. Evans*, 15 Mont. 539, 48 A. S. R. 701, 28 L.R.A. 127, 39 Pac. 850, holding that extrinsic matter necessary to show fraudulent character of forged instrument must be averred; *Territory v. Delana*, 3 Okla. 573, 41 Pac. 618, holding void instrument not subject of forgery in absence of averment of extrinsic facts.

Evidence of other forgeries.

Cited in reference note in 116 A. S. R. 530, on admissibility of other forgeries in prosecution for forgery.

What words actionable.

Cited in reference note in 61 A. D. 498, as to when words are actionable *per se* as imputing crime.

22 AM. DEC. 322, HANSON v. BARNES, 3 GILL & J. 359.

Abatement of writ by death.

Cited in *Davis v. Oswalt*, 18 Ark. 414, 68 A. D. 182, holding execution issued in defendant's lifetime may be levied on his personality after his death; *Trail v. Snouffer*, 6 Md. 308, holding fieri facias in name of plaintiff deceased at date of writ not enforceable; *Von Puhl v. Rucker*, 6 Iowa, 187, holding heirs and terre-tenants need not be made parties on death of defendant after scire facias placed in hands of officer; *Harris v. Laveille*, 1 Md. Ch. 466, holding on death of judgment debtor after levy of execution scire facias against heirs or terre-tenants unnecessary; *Mundy v. Bryan*, 18 Mo. 29, upholding sale made after defendant's death under levy made before.

Cited in reference notes in 27 A. S. R. 542, on abatement by plaintiff's death; 57 A. S. R. 878, on abatement of action by death of one plaintiff; 42 A. D. 371,

on execution after death of defendant; 48 A. D. 706, on issuance of execution after death of defendant; 38 A. D. 465, on effect of death of defendant after issuance or levy of writ; 56 A. D. 436, on effect on sheriff's power to levy or sell of death of judgment debtor before or after execution issued; 68 A. D. 186, on necessity for revival of judgment after death of party and before issuance of execution; 62 A. D. 768, on validity of executions issued or served after death of defendant or dissolution of defendant corporation.

Cited in note 61 L.R.A. 382, on effect of death of sole judgment debtor after delivery of execution but before its levy.

Scire facias to bring in new party.

Cited in reference note in 52 A. D. 378, as to when scire facias lies to make executors parties.

Return of writ.

Cited in reference note in 38 A. D. 768, on necessity for return of execution.

Order of levy on property.

Cited in reference note in 65 A. D. 480, on duty of sheriff to levy on personalty before realty.

Subjection of lands to sale on execution.

Cited in *Cape Sable Co's Case*, 3 Bland, Ch. 606, holding officer executing writ of fieri facias not obliged to resort first to personal property; *Tessier v. Wyse*, 3 Bland, Ch. 28, holding creditor need not show insufficiency of deceased debtor's personal estate to enable him to resort to realty; *Suckley v. Rotchford*, 12 Gratt. 60, 65 A. D. 240, holding judgment creditor establishing debt in debtor's lifetime not compelled to regard lands as secondarily liable.

Cited in reference note in 49 A. D. 233, on liability of lands to execution at common law.

Judgment, execution, or attachment as lien.

Cited in *Anderson v. Tuck*, 33 Md. 225, holding judgment lien on debtor's real estate from date of rendition; *Jordan v. Reynolds*, 105 Md. 288, 121 A. S. R. 578, 9 L.R.A.(N.S.) 1026, 66 Atl. 37, holding judgment against husband not lien during lifetime of wife on property held by them as tenants by the entirety; *Morton v. Graffin*, 68 Md. 545, 13 Atl. 341, holding attachment not lien on equity of redemption enforceable in equity.

Cited in reference notes in 22 A. D. 668; 23 A. D. 596,—on judgment liens; 22 A. D. 279, on judgment lien on realty.

—When lien attaches.

Cited in reference notes in 41 A. D. 625; 47 A. D. 717,—as to when judgment lien attaches; 27 A. D. 277; 65 A. D. 503, as to time from which execution lien binds property; 27 A. D. 103, as to time from which execution binds personalty; 25 A. D. 154, on time when execution bound defendant's goods; 86 A. D. 783, as to whether execution creditor has lien upon personal property before levy.

Cited in notes in 11 E. R. C. 628, as to when lien of writ of execution attaches; 38 L.R.A. 249, on lien of judgment from time of entry as to conveyance made after beginning of term.

Presumption in regard to acts of public officers.

Cited in *Woodall v. Oden*, 62 Ala. 125, sustaining presumption that public officers prescribed and approved bond in accordance with their duty; *Miller v. Wilson*, 32 Md. 297, holding omission to state that legal notice of sale was given does not impair validity of sheriff's return.

Distinguished in *Hill v. Draper*, 10 Barb. 454, refusing to indulge presumption in favor of acts of public officer to extent of working forfeiture of property.

Notice of public sale.

Cited in *Simson v. Eckstein*, 22 Cal. 580, holding proof of notice of sale under power in mortgage unnecessary.

Cited in note in 39 A. D. 573, on sufficiency of notice of sale on execution.

Applicability of statute of frauds to sheriff's sale.

Cited in notes in 41 A. D. 52; 43 A. D. 531,—on applicability of statute of frauds to sheriffs' sales.

—Memorandum to satisfy statute of frauds.

Cited in *Sanborn v. Chamberlin*, 101 Mass. 409, holding sheriff's return of sale of equity of redemption sufficient memorandum to take sale out of statute of frauds; *State, Joslin, Prosecutor, v. Ervien*, 50 N. J. L. 39, holding written assignment necessary where sheriff sells leasehold estate.

Cited in note in 43 A. D. 531, on sheriff's return as sufficient memorandum of sale.

22 AM. DEC. 329, TURNER v. WALKER, 3 GILL & J. 377.

Issuance or return of process.

Cited in *Booth v. Campbell*, 15 Md. 569, upholding right to execution for residue of judgment; *Griffith v. Aetna F. Ins. Co.* 7 Md. 102, holding court has power to order an attachment by way of execution upon its own judgment; *Ex parte Watkins*, 7 Pet. 568, 8 L. ed. 786, holding person taken under *capias ad satisfaciendum* should be brought into court and committed by its order.

Cited in reference note in 25 A. D. 600, on issue of *capias ad satisfaciendum* for residue before issue and return of *feri facias*.

Distinguished in *Knight v. Frost*, 14 Mo. App. 331, holding return of *nulla bona* made before return day not absolute nullity.

Action for malicious prosecution.

Cited in *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975, holding action for malicious prosecution maintainable for maliciously procuring arrest without probable cause.

Cited in reference notes in 24 A. D. 619, on actions for malicious prosecution; 24 A. D. 683; 30 A. D. 621,—on case as proper remedy for malicious prosecution or arrest; 34 A. D. 129, on requisites to maintenance of action for malicious prosecution and evidence of such requisites.

Cited in note in 13 L.R.A. 60, on action for malicious prosecution in case of arrest.

—Civil suit.

Cited in *Tallant v. Burlington Gaslight Co.* 36 Iowa, 262, holding action maintainable at common law for malicious prosecution of civil suit.

Cited in reference note in 86 A. D. 215, on actions for prosecution of civil suit or process.

Distinguished in *McNamee v. Minke*, 49 Md. 122, holding action not maintainable for malicious prosecution of ejectment action where plaintiff failed to recover all he claimed; *Clements v. Odorless Excavating Apparatus Co.* 67 Md. 461, 1 A. S. R. 409, 10 Atl. 442, denying right to maintain action for malicious prosecution of civil suit in which judgment for plaintiff therein was reversed on appeal; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323, hold-

ing action for malicious prosecution not maintainable because of alleged slanderous allegations in bill filed against corporation.

—Termination of prosecution.

Cited in *Rothschild v. Meyer*, 18 Ill. App. 284; *Ragsdale v. Bowles*, 16 Ala. 62,—holding prosecution complained of must have ended; *Boyd v. Cross*, 35 Md. 194, holding plaintiff must show that prosecution is terminated and was malicious and without probable cause.

Cited in note in 2 L.R.A.(N.S.) 929, as to when action is sufficiently at an end to support a suit for malicious prosecution.

Proof of malice.

Cited in *Mitchell v. Silver Lake Lodge*, 29 Or. 294, 45 Pac. 798, holding malice must be shown in action for malicious attachment.

Cited in reference note in 27 A. S. R. 31, on evidence to prove malice in malicious prosecution.

Cited in notes in 26 A. S. R. 149, on malice as element in action of malicious prosecution; 26 A. S. R. 156, on admissibility in malicious prosecution of evidence of ill-will of prosecutor; 16 E. R. C. 756, on burden of proving malice and want of probable cause in action for malicious prosecution.

Implying malice.

Cited in *Garvey v. Wayson*, 42 Md. 178; *Hamilton v. Smith*, 39 Mich. 222; *Straus v. Young*, 36 Md. 246,—holding malice inferable from want of probable cause for prosecution complained of.

Cited in reference note in 44 A. D. 126, as to when malice will be presumed.

Cited in note in 26 A. S. R. 152, as to inferring malice in action of malicious prosecution.

Want of probable cause.

Cited in *Medcalfe v. Brooklyn L. Ins. Co.* 45 Md. 198; *Center v. Spring*, 2 Iowa, 393,—holding want of probable cause must be shown in action for malicious prosecution.

Cited in reference notes in 36 A. D. 586, on malice and want of probable cause in malicious prosecution; 25 A. D. 105; 35 A. D. 205; 61 A. D. 580,—on necessity that want of probable cause be shown in action for malicious prosecution or malicious arrest; 28 A. D. 257; 29 A. D. 358, 516; 30 A. D. 621,—on necessity of concurrence of malice and want of probable cause to support action for malicious prosecution; 24 A. D. 683, on necessity of alleging want of probable cause.

Malice and motive as questions for jury.

Cited in *Vinal v. Core*, 18 W. Va. 1, holding malice question of fact for jury; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 57 A. R. 318, 3 Atl. 306, holding motive and intent of party question for jury; *Schindel v. Schindel*, 12 Md. 108, holding jury may consider motive of trespasser on question of damages.

Cited in reference notes in 30 A. D. 621; 18 A. S. R. 493,—on question of malice for jury.

Cited in note in 26 A. S. R. 152, on malice in action of malicious prosecution as question for jury.

Advice of counsel as defense.

Cited in *Chandler v. McPherson*, 11 Ala. 916, holding advice of counsel defense in action for malicious prosecution if fairly sought on real facts; *Leaird v. Davis*, 17 Ala. 27; *Turner v. O'Brien*, 5 Neb. 542,—holding advice of counsel fairly obtained rebuts inference of malice.

Cited in notes in 26 A. S. R. 144; 18 L.R.A.(N.S.) 53; 25 L. ed. U. S. 117,—on advice of counsel as defense in action for malicious prosecution; 18 L.R.A.(N.S.) 67, on correctness of advice given by counsel as affecting right to rely on the same as defense to action for malicious prosecution; 18 L.R.A.(N.S.) 63n, on motive of prosecutor as affecting right to rely on advice of counsel as defense to action for malicious prosecution.

Belief of party as defense.

Cited in note in 26 A. S. R. 140, on belief of accuser as defense to action for malicious prosecution.

Pleading in action for malicious prosecution.

Cited in reference notes in 39 A. S. R. 617, on pleading malice in action for malicious prosecution; 13 A. S. R. 381, on necessity that complaint in malicious prosecution state that prosecution was malicious and plaintiff acquitted.

Cited in notes in 26 A. S. R. 152, on plaintiff's pleadings in malicious prosecution; 26 A. S. R. 153, on plaintiff's pleadings in malicious prosecution.

Recovery upon evidence.

Cited in *State use of Gaither v. Gaither*, 11 Gill & J. 160, holding plaintiff's recovery must be based upon the pleadings and evidence not upon the evidence alone.

Cited in reference notes in 50 A. D. 67, on variance between cause of action alleged and that proved; 91 A. D. 407, on recovery upon evidence of good cause of action not averred in complaint; 100 A. D. 297, on right of party setting up one cause of action to recover upon another.

Wrongful enforcement or abuse of process.

Cited in *Deal v. Harris*, 8 Md. 40, 63 A. D. 686, holding justice of peace not liable for enforcement of erroneous judgment rendered within his jurisdiction.

Distinguished in *Bartlett v. Christilf*, 69 Md. 219, 14 Atl. 518, holding statements made in proceeding to remove receiver not malicious abuse of process.

22 AM. DEC. 337, BOSLEY v. CHESAPEAKE INS. CO. 3 GILL & J. 450.

Propriety of instruction.

Cited in *Adams v. Capron*, 21 Md. 186, 83 A. D. 566, holding instruction erroneous when founded on hypothesis precluding jury from finding facts impairing right of recovery; *Haines v. Pearce*, 41 Md. 221, holding instruction withdrawing explanatory facts from jury erroneous; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088, holding instruction that plaintiff entitled to recover if jury find certain facts withdraws other facts from jury; *Winner v. Penniman*, 35 Md. 163, 6 A. R. 385, holding conclusion arrived at in instruction on segregated facts must be consistent with truth of other facts in evidence.

Cited in reference note in 26 A. D. 433, on refusal of instructions asked, on hypothetical statement of facts.

Abandonment of insured vessel.

Cited in reference notes in 40 A. D. 469, on abandonment in insurance; 28 A. D. 252; 29 A. D. 576,—on abandonment of insured vessel; 40 A. S. R. 183, on effecting abandonment in cases of marine insurance; 33 A. D. 733, on necessity of making abandonment within reasonable and convenient time after loss.

Cited in notes in 1 E. R. C. 130, on right to abandon upon mere apprehension of total loss; 1 E. R. C. 36, on stranding as justifying abandonment of ship.

— Notice of.

Cited in *McConochie v. Sun Mut. Ins. Co.* 26 N. Y. 477, holding notice that cargo very seriously damaged insufficient to show constructive total loss; *Radcliff v. Coster*, Hoff. Ch. 98, holding offer to abandon must be founded on information of sufficient facts to justify abandonment.

Cited in note in 1 E. R. C. 45, on necessity of notice of abandonment to convert constructive into actual total loss.

Nonprejudicial error as ground of reversal.

Cited in *McNulty v. Batty*, 2 Pinney (Wis.) 53, refusing to reverse judgment for error not prejudicial; *Doe ex dem. Commyns v. Latimer*, 2 Fla. 71; *Latterett v. Cook*, 1 Iowa, 1, 63 A. D. 428,—refusing to disturb judgment for erroneous admission of evidence not prejudicial; *Rawlings v. State*, 2 Md. 201; *State v. Stanford*, 20 Ark. 145,—holding judgment will not be reversed for matter of form which is not prejudicial.

Cited in reference note in 31 A. D. 116, on refusal to reverse for nonprejudicial errors.

— In instructions.

Cited in *Keener v. Harrod*, 2 Md. 63, 56 A. R. 706; *Glenn v. Rogers*, 3 Md. 312,—refusing to reverse judgment for erroneous but not prejudicial instruction.

Cited in reference note in 50 A. D. 681, on necessity that actual or probable injury from erroneous instruction be shown to warrant reversal.

Cited in notes in 37 A. D. 714, on what errors in instructions warrant reversal; 99 A. D. 132, on necessity for affirmative showing of error in giving or refusing instructions.

Affidavit or testimony of juror.

Cited with special approval in *Browne v. Browne*, 22 Md. 110, holding jurors cannot be heard to impeach their verdict for misbehavior or mistake.

Cited in *Cook v. Sypher*, 3 Iowa, 484, holding affidavit of juror not receivable to impeach verdict; *Oregon Cascade R. Co. v. Oregon Steam Nav. Co.* 3 Or. 178, holding affidavit of juror inadmissible to show mistake in making up verdict; *Gardner v. Cumming*, Ga. Dec. Pt. 1, p. 1, holding affidavit of juror inadmissible to impeach verdict by showing what passed in jury room; *Ford v. State*, 12 Md. 514, holding jurors cannot testify to motives upon which they joined in verdict; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479, holding testimony of jurors assessing damages in condemnation proceedings receivable on review on all subjects relating to controversy.

Distinguished in *Wright v. Mississippi & I. Teleg. Co.* 20 Iowa, 195, holding affidavit of juror receivable to avoid verdict for any matter not essentially inherent in verdict.

22 AM. DEC. 350, CARROLL v. LEE, 3 GILL & J. 504.**Separate estate of married woman.**

Cited in reference notes in 40 A. D. 444, as to what is wife's separate property; 10 A. S. R. 288, on right of married women to hold and dispose of separate property; 56 A. D. 782, on necessity of trustee of married woman's separate property; 37 A. D. 440, on right of wife to acquire separate property without intervention of trustee; 29 A. D. 68, on married woman's right to hold separate property in equity through intervention of trust though no trustee was appointed.

Cited in note in 39 A. D. 556, on what is wife's separate property.

— **Gifts to her separate use.**

Cited in *Hutchins v. Dixon*, 11 Md. 29, upholding gift of separate estate to wife without intervention of trustee; *Chew v. Beall*, 13 Md. 348, upholding parol gift, accompanied with delivery of negro slave for separate use of *feme covert*; *Brandt v. Mickle*, 28 Md. 436, holding intent to transfer separate interest must clearly appear on gift by husband for separate use of wife; *Bayne v. State*, 62 Md. 100, holding money not shown to have come to wife as her separate estate vests in husband.

Cited in reference note in 31 A. D. 502, on validity of gift to wife's separate use.

Cited in note in 29 A. D. 103, on requisites of gift to wife's separate use.

Chancery jurisdiction.

Cited in *Keyser v. Rice*, 47 Md. 203, 28 A. R. 448, upholding chancery jurisdiction where property in controversy is within state although claimant resides abroad; *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 A. D. 300, holding decree affecting personalty within state may be valid as to resident defendants though void as to nonresidents.

Cited in reference note in 48 A. D. 320, on jurisdiction of court over property within state.

— **Over nonresidents or property outside of state.**

Cited in *Schmaltz v. York Mfg. Co.* 204 Pa. 1, 93 A. S. R. 782, 59 L.R.A. 907, 53 Atl. 522, sustaining right of court of equity having jurisdiction of all parties to determine rights to property in another state.

Cited in reference note in 20 A. S. R. 212, on jurisdiction over nonresidents and their property.

Cited in notes in 6 A. S. R. 189, on equity jurisdiction over nonresidents; 76 A. D. 666, on jurisdiction of foreigners and their property; 67 A. D. 96, on power of court to compel party to exercise his control over property or persons situated in another state.

Distinguished in *Columbia National Sand Dredging Co. v. Morton*, 28 App. D. C. 288, 7 L.R.A. (N.S.) 114, 8 A. & E. Ann. Cas. 511, denying right of equity to restrain trespass on lands in another state where question of title involved.

Enforcement of decree.

Cited in note in 67 A. D. 101, on means of enforcement of decree concerning foreign subject-matter.

Appearance as waiver.

Cited in *Brooks v. Delaplaine*, 1 Md. Ch. 351; *Brown v. Bank of Mississippi*, 31 Miss. 454,—holding appearance, waiver of objection to jurisdiction.

Cited in reference note in 54 A. D. 449, on waiver of want of jurisdiction by defendant by his appearance and plea in bar.

Running of statute of limitations.

Cited in *Hittson v. Davenport*, 3 Colo. 597, holding parol promise insufficient to take debt upon specialty out of statute of limitations; *Mullikin v. Duvall*, 7 Gill & J. 355, holding unreturned execution will not prevent statute of limitations running against judgment.

22 AM. DEC. 353, BOSTON v. BINNEY, 11 PICK. 1.

When action for use and occupation lies.

Cited in *Kittredge v. Peaslee*, 3 Allen, 235; *Central Mills Co. v. Hart*, 124 Mass. 123; *Hurley v. Lamoreaux*, 29 Minn. 138, 12 N. W. 447; *Dudding v. Hill*, Am. Dec. Vol. III.—73.

15 Ill. 61,—holding action for use and occupation only lies where there is contract express or implied; *Crowell v. Crane*, 7 Barb. 191, holding action for use and occupation will not lie where circumstances rebut implication of promise to pay rent; *Merrill v. Bullock*, 105 Mass. 486, holding action for use and occupation not sustainable against one not claiming under plaintiff; *Alton v. Pickering*, 9 N. H. 494, holding occupant recognizing title of another liable for use and occupation although title in controversy with third person; *Ward v. Bull*, 1 Fla. 311, holding demise must be shown to support action for use and occupation; *Brooks v. Allen*, 146 Mass. 201, 15 N. E. 584, holding firm not liable for use and occupation under lease by which one partner was to pay the rent; *Warren v. Ferdinand*, 9 Allen, 357, holding action for use and occupation not maintainable for rent due under written lease; *Holmes v. Williams*, 16 Minn. 164, Gil. 146, holding action for use and occupation will not lie where defendant's possession not unlawful; *Woodbury v. Woodbury*, 47 N. H. 11, 90 A. D. 555, holding vendor may maintain against defaulting purchaser either trespass or assumpsit for use of premises; *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770; *Preston v. Hawley*, 139 N. Y. 296, 34 N. E. 906,—holding vendor retaining possession after conveyance not liable for use and occupation.

Cited in reference notes in 23 A. D. 407, on assumpsit for use and occupation; 80 A. D. 460, on assumpsit for use and occupation where defendants' holding is adverse.

Cited in note in 46 A. D. 289, on action for use and occupation.

—Against tenant at will.

Distinguished in *Gould v. Thompson*, 4 Met. 224, holding assumpsit for use and occupation lies against tenant at will.

Rebuttal of implied contract.

Cited in *Holmes v. Williams*, 16 Minn. 164, Gil. 146, holding adverse possession of land rebuts implied contract.

Controverting landlord's title.

Cited in *Cobb v. Arnold*, 8 Met. 398, holding tenant cannot controvert landlord's title; *Miller v. Lang*, 99 Mass. 13, holding tenant holding over cannot deny landlord's title without notice or surrendering possession; *Appleton v. Ames*, 150 Mass. 34, 5 L.R.A. 206, 22 N. E. 69, holding notice to quit rendered unnecessary by disclaimer of tenancy.

Cited in notes in 89 A. S. R. 113, on actions in which estoppel to deny landlord's title may be asserted; 13 A. D. 71, on duration of estoppel to deny title created by possessor's acceptance of lease from claimant.

Notice to quit.

Cited in note in 15 E. R. C. 656, on necessity of notice to tenant to quit where he disclaims to hold under landlord.

Rental contract as binding estate of decedent.

Cited in *King v. Woodruff*, 23 Conn. 56, 60 A. D. 625, holding estate bound by terms of contract as to payment of rent to decedent.

Right to try title to land in assumpsit.

Cited in *Leal v. Terbush*, 52 Mich. 100, 17 N. W. 713, holding assumpsit will not lie to try title to land; *Sampson v. Shaeffer*, 3 Cal. 196, holding title to land cannot be tried in assumpsit for use and occupation.

Cited in reference note in 50 A. D. 791, on trial of title in assumpsit for use and occupation.

Cited in note in 89 A. D. 428, 429, on assumpsit not being proper action to try title.

Distinguished in *Tamm v. Kellogg*, 49 Mo. 118, holding party claiming land may sue for money had and received, another receiving compensation on condemnation of the land.

22 AM. DEC. 359, BULGER v. ROCHE, 11 PICK. 36.

Right to recover on claim barred by foreign statute.

Cited in *Thompson v. Reed*, 75 Me. 404, holding action maintainable on foreign contract barred by foreign statute; *Langston v. Aderhold*, 60 Ga. 376, holding claim barred by statute of state where made may be recovered in foreign state.

Cited in reference note in 48 A. D. 56, on effect of statute of limitations of another state.

Cited in notes in 22 A. D. 363, on demands barred by law of country where they originated; 59 A. S. R. 878, on right to prosecute cases barred by foreign statute of limitations; 59 A. S. R. 885, on injunction against actions barred by statute of limitations of other state.

Cited as changed by statute in *Hays v. Cage*, 2 Tex. 501, holding claim barred by foreign law unenforceable against party removing to state.

Disapproved in *Goodman v. Munks*, 8 Port. (Ala.) 84, holding action not maintainable on contract barred by statute of limitations of state where made.

Lex fori as governing remedy and limitation.

Cited in *Hoag v. Dessan*, 1 Pittsb. Rep. 390; *Brooke v. New York*, L. E. & W. R. Co. 108 Pa. 529, 56 A. R. 235, 1 Atl. 206, 16 W. N. C. 514, 16 Pittsb. L. J. N. S. 501, 42 Phila. Leg. Int. 417,—holding remedy and whatever relates to limitation of actions determined by *lex fori*; *Lindsay v. Hill*, 66 Me. 212, 22 A. R. 564, holding remedies for enforcing contracts regulated by law of forum; *Pillet v. Edgar*, 4 Rob. (La.) 274, holding proceeding by scire facias to render judgment executory remedial and governed by *lex fori*; *Carver v. Adams*, 38 Vt. 500, holding foreign statute prohibiting suit on set-off not pleaded remedial and local; *Brigham v. Bigelow*, 12 Met. 268; *Thibodeau v. Levassuer*, 36 Me. 362,—holding law of forum governs time of limitation; *Morgan v. Camden & Atlantic R. Co.* 18 Phila. 384, 43 Phila. Leg. Int. 152, 18 W. N. C. 128, 2 Pa. Co. Ct. 97, holding *lex fori* governs all question of limitation whether action upon tort or contract; *Belden v. Blackman*, 118 Mich. 448, 76 N. W. 979, holding statute of limitations applicable to cause of action which accrued without state between nonresidents; *Gilman v. Cutts*, 23 N. H. 376, holding action governed by statute of limitations in force at its commencement; *Blackburn v. Morton*, 18 Ark. 384, holding parties within territorial jurisdiction of court bound by local laws as to prescriptive period.

Cited in notes in 74 A. S. R. 877; 95 A. S. R. 661,—on conflict of laws as to statute of limitations; 6 L.R.A.(N.S.) 659, on law governing limitation of actions on contract; 48 L.R.A. 628, on statute of limitations governing actions on contract in another state or country in absence of statutory provisions in forum as to effect of bar of other state.

When statute begins to run.

Cited in *Van Schuyver v. Hartman*, 1 Alaska, 431, holding statute of limitations of forum does not begin to run until debtor comes within jurisdiction; *Tagart v. Indiana*, 15 Mo. 209, holding statute of forum runs in favor of debtor as against foreign contract only from time of his removal to state

Annotation cited in *Van Schuyver v. Hartman*, 1 Alaska, 431, on when statute begins to run on right of action on foreign contract.

Extinguishing debt or barring remedy.

Cited in *Sichel v. Carrillo*, 42 Cal. 493; *Re Shepard*, 1 Nat. Bankr. Reg. 439, Fed. Cas. No. 12,753,—holding statute of limitations does not extinguish debt but only bars remedy; *Chapin v. Freeland*, 142 Mass. 383, 56 A. R. 701, 8 N. E. 128 (dissenting opinion); *Currier v. Studley*, 159 Mass. 17, 33 N. E. 709 (dissenting opinion); *Mulvane v. Sedgley*, 63 Kan. 105, 55 L.R.A. 552, 64 Pac. 1038 (dissenting opinion),—on statute of limitations as extinguishing debt; *Perkins v. Guy*, 55 Miss. 153, 30 A. R. 510, holding action maintainable on foreign contract barred by foreign statute not extinguishing debt; *Freeman v. Baldwin*, 13 Ala. 246, denying right to redeem from mortgage when such right extinguished by laws of state where contract made.

Distinguished in *Brown v. Parker*, 28 Wis. 21, denying right to recover on foreign contract extinguished by statute of limitations of state where made.

Effect of absence or nonresidence on running of limitations.

Cited in *Hatch v. Spofford*, 24 Conn. 432, holding in action on foreign contract debtor's period of absence to be deducted in computing period of limitations; *Dudley v. Kimball*, 17 N. H. 498; *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574; *Brown v. Bicknell*, 1 Pinney (Wis.) 226, *Burnett (Wis.)* 65; *Power v. Hathaway*, 43 Barb. 214,—holding statute of limitations not available to non-resident not within state for prescriptive period; *Mason v. Union Mills Paper Mfg. Co.* 81 Md. 446, 48 A. S. R. 524, 29 L.R.A. 273, 32 Atl. 311, holding foreign contract between nonresidents within provision excluding absent debtor from benefit of statute of limitations; *Brigham v. Bigelow*, 12 Met. 268, holding statute of limitations does not run in favor of absent debtor not leaving property within state; *Blackburn v. Blackburn*, 124 Mich. 190, 83 A. S. R. 325, 82 N. W. 835, holding exception of time of absence from state from prescriptive period applies where both parties remove to another state; *Canadian P. R. Co. v. Johnston*, 25 L.R.A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738, holding claim not barred by foreign statute where party left foreign country before prescriptive period elapsed; *Wynn v. Lee*, 5 Ga. 217, holding statute of limitations runs against cause of action for recovery of personalty accruing to nonresident; *Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 A. D. 393, holding foreign corporation "person" within provision excluding time of absence from state from prescriptive period; *McMillan v. Wood*, 29 Me. 217, holding word "returned" in statute of limitations applies to person never within state; *Sissions v. Bicknell*, 6 N. H. 557, holding provision excluding from prescriptive period time of residence without state applies to persons never inhabitants; *Hobart v. Upton*, Fed. Cas. No. 6,547, holding statutory right of ward to sue to recover estate within five years after return to territory applies to one never residing in it; *Whitney v. Goddard*, 20 Pick. 304, 32 A. D. 216, holding citizen of another state not person "beyond sea" within statute of limitations; *Snoddy v. Cage*, 5 Tex. 106 (dissenting opinion), on effect of nonresidence upon right to sue.

Cited in reference note in 52 A. D. 782, on running of limitations in favor of nonresident debtor from time of his coming within state.

Cited in notes in 13 A. D. 369; 36 A. D. 73,—on effect of absence from state on operation of statute of limitation.

22 AM. DEC. 366, WILLIAMS v. HENSHAW, 11 PICK. 79, Reaffirmed in later case between same parties in 12 Pick. 378, 25 Am. Dec. 614.

Necessity of final settlement between partners.

Cited in *Mickle v. Peet*, 43 Conn. 65; *Wright v. Eastman* 44 Me. 220; *Williams v. Henshaw*, 12 Pick. 378, 23 A. D. 614; *Scott v. Caruth*, 50 Mo. 120; *Dowling v. Clarke*, 13 R. I. 134; *Ainey's Appeal*, 11 W. N. C. 568, 2 Pennyp. 192,—holding final settlement essential to recovery of balance between partners; *Fry v. Potter*, 12 R. I. 542, sustaining assumpsit by executor to recover ascertained losses on land speculation; *Couilliard v. Eaton*, 139 Mass. 105, 28 N. E. 579, holding action not maintainable between partners on partnership transaction when firm affairs unsettled; *Gomersall v. Gomersall*, 14 Allen, 60, holding action between partners for share of profits not maintainable prior to settlement of accounts; *Clarke v. Mills*, 36 Kan. 393, 13 Pac. 569, holding partner may maintain action against copartner for contribution in absence of accounting where firm transactions limited; *Peabody v. Allen*, 194 Mass. 345, 80 N. E. 582, holding cause of action for half of loss incurred on joint venture arises when amount determined.

— Action effecting final settlement.

Cited in *Sikes v. Work*, 6 Gray, 433, holding assumpsit maintainable between partners to recover balance where action will effect final settlement; *Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652, 8 A. & E. Ann. Cas. 766, holding partner's share of single item of profits recoverable at law where everything else settled up; *Gibson v. Moore*, 6 N. H. 547, holding action between partners maintainable on final adjustment of specific portion of partnership transactions.

Cited in notes in 12 A. D. 651, on action between partners on final settlement; 23 A. D. 619, on action at law on covenant in partnership articles.

Relief in equity.

Cited in *Maguire v. Pingree*, 30 Me. 508, holding joint owner seeking settlement of disputed account should resort to equity; *Ryder v. Wilcox*, 103 Mass. 24, holding action at law not maintainable for exclusion of partner from partnership business or refusal to account; *McGehee v. Dougherty*, 10 Ala. 863, denying right of partner to maintain bill against copartner for sum found due on settlement; *Hyer v. Richmond Traction Co.* 168 U. S. 471, 42 L. ed. 547, 18 Sup. Ct. Rep. 114, denying specific performance of contract to secure franchise and divide profits.

Disapproved in *Price v. Drew*, 18 Fla. 670, holding remedy of partner making advances and settling losses lies in equity unless balance struck.

Condition precedent to action.

Cited in *Dickinson v. Granger*, 18 Pick. 315, holding assumpsit maintainable to recover final balance of partnership account although plaintiff has not paid debts assumed; *Hill v. Fuller*, 188 Mass. 195, 74 N. E. 361, holding joint debtor may maintain bill for contribution although joint debt not fully paid.

Liability on contract — Express contract.

Cited in *Collamer v. Foster*, 26 Vt. 754, holding partner liable to copartner on express contract; *Newman v. Tichenor*, 88 Ill. App. 1; *Truitt v. Baird*, 12 Kan. 420,—holding action at law maintainable by partner against copartner on express promise to contribute capital; *George v. Benjamin*, 100 Wis. 622, 69 A. S. R. 963, 76 N. W. 619, holding action maintainable between partners on express promise to contribute money to enterprise; *Sprout v. Crowley*, 30 Wis. 187, holding part-

ner liable to copartner on express agreement to repay advances; *Edwards v. Remington*, 51 Wis. 336, 8 N. W. 193, holding partner agreeing to pay firm indebtedness liable to copartner for failure to do so; *Rockwell v. Wilder*, 4 Met. 556, holding partner may enforce note given by copartner for sum not exceeding balance due in absence of final settlement; *Costello v. Crowell*, 134 Mass. 280, sustaining payee's right to sue on note given to secure performance of agreement to purchase and sell lands.

Distinguished in *Capen v. Barrows*, 1 Gray, 376, denying right of partner to sue at law on covenants in partnership articles where concerns of firm not closed.

— **Implied promise.**

Cited in *Rowland v. Boozer*, 10 Ala. 690, holding distribution of assets of company promise to pay indebtedness of individual members to firm; *Cochrane v. Allen*, 58 N. H. 250, holding action maintainable between partners on account stated in absence of express promise; *Rose v. Bradley*, 91 Wis. 619, 65 N. W. 509, holding partner may sue copartner at law to recover agreed balance in absence of express promise to pay.

Sums advanced for common benefit.

Cited in *Morgan v. Nunes*, 54 Miss. 308, sustaining right of partner to sue copartner for sums advanced as his share of capital; *Wetherbee v. Potter*, 99 Mass. 354, holding partner may recover without settlement of final balance money advanced to make up copartner's share of capital; *Currier v. Rowe*, 46 N. H. 72, sustaining right of partner to recover sums advanced to copartner to launch partnership; *Dickinson v. Williams*, 11 Cush. 258, 59 A. D. 142, holding tenant in common may sue cotenant for money advanced for common benefit; *Wheeler v. Wheeler*, 111 Mass. 247, holding heir may sue coheirs at law for sums advanced for common benefit.

Refusal of partner to permit launching of business.

Cited in *Hill v. Palmer*, 56 Wis. 123, 43 A. R. 703, 14 N. W. 23, holding partner wrongfully refusing to permit firm to launch business liable to copartner.

22 AM. DEC. 370, KING v. FOWLER, 11 PICK. 302.

Presumption as to death.

Cited in reference note in 53 A. D. 402, on presumption of death from absence.

Cited in note in 92 A. D. 705, on presumption of death.

— **Death without issue.**

Cited in *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088, holding law will not presume marriage or issue; *Emerson v. White*, 29 N. H. 482, holding there is no presumption of fact that person did or did not die childless; *Bank of Louisville v. Public School Trustees*, 83 Ky. 219, holding presumption of death without issue must depend on circumstances of particular case.

Cited in notes in 12 L.R.A. 839, on admissibility of hearsay evidence as to issue or want of issue; 8 E. R. C. 557, on presumption that person died without issue.

22 AM. DEC. 372, SEAVER v. PHELPS, 11 PICK. 304.

Effect of knowledge or ignorance of insanity.

Cited in *Henry v. Fine*, 23 Ark. 417, holding contract of lunatic, not for necessities, not binding where other party aware of disability; *Alexander v. Haskins*, 68 Iowa, 73, 25 N. W. 935, setting aside unfair conveyance of person known by

grantee to be insane; *Merritt v. Merritt*, 27 App. Div. 208, 50 N. Y. Supp. 604, holding contract with agent of known lunatic not binding; *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202, 86 A. S. R. 167, 40 L.R.A. 250, 29 S. E. 182, holding bank unaware of fact of insanity not protected in paying check of person adjudged insane; *Van Patton v. Beals*, 46 Iowa, 62, holding promissory note of lunatic invalid although payee ignorant of his incapacity; *Lincoln v. Buckmaster*, 32 Vt. 652, denying right to recover for services or money furnished to person not known to be lunatic.

Cited in note in 15 A. D. 367, on invalidity of contract of insane person where insanity is known to other party.

Whether agreement of person lacking contractual capacity void or voidable.

Cited in *Burke v. Allen*, 29 N. H. 106, 61 A. D. 642, holding contract of insane person voidable but not absolutely void; *Cooney v. Lincoln*, 21 R. I. 246, 79 A. S. R. 799, 42 Atl. 867, holding contract made by one lacking mental capacity merely voidable; *Cundall v. Haswell*, 23 R. I. 508, 51 Atl. 426, holding purchase of real estate by lunatic on execution sale voidable; *Allis v. Billings*, 6 Met. 415, 39 A. D. 744, holding deed of insane person voidable only; *Wolcott v. Connecticut General L. Ins. Co.* 137 Mich. 309, 100 N. W. 569, holding deed of lunatic not absolutely void but merely voidable; *Paul v. Smith*, 41 Mo. App. 275, holding contract of infant not for necessities voidable.

Cited in reference notes in 70 A. D. 200, on validity of contracts with infant; 66 A. S. R. 173, on validity of contracts with insane persons.

Cited in notes in 71 A. S. R. 425, on contracts of insane persons; 19 L.R.A. 489, on validity of a deed made by an insane person; 6 E. R. C. 76, on validity of contract between lunatic and one without knowledge of his insanity.

Avoiding contract of person incompetent to contract.

Cited in *Thornton v. Appleton*, 29 Me. 298, holding contract of insane party may be avoided; *Dicken v. Johnson*, 7 Ga. 484, holding equity will set aside deed of insane person; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 A. R. 848, 30 N. W. 290, holding drunkard in complete state of intoxication without capacity to contract; *Hall v. Butterfield*, 59 N. H. 354, 47 A. R. 209, holding infant's liability on contract limited by benefit received.

Cited in reference note in 47 A. S. R. 465, on disaffirmance of contracts with insane persons.

Cited in note in 16 E. R. C. 741, on avoidance of contract of alleged insane person.

— Contract for necessities.

Cited in *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460, upholding contract for necessities made in good faith with adjudged lunatic; *Sawyer v. Lufkin*, 56 Me. 308, holding estate of insane person of full age under guardianship liable for necessities; *Hosler v. Beard*, 54 Ohio St. 398, 56 A. S. R. 720, 35 L.R.A. 161, 43 N. E. 1040, holding promissory note of idiot invalid unless given for necessities or adequate consideration; *State v. Pike*, 49 N. H. 399, 6 A. R. 533, holding insanity ground for avoiding contract not for necessities.

— Executed or executory contract.

Cited in *Young v. Stevens*, 48 N. H. 133, 97 A. D. 592, 2 A. R. 202, holding insanity bar to action upon either executed or executory contract; *Allen v. Berryhill*, 27 Iowa, 534, 1 A. R. 309 (dissenting opinion), on enforcement of executory contract made by insane person.

Cited in note in 15 A. D. 366, on validity of executed contracts of insane persons.

— Who may avoid contract.

Cited in *Hovey v. Hobson*, 53 Me. 451, 89 A. D. 705, sustaining right of heirs of insane person to avoid latter's unratified deed as against grantee; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735, setting aside unconfirmed mortgage of insane person at suit of heirs; *Carrier v. Sears*, 4 Allen, 336, 81 A. D. 707, holding payee's procurement of indorsement of note by insane person no defense in action against maker.

Equity jurisdiction over estates of incompetents.

Cited in note in 1 L.R.A. 611, on equity jurisdiction over estates of idiots and lunatics.

Setting aside judgment.

Cited in *Leach v. Marsh*, 47 Me. 548, 74 A. D. 503, setting aside judgment by default against insane person; *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145, setting aside judgment recovered against insane person on note given without consideration.

22 AM. DEC. 375, COLTON v. SMITH, 11 PICK. 311.

Identity of interests of mortgagor and mortgagee.

Cited in *Bemis v. Clark*, 11 Pick. 452, holding interests of mortgagor and mortgagee distinct for many purposes; *Martin v. Jackson*, 27 Pa. 504, 67 A. D. 489, holding possession of mortgagor is possession of mortgagee; *Ayres v. Waite*, 10 Cush. 72, holding mortgagor cannot disseise mortgagee.

Effect and conclusiveness of judgment of partition.

Cited in *Welch v. Agar*, 84 Ga. 583, 20 A. S. R. 380, 11 S. E. 149, sustaining right of creditor holding deed from tenant in common as security to partition with debtor's consent; *Forder v. Davis*, 38 Mo. 107, holding judgment in partition concludes only parties and those holding under them.

Cited in note in 101 A. S. R. 868, on effect of compulsory partition on encumbrancers not made parties to the suit.

Right to partition.

Cited in *Jackman v. Beck*, 37 Ark. 125, holding mortgage on undivided interest does not attach to mortgagor's allotment on partition without consent of mortgagee.

Cited in reference note in 34 A. D. 429, on partition among coparceners.

Cited in note in 67 A. D. 708, on right of mortgagor in possession to compel partition.

Parties to partition suit.

Cited in reference notes in 83 A. D. 418, on mortgagees as parties defendant in partition suit; 113 A. S. R. 154, on mortgagee of cotenant as necessary party to partition suit.

22 AM. DEC. 377, COM. v. MARSHALL, 11 PICK. 350.

Effect of repeal or expiration of penal law.

Cited in *United States v. Vliet*, 22 Fed. 641, holding penal statute cannot be enforced after repeal; *Curtis v. Leavitt*, 15 N. Y. 9, holding repeal of penal statute takes away penalty; *Com. v. Cain*, 14 Bush, 525, holding offenses not punishable under expired statute in absence of saving clause; *Saco v. Gurney*, 34 Me. 14, holding repeal of penal statute without saving clause bars prosecu-

tion of pending suits; *State v. Meader*, 62 Vt. 458, 20 Atl. 730, holding conviction cannot be had under penal statute repealed without saving clause; *Com. v. Bennett*, 108 Mass. 30, 11 A. R. 304, holding penalty incurred after approval of act but before it took effect within clause saving penalties already incurred; *Com. v. Brown*, 7 Pa. Dist. R. 117, 20 Pa. Co. Ct. 144, quashing indictment under act repealed without saving clause; *State v. Mathews*, 14 Mo. 132, sustaining indictment charging offense under repealed act where by statute saving clause unnecessary; *State v. Crusius*, 57 N. J. L. 279, 31 Atl. 235, sustaining conviction after statutory repeal of common law where by statute saving clause unnecessary; *Higginbotham v. State*, 19 Fla. 557, holding repeal of penal law after conviction and pending prosecution of writ of error requires discharge of defendant; *Hartung v. People*, 22 N. Y. 95, holding repeal of penal statute after conviction arrests judgment; *Com. v. Kimball*, 21 Pick. 373, arresting judgment where penal statute repealed without saving clause after conviction; *State v. Daley*, 29 Conn. 272, 1 Cow. Crim. Rep. 37, arresting judgment of conviction under repealed statute in absence of saving clause; *Bank of St. Mary's v. State*, 12 Ga. 475, holding no judgment can be rendered on a repealed penal statute; *State v. Boogher*, 71 Mo. 631, holding no judgment can be given on conviction of common-law offense after statutory repeal of common law.

Cited in note in 94 A. D. 218, on effect of repeal of criminal statute.

Implied repeal by revisory statute.

Cited in *Fox v. Com.* 16 Gratt. 1, holding statute impliedly repealed by subsequent act revising subject-matter; *Ryer v. Prudential Ins. Co.* 110 App. Div. 897, 95 N. Y. Supp. 1158 (dissenting opinion), on repeal of prior law by statutory revision of subject.

— Common law.

Cited in *Coyne v. Southern P. Co.* 155 Fed. 683; *Com. v. Dennis*, 105 Mass. 162; *Doyle v. Kirby*, 184 Mass. 409, 68 N. E. 843; *State v. Crane*, 202 Mo. 54, 100 S. W. 422; *May v. Pennell*, 101 Me. 516, 115 A. S. R. 334, 7 L.R.A. (N.S.) 286, 64 Atl. 885, 8 A. & E. Ann. Cas. 351,—holding common law impliedly repealed by statutory revision of subject; *Smith v. State*, 14 Mo. 147, holding general statute on specific criminal matter repeals common law; *State v. Boogher*, 71 Mo. 631, holding act making crime at common law a statutory offense repeals common law; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567, holding statute requiring mine owner to furnish props does not supersede latter's common-law liability.

Revival of repealed law.

Cited in *State v. Daley*, 29 Conn. 272, 1 Cow. Crim. Rep. 37 (dissenting opinion), on revival of common law by repeal of superseding statute.

Distinguished in *Com. v. Churchill*, 2 Met. 118, holding repeal of repealing act revives pre-existing statute.

Retroactive or ex post facto law.

Cited in *Com. v. Wyman*, 12 Cush. 237, sustaining conviction under statute mitigating punishment prescribed by act in force when crime committed; *Com. v. McDonough*, 13 Allen, 581, holding offender cannot be punished under act imposing liability not existing when offense committed.

Distinguished in *Hill v. Duncan*, 110 Mass. 238, denying retroactive effect, to statute so as to affect pending suit when such construction not necessary; *People v. Hayes*, 140 N. Y. 484, 37 A. S. R. 572, 23 L.R.A. 830, 35 N. E. 951, 9 N. Y. Crim. Rep. 24, 56 N. Y. S. R. 456, holding act changing penal statute so that punishment may be less not *ex post facto* law.

Effect on pending action of change of remedy or procedure.

Cited in *Thayer v. Seavey*, 11 Me. 284, holding repeal without saving clause of statute providing particular remedy operates on pending actions; *Coffin v. Rich*, 45 Me. 507, 71 A. D. 559, holding repeal of remedial statute operates on pending actions although its provisions re-enacted; *Jones v. Com.* 86 Va. 661, 10 S. E. 1005, holding criminal procedure prescribed at time of trial should be followed where change did not affect vested rights; *Fenelon's Petition*, 7 Pa. 173, holding proceeding to assess damages for opening streets arrested by repeal of statute.

Statutory construction.

Cited in *State v. Cain*, 8 W. Va. 720, holding acts *in pari materia* to be construed together.

Disinterring dead body.

Cited in *Wehle v. United States Mut. Acci. Asso.* 11 Misc. 36, 31 N. Y. Supp. 865, denying right of insurer, in absence of contract, to exhume body of insured for dissection.

Cited in note in 42 L.R.A. 736, on criminal liability for disinterment of dead bodies.

22 AM. DEC. 379, CADY v. SHEPHERD, 11 PICK. 400.**Validity of contract executed by partner, agent, or attorney.**

Cited in *Parberry v. Johnson*, 51 Miss. 291, holding single partner must use firm name in order to bind firm; *Re Barrett*, 2 Hughes, 444, Fed. Cas. No. 1,043, upholding power of attorney executed by one partner; *Worrall v. Munn*, 5 N. Y. 229, 55 A. D. 330, upholding validity of land contract executed under seal by agent acting under parol authority; *Wilson v. Hunter*, 14 Wis. 684, 80 A. D. 795, sustaining validity of mortgage executed by partner under parol authority; *Morrison v. Mendenhall*, 18 Minn. 232, Gil. 212, sustaining assignment of mortgage by partner for himself and copartner under authority conferred by partnership articles; *Kasson v. Brocker*, 47 Wis. 79, 1 N. W. 418, sustaining validity as to both partners of appeal bond executed in firm name and approved by court; *Batty v. Adams County*, 16 Neb. 44, 20 N. W. 15, holding conveyance of land under power of attorney by officers of joint stock company binding on stockholders; *Kendall v. Carland*, 5 Cush. 74, raising but not determining question whether both partners bound by lease signed in firm name.

Cited in reference notes in 28 A. D. 381, on partner's power to affix seal; 30 A. D. 304, on power of partner to bind copartner by seal; 30 A. D. 291, on power of partner to bind copartners by sealed instrument; 26 A. D. 433; 36 A. D. 606,—on power of partner after dissolution.

Cited in notes in 19 E. R. C. 439, on authority of partner to bind partnership; 37 A. S. R. 205, on power of partner to bind firm, by sealed instrument; 20 L. ed. U. S. 798, on right of partners to convey partnership realty; 6 A. D. 576, on partner's power to revive liabilities after dissolution; 40 A. S. R. 569, on waiver by partner after dissolution.

Distinguished in *Tapley v. Butterfield*, 1 Met. 515, 35 A. D. 374, holding sealed chattel mortgage executed by one partner in absence of other is valid lien.

Disapproved in *Turbeville v. Ryan*, 1 Humph. 113, 34 A. D. 622, holding partner cannot bind copartner by bond unless authorized under seal to do so.

— Assent.

Cited in *Hawkins v. Hastings Bank*, 1 Dill. 460, Fed. Cas. No. 6,244, holding chattel mortgage under seal executed by one partner binding on assenting co-

partner; *Russell v. Annable*, 109 Mass. 72, 12 A. R. 665, denying validity as to surety of bond executed in attachment suit by one partner without assent of other; *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335, sustaining confession of judgment by one partner in absence of proof that copartners did not consent.

Cited in reference note in 60 A. D. 310, on partner's power to bind copartner by instrument under seal if they assent thereto before execution or ratify it afterwards.

— **Ratification.**

Cited in *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381, 21 N. E. 947, holding person cannot ratify or become party to contract not made on his behalf; *Wilcox v. Dodge*, 12 Ill. App. 517; *Price v. Alexander*, 2 G. Greene, 427, 52 A. D. 526; *Swan v. Stedman*, 4 Met. 548; *Bond v. Aitkin*, 6 Watts & S. 165, 40 A. D. 550; *McDonald v. Eggleston*, 26 Vt. 154, 60 A. D. 303,—holding instrument under seal executed by one partner binding on firm if previously authorized or subsequently ratified; *Van Deusen v. Blum*, 18 Pick. 229, 29 A. D. 582, holding unauthorized and unratified sealed instrument executed by one partner not binding on copartner; *Pike v. Bacon*, 21 Me. 280, 38 A. D. 259, holding assignment executed in firm name with but one seal affixed binding on consenting or ratifying partner; *Ellis v. Ellis*, 47 N. J. L. 69, holding confession of judgment by one partner not binding on copartner in absence of assent or ratification; *McGahan v. National Bank*, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. Rep. 347, holding deed executed by one partner binding on copartner if authorized or ratified by latter; *Gibson v. Warden*, 14 Wall. 244, 20 L. ed. 797, upholding chattel mortgage executed by one partner when authorized and acquiesced in by copartners; *Peihe v. Weber*, 47 Ill. 41, holding lease executed by one partner binding on copartner in case of prior assent or subsequent ratification; *Golding v. Brennan*, 183 Mass. 286, 67 N. E. 239, holding lease executed by one partner not binding on firm unless accepted and acted under; *Smith v. Kerr*, 3 N. Y. 144, holding absent partner bound by lease executed by copartner if act previously authorized or subsequently adopted; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 A. R. 146, holding entry under lease by partner not personally signing constitutes ratification; *Jeffreys v. Coleman*, 20 Fla. 536, sustaining attachment bond executed in firm name by one partner when authorized and ratified by copartner; *Hall v. Norwalk*, 57 Conn. 105, 17 Atl. 356, sustaining agent's unauthorized submission of controversy to arbitration when adopted by principal; *Drumright v. Philpot*, 16 Ga. 424, 60 A. D. 738, sustaining bill of sale with covenants of warranty executed by one partner and verbally ratified by copartner; *Philadelphia & R. Coal & Iron Co. v. Taylor*, 1 Leg. Chron. 361, 5 Legal Gaz. 392, holding sale of colliery by partners binding on copartner cognizant of proposed sale and who accepted profits; *McIntyre v. Park*, 11 Gray, 102, 71 A. D. 690, holding sealed instrument may be ratified by parol; *Herbert v. Henrick*, 16 Ala. 581; *Kramer v. Dinmore*, 152 Pa. 264, 25 Atl. 789, 23 Pittsb. L. J. N. S. 344,—holding partner may ratify by parol sealed contract executed in firm name by copartner.

Cited in note in 28 L.R.A. 101, on ratification of conveyance of partnership real estate by one partner.

Right of partner to notice.

Cited in *Wheelwright v. Bailey*, 82 Me. 118, 19 Atl. 106, holding partner authorizing copartner to file petition in insolvency not entitled to notice.

Necessity of seal.

Cited in reference notes in 24 A. D. 128, on necessity of seal to authority to execute deed; 52 A. D. 533, on necessity of authority under seal to enable one copartner to bind others by note.

Ratification by parol.

Cited in notes in 8 E. R. C. 634, on validity of parol ratification of unauthorized deed by agent; 17 A. D. 59, on ratification by parol of unauthorized execution of deed.

Parol proof of ratification.

Cited in *Strobridge Lithographic Co. v. Gallagher*, 2 Pa. Co. Ct. 356, 18 Phila. 396, 43 Phila. Leg. Int. 270, holding partners authority to execute sealed contract or its subsequent ratification may be shown by parol; *Gallagher v. Strobridge Lithographic Co.* 6 Sadler (Pa.) 118, 9 Atl. 487, on showing by parol partner's authority to execute sealed contract or its subsequent ratification.

Cited in note in 27 L.R.A. 465, on parol evidence as to when real estate will be considered partnership property.

Admission of person having joint interest.

Cited in *Armstrong v. Farrar*, 8 Mo. 627, holding admission of one party having joint interest in suit admissible against all; *Mann v. Locke*, 11 N. H. 246; *Gay v. Bowen*, 8 Met. 100,—holding admission of partner made after dissolution of firm, competent evidence; *Vinal v. Burrill*, 16 Pick. 401, holding confessions of partner after dissolution competent though not conclusive evidence; *Beatty v. Amba*, 11 Minn. 331, Gil. 234, holding admission of partner after dissolution of partnership if admissible not conclusive; *Doughton v. Tilley*, 4 Blackf. 433, raising but not deciding question whether admissions of partner after dissolution admissible against firm; *Webster v. Stearns*, 44 N. H. 498, holding declarations of partner in furtherance of partnership business binding on firm; *Pennoyer v. David*, 8 Mich. 407, holding admission of partner made after dissolution of firm respecting partnership transaction competent; *Russell v. Annable*, 109 Mass. 72, 12 A. R. 665 (dissenting opinion), on proof of assent of copartner by admissions or conduct; *Paine v. Tucker*, 21 Me. 138, 38 A. D. 255 (dissenting opinion), on parol proof of principal's admission that agent executing sealed instrument had power of attorney.

Cited in reference note in 25 A. D. 363, on admissions by partner after dissolution.

Cited in notes in 40 A. S. R. 567, on rights, liabilities, and remedies resulting from admission of new partner after dissolution; 18 L. ed. U. S. 737, on effect of admissions of partner after dissolution of firm on copartners.

— To establish partnership demand.

Cited in *Buxton v. Edwards*, 134 Mass. 567, holding partner may state an account of a debt of the firm after its dissolution; *Feigley v. Whitaker*, 22 Ohio St. 606, 10 A. R. 778, holding admission of partner, made after dissolution of firm, in adjusting partnership business, competent against copartners; *Meggett v. Finney*, 4 Strobh. L. 220, holding acknowledgment by one partner after dissolution insufficient of itself to establish pre-existing contract.

Disapproved in *Bispham v. Patterson*, 2 McLean, 87, Fed. Cas. No. 1,441, holding letter written by member of dissolved firm inadmissible to establish partnership demand.

— To remove bar of statute of limitations.

Cited in *Greenleaf v. Quincy*, 12 Me. 11, 28 A. D. 145, holding admission of

one partner after dissolution will defeat bar of statute of limitations; *Merritt v. Day*, 38 N. J. L. 32, 20 A. R. 362, holding payment of interest by one partner on firm note after dissolution of partnership removes bar of statute of limitations; *Joslyn v. Smith*, 13 Vt. 353, holding admissions of joint contractor competent to go to jury to remove bar of statute of limitations.

Cited in note in 40 A. S. R. 566, on acknowledgments and new promises by partners after dissolution in connection with the statute of limitations.

Limited in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 A. D. 322, holding new promise by partner after dissolution of firm will not revive barred debt as against partnership.

Presumption of knowledge.

Cited in *Johnson v. Levy*, 109 La. 1036, 34 So. 68, holding party presumed, as to innocent third persons, to know what he should know and had opportunity of knowing.

22 AM. DEC. 386, DAVIS v. ALLEN, 11 PICK. 466.

Disqualification of juror or one acting in judicial capacity.

Cited in *Taylor v. Democratic Committee*, 120 Ky. 672, 87 S. W. 786, holding brother of a contestee not entitled to sit as member of committee for trial of election contest; *Cowdrey v. Sheldon*, 122 Mass. 267, holding tenant in common with execution debtor disqualified to act as appraiser of value of latter's interest.

— Of juror.

Cited in *Daniels v. Guy*, 23 Ark. 50, holding person who has any interest in the cause disqualified to serve as juror; *Burdine v. Grand Lodge*, 37 Ala. 478, holding any pecuniary interest in event of suit disqualifies juror; *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 A. R. 673, 12 N. E. 98, holding fact that juror had taken out policy in defendant company for benefit of his wife cause for rejection; *Flagg v. Worcester*, 8 Cush. 69, holding person having claim similar in character disqualified as juror; *Jefferson County v. Lewis*, 20 Fla. 980, holding holder of county bonds similar to those in suit incompetent juror.

Cited in notes in 20 L. ed. U. S. 659, on causes of challenge of jurors and their qualifications; 9 A. S. R. 748, on disqualification of juror for interest in subject-matter; 9 A. S. R. 749, on what interest in question at issue disqualifies juror.

— Of judge.

Cited in *State ex rel. Smith v. Pitts*, 139 Ala. 152, 36 So. 20, holding judge disqualified by extraneous interest naturally calculated to prevent his judgment; *Meyer v. San Diego*, 121 Cal. 102, 66 A. S. R. 22, 41 L.R.A. 762, 53 Pac. 434, holding judge owning real estate in city disqualified to sit in suit involving creation of bonded debt of city; *Hall v. Thayer*, 105 Mass. 219, 7 A. R. 513, holding probate judge disqualified to act where his father-in-law or brother-in-law are parties in interest; *Northampton v. Smith*, 11 Met. 390, holding probate judge not disqualified where will bequeaths money to use of poor of town in which he lives.

Validity of acts of disqualified judge.

Cited in *Moses v. Julian*, 45 N. H. 52, 84 A. D. 114, holding proceedings of judge not entitled by statute to sit in cause void; *Stearns v. Wright*, 51 N. H. 600, holding acts of probate judge prohibited from sitting in cause by statute absolutely void.

Waiver of objection.

Cited in *Raymond v. Cumberland County*, 63 Me. 110, holding technical objection waived unless made at earliest possible opportunity; *Brown v. Webber*, 6

Cush. 560, holding party's failure to seasonably make technical or substantial objection waiver of it; *Sylvester v. Mayo*, 1 Cush. 308, holding moving court for new trial on ground of misdirection waiver of right to take exceptions for misdirection.

Cited in note in 84 A. D. 131, on waiver of judicial disqualification.

— To jurors.

Cited in *United States v. Smith*, 1 Sawy. 277, Fed. Cas. No. 16,341, holding party failing to seasonably take advantage of known ground of challenge waives it; *Walker v. Boston & M. R. Co.* 3 Cush. 1, holding interest of members of sheriff's jury to assess damages to land waived if not seasonably taken; *Bradshaw v. Degenhart*, 15 Mont. 267, 48 A. S. R. 677, 39 Pac. 90, holding fact that party drank with jurors at expense of successful adverse party before verdict, not ground for new trial; *Woodward v. Dean*, 113 Mass. 297, holding party failing to examine jurors not entitled to new trial because of relationship of juror to adverse party; *Tilton v. Kimball*, 52 Me. 500; holding relationship of juror to party not ground for new trial unless unknown at trial; *Jameson v. Androscoggin R. Co.* 52 Me. 412, holding juror's interest not ground for new trial if known to party or his counsel before or at trial; *State v. Bowden*, 71 Me. 89, holding prejudice of juror not ground for new trial unless unknown to party or his counsel before or at trial; *Kent v. Charlestown*, 2 Gray, 281, holding interest of juror known to counsel but not to client not ground for new trial; *Com. v. Dailey*, 12 Cush. 80, holding party on trial for misdemeanor consenting to trial by eleven jurors waives irregularity.

Cited in reference notes in 62 A. D. 312, as to when objection to juror must be made; 50 A. D. 274, on waiver of exception to juror known before trial.

Cited in note in 18 L.R.A. 474, on waiver of disqualification of juror by silence where party knows thereof.

22 AM. DEC. 389, DENNY v. WILLARD, 11 PICK. 519.

What constitutes a lien.

Cited in *Snyder v. Smith*, 185 Mass. 58, 69 N. E. 1089, holding temporary injunction restraining transfer of property creates equitable lien.

Nature of lien created by attachment.

Cited in *Ex parte Foster*, 2 Story, 131, Fed. Cas. No. 4,960, holding that attachment constitutes merely a contingent, conditional lien or security; *Collins v. Brigham*, 11 N. H. 420, holding that attaching creditors acquire lien only on property levied upon.

Cited in note in 39 A. D. 607, on origin and nature of attachment lien.

Right to deal with or claim attached property — Owner.

Cited in *Ware v. Russell*, 70 Ala. 174, 45 A. R. 82; *Mann v. Houston*, 1 Gray, 250; *Whipple v. Thayer*, 16 Pick. 25, 26 A. D. 626,—holding attached goods assignable by owner, subject to the lien of the attachment; *Appleton v. Bancroft*, 10 Met. 235, holding that owner of attached property may mortgage it, subject to lien of the attachment; *Brown v. Crockett*, 22 Me. 537, denying right of owner as bailee of attaching officer to replevy goods taken by another officer under subsequent attachment.

Cited in notes in 20 A. D. 481, on owner's right to pledge property subject to lien; 43 A. D. 264, on right of debtor to sell attached property subject to attachment; 1 L.R.A. (N.S.) 1058, on effect of custody of law on right to alienate personal property.

— Receiptor.

Cited in *Dewey v. Field*, 4 Met. 381, 38 A. D. 376, holding receiptor for goods under attachment estopped from setting up title in himself, where officer was misled by receipt; *Clark v. Morse*, 10 N. H. 236, upholding right of receiptor of attached property to sell and deliver same to bona fide purchaser, with the assent of the owner.

Cited in note in 43 A. D. 264, on right of receiptor to purchase attached goods after delivery to general owner.

Conclusiveness of officer's return.

Cited in reference notes in 29 A. D. 499; 47 A. D. 730,—on conclusiveness of sheriff's return; 25 A. D. 239, as to when and upon whom return of sheriff or other officer is conclusive.

Cited in note in 43 A. D. 531, on conclusiveness as against sheriff of his return of process.

Liability for failure to levy.

Cited in reference note in 72 A. S. R. 160, on liability for failure of sheriff to levy.

Effect of insolvency of owner of attached property.

Cited in *Wright v. Dawson*, 147 Mass. 384, 9 A. S. R. 724, 18 N. E. 1, dismissing action on receipt for attached property allowed to go back to owner who filed petition in insolvency within four months after attachment.

Subsequent levy on attached property.

Cited in *Whitney v. Farwell*, 10 N. H. 9, holding that sheriff, after committing attached property to custody of receiptor who allows it to go back to owner, cannot again attach it without new seizure.

Right of attaching officer to set up paramount title.

Cited in *Governor v. Gibson*, 14 Ala. 326, holding that levy under attachment merely raises strong presumption against officer of defendant's title which must be repelled by proof; *Wadsworth v. Walliker*, 45 Iowa, 394, 24 A. R. 788, holding that officer sued for damages for release of attached property, may show that defendant was not owner thereof.

Distinguished in *Holley v. Wallace*, 10 Ga. 158, questioning rule that a sheriff sued for not levying upon property as belonging to debtor, may prove paramount title in another.

Acts dissolving attachment.

Cited in *Waterhouse v. Bird*, 37 Me. 326, holding attachment lien dissolved by officer allowing property to remain in hands of part owners who receipted therefor promising to redeliver or pay specified sum therefor; *Weston v. Dorr*, 25 Me. 183, 43 A. D. 259, holding attachment dissolved by officer delivering up attached goods upon promise of two persons to redeliver on demand or pay value.

22 AM. DEC. 393, MAY v. PARKER, 12 PICK. 34.**Demurrer as raising want of jurisdiction.**

Cited in *Stephenson v. Davis*, 56 Me. 73, holding want of jurisdiction of court of limited jurisdiction may be inquired into on general or special demurrer.

Joinder of parties — Tenants in common.

Cited in *Clapp v. Pawtucket Inst. for Savings*, 15 R. I. 489, 2 A. S. R. 915, 8 Atl. 697, holding tenants in common must join in personal action; *Bullock v. Hayward*, 10 Allen, 460, holding tenants in common must join in action of tort in

nature of waste; *Frost v. Alturas Water Co.* 11 Idaho, 294, 81 Pac. 996, holding owners in severalty appropriating water from same stream may unite as joint plaintiffs in suit to restrain unlawful diversion of water; *Johnson v. Goodwin*, 27 Vt. 288, holding tenants in common occupying distinct portions of land may join in action for an injury to the possession.

Distinguished in *Campbell v. Wallace*, 12 N. H. 362, 37 A. D. 219, holding tenants in common not entitled to join in real actions.

— **Partners.**

Cited in *Burley v. Harris*, 8 N. H. 233, 29 A. D. 650, holding *assumpsit* not maintainable between two firms where an individual member of one firm is a partner in the other.

Action against cotenant.

Cited in note in 50 A. S. R. 840, on action by cotenant to recover possession of personal property.

Liability for injury to common property.

Cited in *Odiorne v. Lyford*, 9 N. H. 502, 32 A. D. 387, holding tenant in common flowing land held in common without license of cotenant liable to latter.

22 AM. DEC. 397, FAY v. VALENTINE, 12 PICK. 40.

Doctrine of estoppel.

Cited in *Platt v. Squires*, 12 Met. 494, holding priority of mortgage lost by representation of payment to one taking subsequent mortgage; *Holbrook v. Debo*, 99 Ill. 372, holding that doctrine of estoppel will not pass after-acquired estate of grantor not undertaking to convey or warrant indefeasible estate; *Tufts v. Tufts*, 3 Woodb. & M. 456, Fed. Cas. No. 14,233, holding that money advanced must be refunded where specific performance of contract is defeated by plea of statute of frauds.

Cited in reference note in 56 A. D. 362, on estoppel of mortgagee by acts from asserting claim.

Cited in notes in 4 L.R.A. 334, on estoppel of owner to assert title; 49 A. D. 388, on estoppel between mortgagees to deny title; 18 E. R. C. 533, on liability of mortgagee, entitled to priority, to forfeit such priority by fraud or negligence or by notice of prior equity.

Distinguished in *Hayes v. Livingston*, 34 Mich. 384, 22 A. R. 533, holding release of title for fraud not strictly case of estoppel.

— **To redeem.**

Cited in *Woods v. McGavock*, 10 Yerg. 133, holding creditor promising prospective purchaser not to redeem estopped from doing so; *Southard v. Sutton*, 68 Me. 575, holding one assuring proposed purchaser of fee that he will not redeem under mortgage estopped from doing so; *Tufts v. Tapley*, 129 Mass. 380, holding mortgagor concealing his title from purchaser making expensive improvements, estopped to redeem.

Delay in prosecuting suit to redeem.

Cited in *Bancroft v. Sawin*, 143 Mass. 144, 9 N. E. 539, holding that mortgagor may lose right to redeem by delay in prosecuting suit after commencing it.

Allowance for improvements.

Cited in *McSorley v. Larissa*, 100 Mass. 270, holding mortgagee in possession not usually entitled in suit for redemption to allowance for improvements.

Necessity that one seeking equity do equity.

Cited in *Emerson v. Atkinson*, 159 Mass. 356, 34 N. E. 516, holding suit to redeem subject to rule that he who seeks equity must do equity.

22 AM. DEC. 400, FOSTER v. HALL, 12 PICK. 89.

Burden of proof.

Cited in *Toledo, St. L. & W. R. Co. v. Star Flouring Mills Co.* 77 C. C. A. 203, 146 Fed. 953, holding prima facie case rebutted by evidence sufficient to counterbalance that establishing prima facie case; *Gibbs v. Farmers' & M. State Bank*, 123 Iowa, 736, 99 N. W. 703; *Klunk v. Hocking Valley R. Co.* 74 Ohio St. 125, 77 N. E. 752,—holding burden of proof shifts when evidence supporting prima facie case is so far met that it no longer preponderates; *Feary v. Metropolitan Street R. Co.* 162 Mo. 75, 62 S. W. 452, upholding instruction that burden of proof shifts to defendant after plaintiff has shown accident was due to former's negligence.

—As to seller's fraudulent intent.

Cited in note in 32 L.R.A. 71, on presumptions and burden of proof as to purchaser's participation in vendor's fraudulent intent.

Privileged communications.

Cited in *People v. Stout*, 3 Park. Crim. Rep. 670, holding communication to physician privileged although technical relation of physician and client does not exist; *Lloyd v. Pennie*, 50 Fed. 4; *Hammons v. State*, 73 Ark. 495, 108 A. S. R. 66, 68 L.R.A. 234, 84 S. W. 718, 3 A. & E. Ann. Cas. 912, sustaining strict construction of rule making communications between husband and wife privileged; *Selden v. State*, 74 Wis. 271, 17 A. S. R. 144, 42 N. W. 218, holding letters written by husband to wife and by her intrusted to her attorney privileged.

Cited in reference notes in 83 A. D. 118, on privileged communications; 73 A. D. 304, as to when communications are not privileged.

Cited in note in 67 L.R.A. 924, on admissibility in evidence of communications made to persons serving in judicial capacity.

—To attorneys.

Cited in *Sample v. Frost*, 10 Iowa, 266, holding rule as to privileged communications to counsel confined strictly to attorneys; *Barnes v. Harris*, 7 Cush. 576, 54 A. D. 734, holding communication made to student at law not privileged; *McLaughlin v. Gilmore*, 1 Ill. App. 563, holding communication made to person not an attorney trying case before justice of peace not privileged; *Oliver v. Pate*, 43 Ind. 132, holding communications made to prosecuting attorney of county privileged; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Matthews's Estate*, 1 Phila. 202, 9 Phila. Leg. Int. 11, 5 Clark (Pa.) 151; *Satterlee v. Bliss*, 36 Cal. 489,—sustaining strict construction of rule making confidential communication to attorney privileged; *Beeson v. Beeson*, 9 Pa. 279; *Moore v. Bray*, 10 Pa. 519; *State v. Douglass*, 20 W. Va. 770,—holding communications made by client to counsel in his professional character privileged; *Borum v. Fouts*, 15 Ind. 50, holding communications to attorney not privileged unless made to him while employed as legal adviser; *McLellan v. Longfellow*, 32 Me. 494, 54 A. D. 599, holding communications made to attorney with a view to professional employment privileged; *Peek v. Boone*, 90 Ga. 767, 17 S. E. 66, holding knowledge acquired by attorney by reason of anticipated employment privileged; *Johnson v. Sullivan*, 23 Mo. 474; *Jeanes v. Fridenberg*, 3 Clark (Pa.) 199; *Dudley v. Beck*, 3 Wis. 274,—holding communication to attorney privileged although not in reference to legal proceedings begun or apprehended; *Loomis v. New York*, N. H. & Am. Dec. Vol. III.—74.

H. R. Co. 159 Mass. 39, 34 N. E. 82 (dissenting opinion), on right of attorney to disclose confidential communication made before action brought; *Way v. Towle*, 155 Mass. 378, 31 A. S. R. 554, 29 N. E. 506, holding communications by client to attorney privileged although made in presence of third person; *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654, holding communications to attorney in regard to drafting papers privileged; *Lockhard v. Brodie*, 1 Tenn. Ch. 384, holding communications made to attorney employed to procure deed to wife of land bought by husband privileged; *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482, holding statement to attorney as to facts testified to in a public hearing not privileged; *Brown v. Clow*, 158 Ind. 403, 62 N. E. 1006, holding private correspondence between client and attorney admissible; *Mitchell's Case*, 12 Abb. Pr. 249, holding attorney not privileged from testifying as to documents left with him by client; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848, holding breach of professional relations between attorney and client does not justify former in divulging privileged communications; *Bennett's Estate*, 8 W. N. C. 287, holding communication to attorney by client privileged after death of latter; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 A. S. R. 258, 17 L.R.A. 188, 31 N. E. 726, holding attorney may testify on probate of will as to directions given him by testator; *Hatton v. Robinson*, 14 Pick. 416, 25 A. D. 415, holding communications by client as to motive or purpose of deed made to remove attorney's scruples not privileged; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 A. D. 189, holding communications made by client in transaction fraudulent as to creditors privileged.

Cited in notes in 25 A. D. 420, on confidential communications to counsel; 54 A. D. 736, on privileged communications between attorney and client; 66 A. S. R. 217, 219, on privileged communications to attorney; 66 A. S. R. 213, 214, 216, on attorney as witness to facts communicated by client; 66 A. S. R. 240, on persons to whom privilege of confidential communications to attorney extends.

Disapproved in *Hamil v. England*, 50 Mo. App. 338, holding communications by client regarding fraudulent transfer not privileged; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054, holding communications in reference to fraudulent purpose not privileged.

— Waiver of privilege.

Cited in *Passmore v. Passmore*, 50 Mich. 626, 45 A. R. 62, 16 N. W. 170; *King v. Barrett*, 11 Ohio St. 261; *Benjamin v. Coventry*, 19 Wend. 353,—holding client may waive privilege attaching to professional communications to attorney; *Hoyt v. Jackson*, 3 Dem. 388, 7 N. Y. Civ. Proc. Rep. 374, holding party bringing former counsel into court under *subpoena duces tecum* waives privilege; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802, holding executor or administrator of deceased client may waive privilege and call attorney to testify.

Fraudulent conveyances.

Cited in *Giddings v. Sears*, 115 Mass. 505, holding preferential conveyance by insolvent not fraudulent.

— Participation in fraudulent design.

Cited in *Stover v. Herrington*, 7 Ala. 142, 41 A. D. 86; *Hoyt & Bros. Mfg. Co. v. Turner*, 84 Ala. 523, 4 So. 658; *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323; *Sisson v. Roath*, 30 Conn. 15; *Hamilton v. Staples*, 34 Conn. 316; *Badger v. Story*, 16 N. H. 168,—holding grantor's fraud not participated in by grantee will not invalidate deed; *Bayne v. State*, 62 Md. 100 (dissenting opinion), on necessity of grantee's participation in fraudulent intent and purpose; *Currier v. Taylor*, 19 N. H. 189, sustaining validity of mortgage given to defraud creditors to innocent mortgagee; *Mehlhop v. Pettibone*, 54 Wis. 652, 11 N. W. 553, holding to

avoid sale as in fraud of creditors both parties must be connected with fraudulent design; *Pierce v. O'Brien*, 189 Mass. 58, 75 N. E. 61, holding purchaser for valuable consideration not liable for fraud of seller of which he had no knowledge; *Morse v. Aldrich*, 130 Mass. 578, holding fraudulent purpose of original grantor will not defeat title of innocent purchaser from grantee; *Carroll v. Hayward*, 124 Mass. 120, denying right of purchaser from fraudulent grantee with knowledge of fraud to maintain trover; *Brooks v. Claves*, 10 Vt. 37, holding statutory penalty for fraudulent conveyance not incurred in absence of fraudulent intent on part of grantor and grantee; *Com. v. Kimball*, 24 Pick. 366, holding purchaser of stock of merchandise may testify whether transaction was bona fide on his part.

Cited in notes in 34 A. S. R. 395, on knowledge of vendee as affecting validity of fraudulent conveyance; 32 L.R.A. 33, on necessity of participation by purchaser in vendor's fraud to invalidate transfer for good consideration as against vendor's creditors; 32 L.R.A. 37, on what constitutes participation by purchaser in vendor's fraud so as to invalidate as against vendor's creditors transfer made on good consideration.

Disapproved in *Richards v. Vaccaro*, 67 Miss. 516, 19 A. S. R. 322, 7 So. 506, holding proof of vendor's fraud establishes prima facie case against purchaser which latter must meet by proof of good faith.

Recital of consideration.

Cited in *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847, holding recital of valuable consideration in deed not evidence against creditors of grantor attacking it as voluntary; *Horn v. Thompson*, 31 N. H. 562, holding recital of consideration in assignment under seal sufficient evidence as between parties or those claiming under them.

Distinguished in *Kimball v. Fenner*, 12 N. H. 248, holding recital of receipt of consideration in deed not evidence as against existing creditors.

Admissibility of acts or declarations of grantor or vendor.

Cited in *Maynard v. Fellows*, 43 N. H. 255, holding declarations of insolvent debtors admissible on question of their fraudulent intent; *Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025, holding declarations of vendor before sale admissible to show fraudulent intent; *Dennison v. Benner*, 41 Me. 332, holding subsequent conduct or declarations of vendor inadmissible to invalidate vendee's title; *Holbrook v. Holbrook*, 113 Mass. 74, holding declarations subsequent to conveyance inadmissible to impair grantee's title; *Aldrich v. Earle*, 13 Gray, 578, holding subsequent declarations of grantor inadmissible to prove conveyance fraudulent; *Shealy v. Edwards*, 75 Ala. 411, holding acts or declarations of grantor inadmissible to show fraudulent intent as against purchaser for value unless known to latter or part of *res gestæ*.

Cited in reference notes in 26 A. D. 238, on admissibility against vendee of declarations of vendor; 61 A. D. 318, as to when declarations of grantor as to fraudulent conveyance are admissible.

Cited in note in 42 A. D. 631, as to when declarations of vendor are evidence against vendee to show fraud.

Proof of fraudulent intent.

Cited in *Pomeroy v. Bailey*, 43 N. H. 118, holding intent of parties may be proved by separate and independent evidence; *Landecker v. Houghtaling*, 7 Cal. 391, holding evidence of fraudulent intent of grantor admissible without connecting purchaser with it; *Gray v. St. John*, 35 Ill. 222, holding manner in which debtor obtained goods and disposed of them admissible to show intent in making

sale; *Holbrook v. Jackson*, 7 Cush. 136, holding account books of debtor competent evidence to show his knowledge of his insolvency; *Coombs v. Aborn*, (R. I.) 14 L.R.A. (N.S.) 1249, 68 Atl. 817, holding conjecture and suspicion form no adequate basis of judgment of fraud.

— Similar acts to show.

Cited in *New York & H. Cigar Co. v. Berheim*, 81 Ala. 138, 1 So. 470, holding proof that alleged fraudulent grantor purchased other goods inadmissible in absence of proof that he did not pay for them; *Hawes v. Dingley*, 17 Me. 341, holding testimony as to like fraudulent sales or purchases admissible to show that sale or purchase in question was fraudulent; *Blake v. White*, 13 N. H. 267, holding proof of other fraudulent sales admissible but not effectual to defeat transfer unless purchaser knew of fraud; *Taylor v. Robinson*, 2 Allen, 562, holding proof of prior or contemporaneous conveyances by grantor admissible to show fraudulent intent; *Howe v. Reed*, 12 Me. 515; *Warren v. Williams*, 52 Me. 343; *Whittier v. Varney*, 10 N. H. 291,—holding proof of contemporaneous fraudulent conveyances admissible to show grantor's intent.

Distinguished in *Lynde v. McGregor*, 13 Allen, 172, holding evidence of subsequent fraudulent conveyances admissible when parts of one transaction.

— Proof of distinct facts.

Cited in *Darling v. Westmoreland*, 52 N. H. 401, 13 A. R. 55, holding evidence to prove distinct facts may be of different kinds and drawn from different sources; *First Nat. Bank v. Wisdom*, 111 Ky. 135, 63 S. W. 461, holding proof of other forgeries competent to show accused had capacity to imitate signature of supposed obligor; *Knight v. Heath*, 23 N. H. 410, holding proof admissible that paper relating to same subject as instrument sought to be impeached was forged; *State v. Johnson*, 33 N. H. 441, holding proof of fraudulent nature of mortgage admissible to show goods mortgaged were property of mortgagor.

22 AM. DEC. 410, GILMORE v. WILBUR, 12 PICK. 120.

Right to waive tort and sue in assumpsit.

Cited in *Child v. Wofford*, 3 Ala. 564, holding action for goods sold sometimes maintainable although defendant obtained possession of goods tortiously; *Pharr v. Bachelor*, 3 Ala. 237, holding tort may be waived and assumpsit maintained by party who has paid money or furnished goods under contract thereafter rescinded; *Upchurch v. Norsworthy*, 15 Ala. 705, holding that administrator may waive tort, and sue for money received, one wrongfully selling goods of intestate; *Lawson v. Lawson*, 16 Gratt. 230, 80 A. D. 702, holding executor may maintain assumpsit against widow wrongfully retaining bank notes of testator; *Mann v. United States*, 32 Ct. Cl. 580; *Smith v. Smith*, 43 N. H. 536; *Kidney v. Persons*, 41 Vt. 386, 98 A. D. 595,—holding owner of personal property wrongfully converted into money may waive tort and sue in assumpsit; *Bethlehem v. Perseverance Fire Co.* 81 Pa. 445, 3 W. N. C. 104, 33 Phila. Leg. Int. 304; *Mann v. Locke*, 11 N. H. 246,—denying right to waive tort and maintain assumpsit unless wrongdoer has sold goods taken; *Telford & F. Turnp. Co. v. Gerhab*, 9 Sadler (Pa.) 550, 13 Atl. 90, 22 W. N. C. 175, on waiver of tort and recovery of value of goods sold by tortfeasor.

Cited in reference notes in 26 A. D. 481; 49 A. D. 281; 91 A. D. 432; 18 A. S. R. 810; 49 A. S. R. 492,—on waiver of tort to sue in assumpsit; 50 A. D. 400, on right to waive tort and sue in assumpsit.

Cited in notes in 17 A. D. 243, on waiving tort; 40 A. D. 89, as to when tort may be waived and action brought in contract.

Distinguished in *Centre Turnp. Co. v. Smith*, 12 Vt. 212, holding assumpsit will not lie to recover toll which traveler refused to pay on unfounded claim of privilege.

Parol license.

Cited in reference notes in 25 A. D. 472, on parol license; 30 A. D. 72, on creation and nature of license; 26 A. D. 741, on proof of license by parol; 27 A. D. 681, on inoperativeness of license not acted on for long period; 28 A. D. 721, on validity and irrevocability of parol license; 62 A. S. R. 715, on revocability of license to cut timber.

Cited in note in 54 A. D. 167, on revocability of licenses.

Right of entry to remove timber.

Cited in *Otis v. Hadley*, 113 Mass. 100, holding oral permission to remove timber at any time must be acted upon within reasonable time; *Snyder v. East Bay Lumber Co.* 135 Mich. 31, 97 N. W. 49, holding gratuitous parol license to remove timber must be acted on within reasonable time; *Howe v. Batchelder*, 49 N. H. 204, holding on sale of standing trees right to enter and take them in reasonable time incident of sale; *Bunch v. Elizabeth City Lumber Co.* 134 N. C. 116, 46 S. E. 24, holding reasonable limitation of time in which to remove timber limitation of whole grant; *Sanders v. Clark*, 22 Iowa, 275, holding purchaser of standing timber to be removed in given time entitled to right of entry only during time specified; *Reed v. Merrifield*, 10 Met. 155, holding under sale of timber to be removed within five years right of removal terminates on expiration of specified period.

Time for removing timber.

Cited in notes in 55 L.R.A. 524, on time of determining size and suitability of standing timber conveyed; 55 L.R.A. 534, on what is a reasonable time for removal of standing timber and mode of determining same; 55 L.R.A. 532, as to when standing timber sold must be removed where no time is specified in the contract of sale.

Reasonable time as question of law.

Cited in notes in 17 A. D. 548; 28 A. D. 381,—as to when reasonable time is a question of law; 17 A. D. 547, on application to negotiable instruments of rule as to reasonable time being a question of law.

Ratification.

Cited in reference note in 48 A. D. 335, on right of principal to either expressly or impliedly ratify contract by one assuming to act as his agent.

Joinder of parties.

Cited in *Clapp v. Pawtucket Inst. for Savings*, 15 R. I. 489, 2 A. S. R. 915, 8 Atl. 697, holding tenants in common must join in personal action; *Centreville & A. Turnp. Co. v. Jarrett*, 4 Ind. 213, holding tenants in common may join in personal actions for a trespass or nuisance to land; *Kinney v. Service*, 91 Mich. 629, holding cotenants may jointly maintain trespass if one in possession under claim of right in both; *Howard v. Chase*, 104 Mass. 249, holding tenants in common may join in action of tort for conversion of property; *Densmore v. Mathews*, 58 Mich. 616, 26 N. W. 146, holding chattel mortgagees in possession of goods may maintain joint action in trespass for wrongful levy.

Distinguished in *White v. Brooks*, 43 N. H. 402, holding tenant in common may maintain sole action in assumpsit against purchaser of common property from cotenant.

Powers and rights of cotenants.

Cited in *Bradley v. Boynton*, 22 Me. 287, 39 A. D. 582, holding settlement and

release by one tenant in common of action of trover binds cotenant and transfers property; *White v. Elwell*, 48 Me. 360, 77 A. D. 231, holding one cutting hay on shares and storing it in barn of other party tenant at will until removal of property.

Showing action barred.

Cited in *Currier v. Studley*, 159 Mass. 17, 33 N. E. 709 (dissenting opinion), on right to show that conversion complained of occurred more than six years before commencement of action.

22 AM. DEC. 414, ROTCH v. HAWES, 12 PICK. 136.

When trover maintainable against bailee.

Cited in *Hall v. Corcoran*, 107 Mass. 251, 9 A. R. 30, holding trover maintainable for driving horse beyond place agreed upon in illegal contract of hiring; *Wentworth v. McDuffie*, 48 N. H. 402, holding trover maintainable against bailee, knowingly and wilfully driving mare at such a speed as to result in her death; *Beach v. Raritan & D. B. R. Co.* 37 N. Y. 457, sustaining liability in trover for barge hired out for receiving purposes, but lost when being used for transportation purposes; *Harvey v. Epes*, 12 Gratt. 153, sustaining liability in trover for any loss of property while used for different purpose than contemplated in hiring.

Cited in reference note in 42 A. D. 504, as to when bailee is liable for conversion by misuse of bailed property.

Cited in notes in 12 A. D. 621, on bailee's liability for misuser; 26 L.R.A. 366, on liability of hirer for driving team to place where it was not hired to go.

What constitutes conversion.

Cited in *Fail v. McArthur*, 31 Ala. 26, holding that employment of slave at work different from that for which hired, may be treated as conversion by the owner; *Macon & W. R. Co. v. Holt*, 8 Ga. 157, holding carrier taking on cars, slave having general pass and paying usual fare, but without owner's consent or knowledge, guilty of conversion; *Bonaparte v. Clagett*, 78 Md. 87, 27 Atl. 619, holding liability for conversion at factory not affected by fact that owner of converted goods was employed there at the time, where his employment ceased before falsity of representations by which goods were obtained were known to him; *Daggett v. Davis*, 53 Mich. 35, 51 A. R. 88, 18 N. W. 548, holding that retention of unindorsed certificate of capital stock may amount to technical conversion; *Harrington v. Snyder*, 3 Barb. 380, holding taking of companion into cutter by hirer does not show such misuse of horse as amounts to conversion.

Waiver of conversion.

Cited in *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228, holding conversion of notes by secretary of corporation waived garnishment proceeding against transferees.

Distinguished in *Lucas v. Trumbull*, 15 Gray, 306, holding the tort not necessarily waived by receiving back and sending bill for repairs to property injured after conversion by driving beyond place for which rig was hired.

When case proper remedy.

Cited in *Robinson v. Hartridge*, 13 Fla. 501, holding remedy for damage consequent upon breach of duty in act of sale is special action on case.

Liability of infant for torts.

Cited in *Churchill v. White*, 58 Neb. 22, 76 A. S. R. 64, 78 N. W. 369, holding infancy no protection to liability for injuries to rig not used for journey for which hired.

Election of remedies.

Cited in *Columbus v. Howard*, 6 Ga. 213; *Harrison v. Harrison*, 39 Ala. 489,—holding election of remedies by distributees where estate was kept together without order of court, not shown by chancery suit voluntarily dismissed before decree.

22 AM. DEC. 415, SMITH v. SANFORD, 12 PICK. 139.**Book of original entries.**

Cited in *Jackson v. Evans*, 8 Mich. 476, holding charges daily made in account books from temporary memoranda original entries; *Davison v. Powell*, 16 How. Pr. 467, holding book to which memoranda made on boards or paper transferred book of original entries; *Chicago Lumbering Co. v. Hewitt*, 12 C. C. A. 129, 22 U. S. App. 646, 64 Fed. 314, holding book entry made at close of day from pencil memoranda on tally boards original entry; *Ladd v. Sears*, 9 Or. 244, holding bank books posted up each day from tags or checks containing memoranda of the day's business admissible as books of original entry; *Arnold v. Sabin*, 1 Cush. 525; *Sickles v. Mather*, 20 Wend. 72, 32 A. D. 521,—holding book entries daily transcribed from slate admissible; *Miller v. Shay*, 145 Mass. 162, 1 A. S. R. 446, 13 N. E. 468, holding account book of illiterate man containing straight marks showing number of loads delivered admissible as original entries.

Cited in reference notes in 25 A. D. 596; 27 A. D. 279,—on books of account as evidence.

Cited in notes in 52 L.R.A. 577, on admissibility in party's own favor of entries of accounts transferred from memoranda; 125 A. S. R. 845, on admissibility in evidence of entries made in the regular course of business other than in books of account.

Distinguished in *Silver v. Worcester*, 72 Me. 322, holding entries in diaries not purporting to be daily or contemporaneous account inadmissible.

—Suppletory oath.

Cited in *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, holding book entry made by one on information furnished by another admissible if both testify to its correctness; *Barker v. Haskell*, 9 Cush. 218, holding book entry verified by oath competent although originally entered on slate; *State v. Shinborn*, 46 N. H. 497, 88 A. D. 224, holding book entries copied from slate and verified by oaths of persons making original memorandum and transcribing it admissible; *Kent v. Garvin*, 1 Gray, 148, holding suppletory oath of person making original memorandum copied into account book by another necessary; *Harwood v. Mulry*, 8 Gray, 250, holding book entry admissible when supplemented by testimony of persons making charge and delivering goods; *Littlefield v. Rice*, 10 Met. 287, holding wife making entries in book of husband may testify to their correctness; *Towle v. Blake*, 38 Me. 95, holding book entry with suppletory oath inadmissible to prove services in building fence and its price; *Jackson v. Evans*, 8 Mich. 476, holding testimony of servant making original memoranda or delivering goods should be required.

22 AM. DEC. 416, HEDGE v. DREW, 12 PICK. 141.**Levy of execution or attachment.**

Cited in *Morrison v. Blodgett*, 8 N. H. 238, 29 A. D. 653, holding receptor of attached property cannot show no goods were in fact seized.

—Sufficiency of description of property levied on.

Cited in *Randolph v. Carlton*, 8 Ala. 606, holding return to execution need not describe with particularity land levied upon; *McConihe v. Sawyer*, 12 N. H.

396, holding description of land levied upon sufficient if it precludes doubt as to its location; *Colburn v. Pomeroy*, 44 N. H. 19, holding description of land levied on sufficient when properly described on three sides and alternative boundaries given for fourth side.

Validity, sufficiency, and effect of delivery of instrument.

Cited in *Parker v. Hill*, 8 Met. 447, holding validity of delivery of deed not affected by fact that it was after registration; *Howe v. Ould*, 28 Gratt. 1, holding sufficiency of delivery of negotiable paper dependent on circumstances of particular case; *Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 604, holding recorded mortgage ineffectual until delivery; *Robbins v. Rascoc*, 120 N. C. 79, 58 A. S. R. 774, 38 L.R.A. 238, 26 S. E. 807, holding delivery of deed for registry irrevocable delivery to grantee; *Dresel v. Jordan*, 104 Mass. 407, holding deed not invalidated by discrepancy between date and time of acknowledgment since delivery is true date.

Cited in reference note in 29 A. D. 66, on validity of executing and recording of deed as against attachment by creditor of grantor before its delivery.

Cited in note in 54 L.R.A. 905, 907, on rights of third persons in case of delivery to person other than the grantee.

— Proof of delivery.

Cited in *Snow v. Orleans*, 126 Mass. 453, presuming delivery of recorded deed although left with grantor where condition in deed complied with; *Hammond v. Hunt*, 4 Bann. & Ard. 111, Fed. Cas. No. 6,003, holding slight evidence sufficient to show delivery of license to licensee under patent; *Molineux v. Coburn*, 6 Gray, 124, holding possession by mortgagee of recorded mortgage proof of delivery; *Powers v. Russell*, 13 Pick. 69, holding delivery not shown where grantor took deed to registry and on its return retained it.

— Delivery for use of another.

Cited in *Cooper v. Jackson*, 4 Wis. 537, holding delivery of deed to registrar, good delivery when assented to by grantee; *Shaw v. Hayward*, 7 Cush. 170, holding delivery of deed for record at request of grantee good delivery to latter; *Kellogg v. Miller*, 2 McCrary, 395, 13 Fed. 198, holding delivery of mortgage to recorder for record sufficient delivery to mortgagee; *Marsh v. Austin*, 1 Allen, 235, holding delivery of deed to agent for grantee effectual; *Cowell v. Daggett*, 97 Mass. 434, holding grantor's delivery of deed for registry sufficient delivery from time of grantee's subsequent assent thereto; *Richardson v. Lincoln*, 5 Met. 201, holding leaving note with attorney for use of person who brings suit thereon sufficient delivery.

— Acceptance.

Cited in *Creeden v. Mahoney*, 193 Mass. 402, 79 N. E. 776, holding acts of grantee showing acceptance of deed sufficient to pass title; *Oxnard v. Blake*, 45 Me. 602, holding acceptance by mortgagee of chattel mortgage executed and recorded without his knowledge equivalent to delivery.

Cited in note in 1 A. D. 61, on presumption of acceptance of provision for one's benefit.

Distinguished in *Hulick v. Scovil*, 9 Ill. 159, holding proof of acceptance subsequent to delivery insufficient to validate deed.

— Intervening levy of attachment or execution.

Cited in *Herring v. Richards*, 1 McCrary, 570, 3 Fed. 439, holding title of grantee accepting deed relates back to date of conveyance unless defeated by intervening levy of attachment or execution; *Fischer Leaf Co. v. Whipple*, 51 Mo.

App. 181, sustaining chattel mortgage filed by mortgagor and accepted by mortgagee as against subsequent attachment.

Distinguished in *Welch v. Sackett*, 12 Wis. 244, upholding attachment intervening between filing of chattel mortgage and its acceptance by mortgagee; *Day v. Griffith*, 15 Iowa, 104, upholding attachment intervening between delivery of bill of sale for record and acceptance by grantee; *Samson v. Thornton*, 3 Met. 275, 37 A. D. 135, upholding attachment as against grantee under registered deed not accepted until after levy; *Hibberd v. Smith*, 67 Cal. 547, 56 A. R. 726, 4 Pac. 473, upholding lien of judgment against prior grantee subsequently accepting conveyance; *Goodsell v. Stinson*, 7 Blackf. 437, holding judgment recovered after mortgage recorded but before mortgagee assented thereto entitled to priority.

22 AM. DEC. 418, BRADLEY v. HEATH, 12 PICK. 163.

Privileged communications — In discharge of duty or to protect interest.

Cited in *Moore v. Butler*, 48 N. H. 161, holding words spoken in good faith in the performance of duty privileged; *Sheckell v. Jackson*, 10 Cush. 25, holding libelous publication honestly made in performance of duty justifiable; *Missouri P. R. Co. v. Richmond*, 73 Tex. 568, 15 A. S. R. 794, 4 L.R.A. 280, 11 S. W. 555, holding publication of false statement made in discharge of duty not actionable; *Kinyon v. Palmer*, 18 Iowa, 377, upholding freedom of press to expose disloyalty to government; *Rude v. Nass*, 79 Wis. 321, 24 A. S. R. 717, 48 N. W. 555, holding defamatory communication conditionally privileged if made in good faith in performance of duty or to one having an interest in facts; *Noonan v. Orton*, 32 Wis. 106, holding communications made in good faith to person having an interest in them conditionally privileged; *Knowles v. Peck*, 42 Conn. 386, 19 A. R. 542, holding communication to patentees as to intent of person having patented material in his possession privileged; *Erber v. Dun*, 12 Fed. 526, holding verbal communications made by mercantile agency to interested persons as to financial standing privileged; *Schulze v. Jalonick*, 18 Tex. Civ. App. 296, 44 S. W. 580, holding communication made in good faith to protect interest of party making it privileged.

Cited in reference notes in 62 A. S. R. 677, as to what communications are privileged; 32 A. S. R. 87, as to when slanderous words are privileged.

Cited in notes in 27 A. D. 158; 33 A. D. 541,—on privileged communications.

— Lawful occasion generally.

Cited in *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding color of lawful occasion insufficient to justify defamatory statement; *Smith v. Higgins*, 16 Gray, 251, holding pertinent statement by voter at town meeting privileged; *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963, holding pertinent answers of witness examined before legislative committee privileged; *McGaw v. Hamilton*, 184 Pa. 108, 63 A. S. R. 786, 39 Atl. 4, 28 Pittsb. L. J. N. S. 263, holding irrelevant charge of perjury not privileged although made in debate by member of borough council; *Howland v. Flood*, 160 Mass. 509, 36 N. E. 482, holding statements in report of investigating committee appointed by town privileged; *Kleizer v. Symmes*, 40 Ind. 562, holding words spoken by pastor in regular course of church discipline prima facie justifiable; *Decker v. Gaylord*, 35 Hun, 584, holding communication made in good faith to school commissioner as to character of teacher privileged; *Mayo v. Sample*, 18 Iowa, 306, holding charge of crime by officer attempting to discover offender not slanderous in absence of malice; *Robinson v. Van Auken*, 190 Mass. 161, 76 N. E. 601, holding charge of larceny made in good faith in presence of police officer privileged.

Cited in notes in 104 A. S. R. 121, on application of doctrine of privilege to statements by members of legislative and executive departments; 15 A. D. 232, on privileged nature of communication addressed to body or individual to procure redress; 9 E. R. C. 80, on communication made in discharge of public or private duty as privileged.

— In judicial proceeding.

Cited in *Aylesworth v. St. John*, 25 Hun, 156, holding alleged libel privileged if made in good faith in judicial proceeding in which it was pertinent and material; *Lewis v. Black*, 27 Miss. 425, holding relevant statement of party on trial of action privileged in absence of malice; *Jennings v. Paine*, 4 Wis. 358, holding accusation of perjury made by attorney against witness in course of a legal proceeding privileged; *Hoar v. Wood*, 3 Met. 193, holding words spoken by witness at trial and relevant to issues privileged; *Sands v. Robinson*, 12 Smedes & M. 704, 51 A. D. 132, holding testimony by justice of the peace before grand jury as to rumors heard by him privileged.

Cited in reference notes in 23 A. S. R. 76, on prima facie privilege of words spoken in course of judicial proceedings; 81 A. D. 56, on counsel's liability for words spoken in judicial proceeding, if not pertinent to case.

Cited in note in 3 L.R.A. 418, on rule that privilege in judicial proceedings extends to both attorney and client.

Malice and probable cause.

Cited in *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, holding *onus probandi* to establish malice on plaintiff where libelous communication prima facie privileged; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 114 A. S. R. 171, 3 L.R.A.(N.S.) 696, 83 Pac. 131, 7 A. & E. Ann. Cas. 840, holding burden on plaintiff to show absence of good faith and probable cause where libel complained of written on privileged occasion; *Landis v. Campbell*, 79 Mo. 433, 49 A. R. 239, holding burden of proving express malice upon plaintiff where communication privileged; *Vial v. Larson*, 132 Iowa, 208, 109 N. W. 1007, holding burden of proof to show malice upon plaintiff where slanderous communication privileged.

— Burden of proving.

Cited in *Jarnigan v. Fleming*, 43 Miss. 710, 5 A. R. 514, holding in action for slander express malice need not be shown unless communication privileged; *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846, holding proof of falsity of charge tends to show malice; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, holding grounds of good faith and belief may be shown in support of defense of privileged communication; *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding false publication justifiable only if made from good motives with probable cause; *Briggs v. Garrett*, 111 Pa. 404, 56 A. R. 274, 2 Atl. 513, 17 W. N. C. 129, 43 Phila. Leg. Int. 199, holding that libel was malicious immaterial if probable cause exists.

Cited in reference note in 25 A. S. R. 581, as to when malice must be proved in slander.

Cited in note in 3 L.R.A.(N.S.) 697, on burden of showing good faith and probable cause for alleged privileged communications.

Distinguished in *Watson v. Moore*, 2 Cush. 133, holding proof of suspicious circumstances inadmissible to rebut malice in action for slander.

What must be pleaded in libel or slander.

Cited in *State v. Burnham*, 9 N. H. 34, 31 A. D. 217, holding that publication was upon lawful occasion matter in excuse admissible under general issue; *Johnson v. Brown*, 13 W. Va. 71, holding that alleged libelous matter was published in

due course of legal procedure may be shown under general issue; *Barrows v. Carpenter*, 1 Cliff. 204, Fed. Cas. No. 1,068, holding defense of exigency or interest warranting publication admissible under general issue; *Edwards v. Chandler*, 14 Mich. 471, 90 A. D. 249, holding proof of truth of privileged communication admissible under general issue; *Atwater v. Morning News Co.* 67 Conn. 504, 34 Atl. 865, holding proof of truth of libelous words inadmissible unless pleaded in justification.

Aggravation or mitigation of damages.

Cited in *Denslow v. Van Horn*, 16 Iowa, 476, holding mere failure to prove defense of bad character set up in good faith in action for breach of marriage promise does not tend to aggravate damages.

— In action for slander.

Limited in *Pallet v. Sargent*, 36 N. H. 496, holding plaintiff's admissions of criminal acts not receivable in mitigation of damages in action for slander; *Knight v. Foster*, 39 N. H. 576, holding suspicious conduct of plaintiff not admissible in mitigation of damages in action for slander.

22 AM. DEC. 421, BAKER v. BOSTON, 12 PICK. 183.

Powers of city council.

Cited in *Richmond v. McGirr*, 78 Ind. 192, denying right of court to control discretion conferred by legislature on common council to buy land and construct public buildings; *Wilkes-Barre v. Troxell*, 5 Luzerne Leg. Reg. 133, sustaining right of city council to determine what streets shall be opened and widened.

Cited in reference note in 20 A. S. R. 939, on legislative powers of mayor and aldermen.

Right to abate nuisance.

Cited in *Beebe v. State*, 6 Ind. 501, 63 A. D. 391 (dissenting opinion), on right of person injured by nuisance to abate it.

Cited in reference notes in 26 A. D. 102, on remedies for public nuisances; 24 A. D. 161, on private right of action for public nuisance; 49 A. D. 586, on right of private action by one specially injured by public nuisance.

Cited in notes in 6 L.R.A. 763, on abatement of public nuisances; 31 A. D. 132, on private action for public nuisance; 57 A. S. R. 697, on private action for damages for obstruction of navigable waters; 4 L.R.A. 212, on necessity to recovery, of plaintiff's showing special injury from public nuisance; 59 L.R.A. 47, on extent of sovereign's right as against subjects to obstruct or destroy navigation.

— Right of town or municipality.

Cited in *Phoenix v. Emigration Comrs.* 1 Abb. Pr. 466, holding common council may abate nuisance injurious to public health; *Montezuma v. Minor*, 73 Ga. 484, sustaining right of town council to abate millpond endangering public health; *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446, sustaining right of town to remove obstruction from highway in a summary way; *Clark v. Holt*, 18 Ark. 257, upholding right of municipality to pull down house constituting nuisance; *McKibbon v. Ft. Smith*, 35 Ark. 352, sustaining right of town council to remove wooden building erected within fire limits; *Kennedy v. Phelps*, 10 La. Ann. 227, upholding right of municipality to abate hide-curing establishment as menace to public health.

Cited in reference notes in 40 A. S. R. 778, on municipality's power to abate nuisance; 30 A. D. 572, on power of municipal corporations to abate nuisances and

to declare what is a nuisance; 24 A. D. 197, on power of municipal corporations to abate nuisances and to declare what is a nuisance.

Cited in notes in 36 L.R.A. 609, on method of abatement of nuisances by municipalities; 40 A. D. 344, on power of municipal corporations to prohibit and prevent nuisances; 36 L.R.A. 601, on extent of municipal power to prevent or abate nuisances; 27 A. D. 98, on power of municipal corporations to remove nuisances and to determine what is a nuisance; 38 L.R.A. 169, on municipal power over use of buildings to prevent nuisance; 38 L.R.A. 643, on municipal power over nuisances relating to trade or business; 38 L.R.A. 325, on municipal power over nuisances relating to water and water courses; 59 L.R.A. 78, on powers and liabilities of municipality as to obstruction or destruction of rights of navigation.

Distinguished in *Clark v. Syracuse*, 13 Barb. 32, restraining city from abating dam as nuisance endangering health; *Babcock v. Buffalo*, 1 Sheldon, 317, denying right of city to fill up canal as menace to public health thereby depriving abutting owners of property rights.

— Of health officer.

Distinguished in *Smith v. Baker*, 3 Pa. Dist. R. 626, 14 Pa. Co. Ct. 65, denying right of health officer to dig cesspool on private property to prevent drainage of waste water into street.

Validity of police regulations.

Cited in *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 A. & E. Ann. Cas. 892, sustaining ordinance forbidding erection of billboards on private property; *State v. Theriault*, 70 Vt. 617, 67 A. S. R. 695, 43 L.R.A. 290, 41 Atl. 1030, holding statute prohibiting riparian owner from fishing in brook stocked with fish by state valid exercise of police power; *People ex rel. Wood v. Draper*, 25 Barb. 344, upholding act providing for establishment and government of metropolitan police district; *Galena & C. Union R. Co. v. Loomis*, 13 Ill. 548, 56 A. D. 471, holding general police laws of state binding on railroad corporation; *Richmond, F. & P. R. Co. v. Richmond*, 26 Gratt. 83, holding railroad corporation subject to valid exercise of police power; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 53 A. S. R. 557, 41 L.R.A. 481, 66 N. W. 624, holding ordinance requiring railroad company to construct or repair viaducts at street crossings valid exercise of police power.

Cited in reference notes in 28 A. D. 191, on police powers of municipal corporations; 90 A. D. 283, as to valid exercise of police power by municipal corporations.

Distinguished in *State, Jersey Co., Prosecutor, v. Jersey City*, 34 N. J. L. 31, holding resolution of common council directing removal of obstructions from private wharves invalid where public easement disputed.

— As to wooden buildings within fire limits.

Cited in *Wadleigh v. Gilman*, 12 Me. 403, 28 A. D. 188; *Baumgartner v. Hasty*, 100 Ind. 575, 50 A. R. 830,—sustaining ordinance prohibiting erection of wooden building within fire limits; *King v. Davenport*, 98 Ill. 305, 38 A. R. 89, sustaining ordinance forbidding placing of wooden roof on building within fire limits.

Cited in note in 13 L.R.A. 481, on municipal control over erection of wooden buildings.

—Health regulations.

Cited in *Watertown v. Mayo*, 109 Mass. 315, 12 A. R. 694, holding statute forbidding maintenance of slaughterhouse within town or city valid exercise of police

power; *Health Department v. Trinity Church*, 145 N. Y. 32, 45 A. S. R. 579, 27 L.R.A. 710, 39 N. E. 833, sustaining statute requiring water to be furnished on each floor of every tenement house; *Green v. Savannah*, 6 Ga. 1, sustaining as police regulation, ordinance forbidding cultivation of rice within city limits; *Agnew v. Washington*, 7 Pa. Co. Ct. 180, sustaining ordinance prohibiting drilling of oil or gas wells within limits of borough; *Hengehold v. Covington*, 108 Ky. 752, 37 S. W. 495, upholding ordinance providing for removal of smallpox patients to pesthouse; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 A. R. 113, 11 N. E. 929, upholding regulation of board of health requiring disinfection of imported rags; *Sohier v. Trinity Church*, 109 Mass. 1, upholding power of legislature to pass laws regarding removal of tombs and disposal of remains of dead; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 A. D. 650, holding notice not required previous to order of board of health to remove nuisance; *Harrington v. Providence*, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1, holding ordinance forbidding privy vaults and requiring drainage into sewer constitutional although not providing for notice or hearing; *Miller v. Horton*, 152 Mass. 540, 23 A. S. R. 850, 10 L.R.A. 116, 26 N. E. 100 (dissenting opinion), on constitutionality of act providing for killing of horse affected with glanders.

Cited in note in 80 A. S. R. 213, on powers which may be delegated to boards of health.

Interference with or appropriation of private property.

Cited in *Salem v. Eastern R. Co.* 98 Mass. 431, 96 A. D. 650, holding that board of health in removing nuisance may resort to measures injuriously affecting other lands; *State v. Morris*, 77 N. C. 512, holding charter of lottery company revocable by legislative act; *Moore v. State*, 48 Miss. 147, 12 A. R. 367, holding lottery charter for term of years may be abrogated by constitutional provision; *Lowell v. Boston*, 111 Mass. 454, 15 A. R. 39, denying right of legislature to impose tax for private benefit; *Richmond, F. & P. R. Co. v. Richmond*, 26 Gratt. 83, holding prohibition of noxious use of property not an appropriation to a public use.

Cited in reference notes in 23 A. D. 632, on right to take private property for public purposes; 32 A. S. R. 270, on power of municipal corporation to appropriate property without compensation; 76 A. S. R. 154, on compensation for private property used under police power; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use.

Cited in note in 19 L.R.A. 198, on right to compensation for property destroyed in abating public nuisance.

Nature of license.

Cited in reference note in 30 A. D. 72, on creation and nature of license.

Prescriptive right.

Cited in *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446, holding possession to be adverse must be consistent with idea of deed or raise presumption of one.

Cited in note in 53 L.R.A. 896, on prescriptive right to pollution of streams, etc.

Liability of corporation on contract or in tort.

Cited in *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 A. D. 742, holding corporation whether municipal or private liable for contracts or torts of its agent connected with business of agency.

— Municipal corporations.

Cited in *Thayer v. Boston*, 19 Pick. 511, 31 A. D. 157, holding action sounding in tort may be maintained against municipal corporation; *McGraw v. Marion*, 98 Ky. 673, 47 L.R.A. 593, 34 S. W. 18, holding municipality liable to person injured by enforcement of void and unconstitutional ordinance; *Oklahoma City v. Hill Bros.* 6 Okla. 114, 50 Pac. 242, holding city liable for forcibly entering upon property and breaking up occupant's business; *Commercial Electric Light & P. Co. v. Tacoma*, 20 Wash. 288, 72 A. S. R. 103, 55 Pac. 219, holding city liable for unlawful removal of electric light wires by order of mayor; *Haskell v. New Bedford*, 108 Mass. 208, restraining city from discharging sewage into private dock; *Merrifield v. Worcester*, 110 Mass. 216, 14 A. R. 592, holding city constructing sewers in proper manner not liable for pollution of stream in absence of negligence in care and management; *Cavanagh v. Boston*, 139 Mass. 426, 52 A. R. 716, 1 N. E. 834, holding city not liable in damages for illegal construction of dam by board of health.

Cited in notes in 15 A. S. R. 849, on liability of municipal corporation for maintaining a nuisance; 2 L.R.A. 713, on liability of city for damage from falling wall.

— Counties.

Cited in *Anne Arundel County v. Duckett*, 20 Md. 468, 83 A. D. 557, holding county liable for value of horse killed while being driven on road out of repair; *Coburn v. San Mateo County*, 75 Fed. 520, holding county liable for wrongful acts of officer tearing down fence and forcibly keeping road open.

22 AM. DEC. 425, ILSLEY v. NICHOLS, 12 PICK. 270.**Force or deceit as affecting levy.**

Cited in *Curtis v. Hubbard*, 4 Hill, 437, 40 A. D. 292, holding seizure of goods illegal where sheriff opened latched door to make levy; *People v. Hubbard*, 24 Wend. 369, 35 A. D. 628, sustaining right to resist sheriff opening outer door to make levy; *Hillman v. Edwards*, 28 Tex. Civ. App. 308, 66 S. W. 788, denying right of officer to forcibly enter dwelling to take property under order of sale; *Williams v. Steenrod*, 11 Pa. Dist. R. 22, denying validity of levy on property which defendant was induced by deceit to bring into the state.

Cited in reference notes in 93 A. D. 466, on validity of levy effected by unlawful or fraudulent means; 99 A. D. 556, on breaking open doors to execute writs; 25 A. D. 566, on breaking open doors or windows of dwelling to make levy.

Cited in notes in 95 A. S. R. 128, on liability of sheriffs, constables, and marshals for use of force; 11 E. R. Co. 643, 645, on right of sheriff to break into a house to execute process; 61 A. D. 155, on breaking open doors to effect arrest in execution of civil process.

— Replevin.

Cited in *Kelley v. Schuyler*, 20 R. I. 432, 78 A. S. R. 887, 44 L.R.A. 436, 39 Atl. 893, holding officer guilty of trespass in breaking into dwelling to serve writ of replevin.

Distinguished in *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993, holding that under statute officer armed with replevin writ, authorized to break into dwelling under certain circumstances; *Howe v. Oyer*, 50 Hun, 559, upholding right of constable to break into dwelling to replevy goods, in absence of occupant and after rapping and calling for him.

— Attachment.

Cited in *Swain v. Mizner*, 8 Gray, 182, 69 A. D. 244, holding officer liable for breaking open door of room in tenement house against wish of owner, to attach property of third person therein; *Mack v. Parks*, 8 Gray, 517, 69 A. D. 267, holding attachment of watch invalid where officer obtained possession by wrongfully severing silk guard by which watch was annexed to debtor's person; *Bailey v. Wright*, 39 Mich. 96, holding void, attachment of piano, made by breaking into dwelling house; *Pitkin v. Burnham*, 62 Neb. 385, 89 A. S. R. 763, 55 L.R.A. 280, 87 N. W. 160, holding void, forcible attachment of property by sheriff while goods were in hands of constable who had seized them on voidable judgment.

Effect of fraud or deceit on privilege of witness.

Cited in note in 25 L.R.A. 733, on effect of fraud and deceit on privilege of non-resident witnesses from suit.

Validity of attachment where jurisdiction obtained by fraud.

Cited in *Ambrose v. Barrett*, 121 Cal. 297, 54 Pac. 264 (dissenting opinion), on effect of fraud in obtaining jurisdiction of property attached; *Pomroy v. Parmlee*, 9 Iowa, 140, 74 A. D. 328, holding attachment void where debtor had been by fraud and violence made to bring property into and expose it in county where leviable; *Gilbert v. Hollinger*, 14 La. Ann. 445, holding void, attachment obtained by first bringing property within state jurisdiction by false allegation of citizenship in Federal court; *Deyo v. Jennison*, 10 Allen, 410, holding attachment void, where debtor had been fraudulently induced by creditor to bring property into state where such property was attachable; *Chubbuck v. Cleveland*, 37 Minn. 466, 5 A. S. R. 864, 35 N. W. 362, holding attachment void, where jurisdiction obtained by fraudulent representations to third person communicated to debtor.

Attachment of property in custody of the law.

Cited in *Ex parte Hurn*, 92 Ala. 102, 25 A. S. R. 23, 13 L.R.A. 120, 9 So. 515, holding officer garnishable for money in his hands lawfully taken from prisoner; *Dahms v. Sears*, 13 Or. 47, 11 Pac. 891; *Holker v. Hennessey*, 141 Mo. 527, 64 A. S. R. 524, 39 L.R.A. 165, 42 S. W. 1090,—holding sheriff not subject to garnishment on account of money taken from prisoners before conviction; *Closson v. Morrison*, 47 N. H. 482, 93 A. D. 459, holding question for jury whether search after arrest not made in good faith or for purpose of getting property of prisoner away from his person so that it could be attached.

Cited in note in 12 L.R.A. 509, on attachability of property in the custody of the law.

Successive or subsequent attachments.

Cited in *McNally v. Wilkinson*, 20 R. I. 315, 38 Atl. 1053, holding successive attachments in order to secure sufficient amount in hands of garnishee to pay claim in full, abuse of process.

Distinguished in *Corning v. Dreyfus*, 20 Fed. 426, holding rule in that levy is wrongful where creditor unlawfully obtains possession of debtor's property for purpose of levy not maintainable by subsequent attachment creditor profiting thereby; *Brady v. Royce*, 180 Mass. 553, 62 N. E. 960, holding money attached on defective writ and in hands of officer attachable on subsequent writ by same plaintiff, without first returning such money to debtor.

Liability of attaching officer for depriving debtor of use of property.

Distinguished in *Leavitt v. Butterfield*, 15 Gray, 67, holding officer not liable for depriving debtor of use of personal property by unreasonably retaining possession of building for purpose of keeping attached property therein.

Liability of officer delivering replevied property without bond.

Cited in *Whitney v. Jenkinson*, 3 Wis. 407, holding officer delivering property taken by him on replevin, to plaintiff without requiring sufficient bond liable to defendant therefor.

Obtaining jurisdiction of person by fraud or force.

Cited in *Peel v. January*, 35 Ark. 331, 37 A. R. 27, holding inducing one into state to cross-examine witnesses in one action for purpose of serving him with process in another, fraud in jurisdiction of court, but not available in action on judgment; *Whetstone v. Whetstone*, 31 Iowa, 276; *Dunlap v. Cody*, 31 Iowa, 260, 7 A. R. 129,—holding fact that jurisdiction of defendant was obtained by fraud available in action on judgment; *Byler v. Jones*, 22 Mo. App. 623, holding void, service of summons in civil action obtained by bringing defendant within jurisdiction by wrongful arrest on criminal charge; *Townsend v. Smith*, 47 Wis. 623, 32 A. R. 793, 3 N. W. 439, holding service of summons in libel action illegal where plaintiff fraudulently induced defendant to come within court's jurisdiction in order to have him arrested on criminal charge.

Illegal arrest.

Cited in *Re Allen*, 13 Blatchf. 271, Fed. Cas. No. 208, holding imprisonment of one in Vermont, after arrest in New Hampshire by Vermont officer under Vermont warrant, illegal.

Distinguished in *Carle v. Delesdernier*, 13 Me. 363, 29 A. D. 508, holding action not maintainable against officer for arresting by virtue of process person at the time privileged from arrest.

Effect of abduction before arrest.

Distinguished in *Kingen v. Kelley*, 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36, holding criminal jurisdiction not defeated because one accused of grand larceny was abducted from another state before arrest.

Collateral attack upon validity of arrest.

Distinguished in *Everett v. Henderson*, 146 Mass. 89, 4 A. S. R. 284, 14 N. E. 932, holding falsity of affidavit upon which arrest founded and recognizance entered into, not open to attack in action on recognizance.

22 AM. DEC. 433, ARNOLD v. SCOTT, 2 MO. 13.**When statute of limitations operative.**

Cited in *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 A. S. R. 290, 38 N. E. 208, holding statute not operative for fraud in issue of stock until knowledge acquired; *Wells v. Halpin*, 59 Mo. 92, holding that concealment by third parties does not prevent operation of statute against action to recover chattel; *Pietsch v. Milbrath*, 123 Wis. 647, 107 A. S. R. 1017, 68 L.R.A. 945, 102 N. W. 342, holding that fraudulent concealment of cause of action at law does not bar operation of statute under express provision of law; *Smith v. Newby*, 13 Mo. 159, holding operation of statute not prevented by mere ignorance of rights.

Cited in reference notes in 25 A. D. 717, as to when statute of limitations will begin to run; 36 A. D. 107, on how far fraud prevents running of statute of limitations.

Cited in notes in 51 A. D. 583, on statute of limitations in case of fraud; 60 A. D. 513, on fraud at law as preventing operation of statute of limitations; 25 L.R.A. 567, on how far statutes of limitation will be regarded as having abrogated maxim that one cannot profit by his own wrong.

22 AM. DEC. 435, OWENS v. GEIGER, 2 MO. 39.**Liability of bailees.**

Cited in reference notes in 24 A. D. 160, on liability of other bailees for property lost or stolen; 92 A. D. 185, on duty and liability of agister.

22 AM. DEC. 437, MELTON v. McDONALD, 2 MO. 45.**When replevin maintainable.**

Cited in Phillips v. Schall, 21 Mo. App. 38, holding gist of replevin wrongful detention, not original taking.

Cited in note in 55 A. D. 433, as to when detinue will lie.

Gist of action of detinue.

Cited in reference note in 33 A. D. 309, on gist of action of detinue.

Cited in note in 9 E. R. C. 319, on detainer as gist of action of detinue.

Proof in replevin.

Cited in Glass v. Basin & B. S. Min. Co. 31 Mont. 21, 77 Pac. 302; Benedict & B. Mfg. Co. v. Jones, 60 Mo. App. 219,—holding petition in replevin failing to show plaintiff's interest, defective; Andrews v. Costican, 30 Mo. App. 29, holding plaintiff in replevin required to show title with right to immediate possession.

Possession of mortgaged property.

Cited in Stonebraker v. Ford, 81 Mo. 532, holding sureties of mortgagee not entitled to possession of mortgaged property until debt paid by them.

22 AM. DEC. 440, BENNETT v. O'FALLON, 2 MO. 69.**Husband's liability for necessaries.**

Cited in Hare v. Gibson, 32 Ohio St. 33, 30 A. R. 568, denying liability of husband living separate from wife for necessaries furnished her pending divorce proceedings.

Cited in reference notes in 42 A. D. 219, on husband's liability for wife's necessities; 54 A. D. 492, on husband's liability for debts contracted by wife after she has obtained decree for alimony; 33 A. S. R. 921, on husband's liability for wife's necessities while living apart, where wife has means.

Husband as party.

Cited in Benadum v. Pratt, 1 Ohio St. 403, holding wife living apart from husband through latter's cruelty entitled to maintain action relating to her estate without joining him.

22 AM. DEC. 442, RISHER v. ROUSH, 2 MO. 95.**Relief in equity.**

Cited in reference note in 32 A. D. 695, on legal remedy as bar to equitable relief.

Cited in note in 55 A. S. R. 519, on ignorance of one's rights as ground of relief.

— Against judgment.

Cited in Stein v. Burden, 30 Ala. 270, denying equitable relief against judgment without notice where granted by consent; Wright v. Salisbury, 46 Mo. 26, holding that equity will not grant new trial to let in defense not previously made because of negligence.

Cited in reference notes in 43 A. D. 288, as to when equity will decree new Am. Dec. Vol. III.—75.

trial at law; 29 A. D. 106, on relief in equity against judgments caused by mistake or negligence.

Cited in notes in 54 A. S. R. 242, on effect of mistake, accident, or surprise on right to equitable relief against judgment, decree, or other judicial determination; 30 L.R.A. 797, on injunction against judgment obtained by mistake of law; 30 L.R.A. 703, on injunction against judgment for erroneously refusing a continuance; 32 L.R.A. 324, on general equitable jurisdiction as to injunction against judgment where a legal defense was asserted at law; 31 L.R.A. 772, on injunction against judgment because of payment where defense was made at law; 54 A. D. 466, on equitable relief against judgment at law where no defense was interposed; 32 L.R.A. 323, on general equitable jurisdiction as to injunctions against judgments where there is a failure to defend at law; 31 L.R.A. 763, on injunction against judgments on account of set-offs not asserted at law.

Collateral attack on judgment.

Cited in *State v. Wear*, 145 Mo. 162, 46 S. W. 1099 (dissenting opinion), on collateral attack on judgment.

22 AM. DEC. 444, PHILIPSON v. BATES, 2 MO. 116.

Assumpsit for money had and received.

Cited in reference notes in 26 A. D. 682, as to when action for money had and received lies; 37 A. D. 56, as to when assumpsit lies for money had and received; 76 A. D. 794, on right to recover back money paid on contract, compliance with which has become impossible.

Cited in notes in 24 A. D. 296, an assumpsit to recover back money paid on contract; 52 A. D. 760, on recovery on count for money had and received of money paid on consideration which failed; 4 L.R.A. 369, on rights and remedies of owner of stolen property.

Secondary evidence.

Cited in reference note in 68 A. D. 459, on requisites of secondary evidence to render it admissible.

Cited in note in 11 E. R. C. 507, as to whether there are degrees of secondary evidence.

Admissibility of part of record.

Cited in *Crone v. Dawson*, 19 Mo. App. 214, holding one setting up judgment as bar bound to produce entire record; *Howard v. Thornton*, 50 Mo. 291, holding portion of record not admissible to show jurisdiction of court.

Cited in reference notes in 36 A. D. 145; 64 A. D. 250,—on admissibility of part of record in evidence.

22 AM. DEC. 449, WARD v. STATE, 2 MO. 120.

Powers of grand jury.

Cited in *State v. Terry*, 30 Mo. 368, holding question to witness before grand jury as to knowledge of violation of gaming laws, proper; *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453; *Blaney v. State*, 74 Md. 153, 21 Atl. 547,—sustaining power of grand jury to institute proceedings on own motion; *State v. Blocker*, 14 Ala. 450, holding witness called before grand jury to give evidence as gambling, not liable for contempt for refusal to answer; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, holding examination of witnesses before Federal grand jury not required to be preceded by indictment; *Heard v. Pierce*, 8 Cush.

338, 54 A. D. 757, holding witness acting disrespectful to grand jury subject to discipline by court.

Cited in note in 12 A. S. R. 911, 913, on powers and duties of grand jurors.

Privilege of witness.

Cited in *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116, holding witness in prosecution for bribery not entitled to privilege unless claimed; *Youngs v. Youngs*, 5 Redf. 505, holding witness testifying as to part of transaction waiver of privilege as to rest; *Ex parte Buskett*, 106 Mo. 602, 27 A. S. R. 378, 14 L.R.A. 407, 17 S. W. 753, holding that privilege does not exempt witness from disclosing names of others violating gambling laws; *Re Briggs*, 135 N. C. 118, 47 S. E. 403, sustaining statute requiring witness to disclose gambling by himself and others; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447, holding witness in forgery case not entitled to privilege unless reasonable ground to believe testimony incriminating.

Cited in reference notes in 88 A. D. 320, on questions witnesses need not answer; 49 A. D. 346, on privilege of witness to refuse to answer incriminating questions.

Cited in notes in 75 A. S. R. 319, on privilege of witness as to incriminating testimony; 14 L.R.A. 407, on effect of statutes prohibiting use of testimony against witness.

Who determines incriminating character of evidence.

Cited in *La Fontaine v. Southern Underwriters Asso.* 83 N. C. 132, holding incriminating character of evidence for court to determine.

Cited in notes in 75 A. S. R. 340, 341, on who determines tendency of answer to incriminate witness; 21 A. D. 57, on question for court as to tendency of question to criminate witness.

22 AM. DEC. 454, HECTOR v. STATE, 2 MO. 166.

Admissibility of confessions.

Cited in *Hawkins v. State*, 7 Mo. 190, holding confession upon appeal to tell truth, admissible; *State v. Hagan*, 54 Mo. 192, holding confession of larceny upon inducement of immunity, inadmissible; *State v. Brockman*, 46 Mo. 566, holding confessions of theft induced by fear, inadmissible; *People v. Wolcott*, 51 Mich. 612, 17 N. W. 78, holding confession of larceny to those visiting accused's cell late at night to extract same, inadmissible; *State v. Patterson*, 73 Mo. 695; *State v. Kinder*, 96 Mo. 548, 10 S. W. 77; *State v. Duncan*, 64 Mo. 262,—holding for court to determine whether confession voluntary.

Cited in reference notes in 34 A. D. 675, on admissibility of confessions in evidence; 23 A. D. 128, as to when confessions are admissible; 65 A. D. 676, on admissibility and effect of confessions; 61 A. D. 730, on inadmissibility of confession extorted by pain or made under influence of hope or fear.

Cited in notes in 42 L. ed. U. S. 570, on admissibility of confessions of accused as evidence against him; 6 A. S. R. 246; 28 L. ed. U. S. 263, 264,—as to when confessions of accused are admissible against him; 18 L.R.A.(N.S.) 781, as to who shall decide on question whether confession is voluntary; 18 L.R.A.(N.S.) 832, as to whether confession is voluntary when induced by fear inspired by violence.

Discharge of juror or jury.

Cited in *Hawes v. State*, 88 Ala. 37, 7 So. 302, holding serious sickness of wife ground for discharge of juror; *State v. Pritchard*, 16 Nev. 101, holding court authorized to discharge jury, although it has been sworn, when ends of justice would otherwise be defeated.

Cited in reference note in 41 A. D. 314, on separation or discharge of jury in criminal case before conviction.

— As jeopardy.

Cited in *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656, holding defendant not in jeopardy where jury discharged for sickness of judge; *State v. Nelson*, 26 Ind. 366, holding that discharge of jury unable to agree does not entitle defendant to discharge on ground of once in jeopardy; *Morgan v. State*, 13 Ind. 215, holding defendant in jeopardy when jury sworn and ready for trial.

Cited in note in 21 L. ed. U. S. 873, on what constitutes former jeopardy.

22 AM. DEC. 456, SNELL v. KIRBY, 3 MO. 21.**Action of debt.**

Cited in *Knighton v. Tufi*, 12 Mo. 531, 51 A. D. 174, holding common law action of debt not maintainable on bond.

Cited in reference note in 51 A. D. 175, on action of debt on contract for payment of stipulated sum in property.

22 AM. DEC. 458, DOUGAL v. FRYER, 3 MO. 40. Later case on measure of damages in Collins v. Clamorgan, 6 Mo. 169.**Restriction against alienation.**

Cited in *Mandlebaum v. McDonell*, 29 Mich. 78, 18 A. R. 61, holding devise restricting alienation, void; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940, on effect of restriction in deed against sale before majority; *Clamorgan v. Lane*, 9 Mo. 446, holding devisee not allowed to make partition of land devised not subject to sale, encumbrance, or pledge.

Cited in notes in 57 A. D. 494, on partial restraints on alienation; 3 L.R.A. (N.S.) 676, on validity of restraints on alienation of a fee simple during a limited time.

Distinguished in *Lambert v. Haydel*, 20 Mo. App. 616, sustaining devise in trust not subject to alienation by beneficiary.

Passing of estate by estoppel.

Cited in reference note in 52 A. D. 223, on what necessary to passing of estate by estoppel.

Waiver of condition.

Cited in note in 44 A. D. 747, on waiver of condition subsequent.

Who may take advantage of forfeiture.

Cited in note in 44 A. D. 758, on aid of equity to enforce forfeiture after breach of condition subsequent.

22 AM. DEC. 462, SCOTT v. HILL, 3 MO. 88.**Attachment of drafts or notes.**

Cited in *Wybrants v. Rice*, 3 Tex. 458, holding note not in hands of payee not attachable in hands of maker; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Quarles v. Porter*, 12 Mo. 76,—holding debts evidenced by notes subject of attachment; *Janney v. Bank of Missouri*, 12 Mo. 583, holding draft not attachable until acceptance.

Cited in reference notes in 85 A. S. R. 603, on garnishability of negotiable paper; 266 A. D. 694, on garnishment of debt evidenced by note payable to order; 26 A. D. 364, on necessity of one garnishing note to show defendant's possession of same before recovering thereon.

Cited in notes in 55 A. D. 70; 71 A. S. R. 832,—on garnishment of negotiable paper.

Distinguished in *Somerville v. Brown*, 5 Gill, 399 (dissenting opinion), on attachment of debt represented by note.

Service of garnishment.

Cited in *Marx v. Hart*, 166 Mo. 503, 89 A. S. R. 715, 66 S. W. 260, holding service of garnishment on one partner binding on firm.

22 AM. DEC. 466, LEWIS v. WHITTEMORE, 5 N. H. 364.

Property mingled with another's.

Cited in *Robinson v. Holt*, 39 N. H. 557, 75 A. D. 233, holding mortgagee permitting hay to be mingled with that of mortgagor not entitled to maintain trover upon mass sold on execution against latter; *Smith v. Morrill*, 56 Me. 566, denying liability for taking from mass more than share of logs wrongfully cut from adjacent land; *Safford v. Gallup*, 53 Vt. 291, holding principal whose property mingled with agent's tenant in common as to latter's creditors.

Cited in note in 101 A. S. R. 922, on intermingling of goods of debtor and creditor.

— Officer's levy or sale.

Cited in *Walcott v. Keith*, 22 N. H. 196, holding officer liable for attaching goods easily separable from those of third party by proper inquiry; *Moore v. Bowman*, 47 N. H. 494, holding officer liable for taking horse of third party from drove where property of debtor ascertainable by inquiry; *Gilman v. Hill*, 36 N. H. 311, holding officer liable for conversion for attaching whole mass when informed of portion owned by third party; *Taylor v. Jones*, 42 N. H. 25; *Wilson v. Lane*, 33 N. H. 466,—sustaining officer's right to attach whole mass of stock when debtor's portion not ascertainable by due inquiry; *Albee v. Webster*, 16 N. H. 362; *Franklin v. Gumersell*, 9 Mo. App. 84,—holding burden upon third party to make separation when goods mingled with debtor's after notice of levy; *Smokey v. Peters-Calhoun Co.* 66 Miss. 471, 14 A. S. R. 575, 5 So. 632, denying sheriff's liability for attaching whole mass when third party refused to indicate his portion; *Johnson v. Emery*, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann. Cas. 53, sustaining officer's right to levy on all goods upon owner's refusal to point out portion purchased in fraud of another's creditors; *Wildman v. Sterritt*, 80 Mich. 651, 45 N. W. 657, holding officer not liable for attaching machinery so connected with other as not to be identified; *Tufts v. McClintock*, 28 Me. 424, 48 A. D. 501 (dissenting opinion), on liability of officer attaching property with which debtor's mingled.

Cited in note in 95 A. S. R. 124, on fraudulent intermingling as available defense to sheriffs, constables, and marshals for seizing property of third person.

Validity of sale.

Cited in *Paul v. Crooker*, 8 N. H. 288, holding debtor's conveyance of goods by absolute bill of sale containing secret trust, void as to judgment creditor.

— Change of possession.

Cited in *Corning v. Records*, 69 N. H. 390, 76 A. S. R. 178, 46 Atl. 462, holding sale of chattels in custody of tenant valid without change of possession; *Shaw v. Thompson*, 43 N. H. 130, holding sale without change of possession presumptively fraudulent; *Thompson Mfg. Co. v. Smith*, 67 N. H. 409, 68 A. S. R. 679, 29 Atl. 405, holding sale of machine not void as matter of law where vendee removed parts likely to be lost.

Cited in reference notes in 26 A. D. 284, on possession by vendor on sale of

chattels; 30 A. D. 262, on retention of possession by vendor or mortgagor as evidence of fraud.

22 AM. DEC. 468, PIKE v. EMERSON, 5 N. H. 393.

Authority of attorney.

Cited in *Quinn v. Lloyd*, 36 How. Pr. 378, 7 Robt. 538, 5 Abb. Pr. N. S. 281, denying attorney's power to stipulate that judgment for \$1,200 be set aside and that new trial be had; *Saleski v. Boyd*, 32 Ark. 74, denying power of attorney under general retainer to compromise claim permitting judgment against client; *Potter v. Parsons*, 14 Iowa, 286, sustaining power of attorney to allow judgment against client on note; *Brooks v. New Durham*, 55 N. H. 559, holding client bound by attorney's agreement that report of referee shall be final; *Leahy v. Stone*, 115 Ill. App. 138, holding client bound by attorney's stipulation that judgment be final; *Wilbur v. Wilbur*, 18 R. I. 654, 30 Atl. 455, holding client bound by attorney's admission of fact to obviate necessity of proving it; *Ball v. Bank of State*, 8 Ala. 590, 42 A. D. 649, denying right of attorney under general retainer to release client's claim so as to make witness competent.

Cited in notes in 30 A. D. 628, on right of attorney to submit to arbitration or reference; 76 A. D. 257, on binding force upon client of counsel's agreement as to conduct of trial.

— As to amount of recovery.

Cited in *Wilson v. Spring*, 64 Ill. 14, holding client bound by attorney's admission on foreclosure of amount due; *Beliveau v. Amoskeag*, 68 N. H. 225, 73 A. S. R. 577, 44 L.R.A. 167, 40 Atl. 734, holding client bound by attorney's stipulation of amount of recovery in negligence action.

— As to matters relating to appeal.

Cited in *Re Heath*, 83 Iowa, 215, 48 N. W. 1037, sustaining attorney's power to waive appeal in will case where client without means; *Hanson v. Hoitt*, 14 N. H. 56, sustaining attorney's power to waive informality in appeal; *People v. New York*, 11 Abb. Pr. 66, holding stipulation by city attorney withdrawing appeals and motion for new trial not binding on city.

22 AM. DEC. 468, LITTLE v. GARDNER, 5 N. H. 415.

Husband's liability for wife's torts.

Cited in note in 92 A. S. R. 164, on husband's liability for torts of wife at common law.

22 AM. DEC. 469, SARGENT v. GRAHAM, 5 N. H. 440.

Tender.

Cited in *Plurede v. Levasseur*, 89 Me. 180, 36 Atl. 110, holding actual tender waived by absolute refusal to accept offer to return goods.

— Sufficiency of.

Cited in *Brown v. Simons*, 44 N. H. 475, holding production of money in pocketbook in payment of mortgage debt, valid tender; *Otis v. Barton*, 10 N. H. 433, holding readiness to pay note at designated time and place, good tender; *Potter v. Thompson*, 10 R. I. 1; *Fuller v. Little*, 7 N. H. 535,—holding offer to pay without possession of money, not tender.

Cited in reference note in 26 A. D. 265, on sufficiency of tender.

Cited in notes in 77 A. D. 474, giving illustrations of insufficient tender;

77 A. D. 470, on general requisites of good tender and effect thereof; 12 A. D. 571, on what is valid tender of money; 46 A. D. 150, on necessity that valid tender be unconditional.

— Objection to sufficiency.

Cited in *Lyman v. Littleton*, 50 N. H. 42, holding objection to character of money tendered without giving reason, untenable.

22 AM. DEC. 472, RIX v. JOHNSON, 5 N. H. 520.

Boundary of land.

Cited in *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524, holding location of boundary question for jury when evidence conflicting; *Higginbotham v. Stoddard*, 9 Hun, 1, holding designated boundary not controlling when exact quantity conveyed given.

— By highway or stream.

Cited in *Woodman v. Spencer*, 54 N. H. 507, holding land to center of highway conveyed by deed of land on side of road; *People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 9, 17 N. E. 147, holding that boundary of city to certain stream extends to center; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 30 A. S. R. 669, 18 L.R.A. 695, 31 N. E. 865, holding title to center of pond conveyed by deed to pond; *Norcross v. Griffiths*, 65 Wis. 599, 56 A. R. 642, 27 N. W. 606, holding land to middle of stream presumed to pass by conveyance without mentioning stream; *Kent v. Taylor*, 64 N. H. 489, 13 Atl. 419, holding thread of stream boundary of land to tree on bank thence up river; *Warren v. Thomaston*, 75 Me. 329, 46 A. R. 397, holding thread of stream dividing line between two towns bounded by stream; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 47 A. S. R. 516, 25 L.R.A. 815, 60 N. W. 681, holding riparian rights with privilege of cutting ice conveyed by deed of land bounded by stream; *Smith v. Furbish*, 68 N. H. 123, 47 L.R.A. 226, 44 Atl. 398, holding bed of river not included in deed of land beginning at river and extending far enough to include acre; *Daniels v. Cheshire R. Co.* 20 N. H. 85, holding bank of navigable river at low-water mark boundary of land extending to stream; *Clement v. Burrs*, 43 N. H. 609, sustaining right of landowner to maintain trespass against one removing manure located between low and high water mark of navigable stream; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 29 A. S. R. 793, 13 S. E. 42, holding low-water mark of navigable stream boundary of land to stake at river; *French v. Bankhead*, 11 Gratt. 136, holding high-water mark boundary of land ceded to government; *St. Clair County v. Lovington*, 23 Wall. 46, 23 L. ed. 59, holding where river is boundary of tract there is no vacant land left for appropriation between river and river boundary.

Cited in notes in 6 L.R.A. 388, on public lands, surveys, and meander lines; 42 L.R.A. 502, on effect of bounding grant on river or tide water as to existence of strips as between land granted and water.

— Place of beginning.

Cited in *Kendall v. Green*, 67 N. H. 557, 42 Atl. 178, holding side of house not edge of eaves point of beginning in measuring land certain distance from house.

Appraisal of property.

Cited in *Whittier v. Varney*, 10 N. H. 291, holding officer's return failing to show notice of debtor to appoint appraiser, insufficient; *Burnham v. Aiken*,

6 N. H. 306, holding separate appraisal necessary when execution issued against land owned by several.

Compliance with statute.

Cited in *Matthews v. People*, 159 Ill. 399, 42 N. E. 864, holding surety on dramshop keeper's bond not required to be resident of county but freeholder; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794 (dissenting opinion), on strict compliance with statute in making assessments.

Right to accretions.

Cited in *Gerrish v. Clough*, 48 N. H. 9, 97 A. D. 561, 2 A. R. 165, holding accretions property of owner whose land on that side of river.

22 AM. DEC. 476, KIMBALL v. BLAISDELL, 5 N. H. 533.

Estoppel to claim after-acquired interest.

Cited in *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714, holding grantor estopped to claim interest in land after conveyance by deed containing non-claim; *Jewell v. Porter*, 31 N. H. 34; *Fletcher v. Chamberlin*, 61 N. H. 438; *Murphy v. Hill*, 88 N. H. 544, 44 Atl. 703; *Pike v. Galvin*, 29 Me. 183 (dissenting opinion 30 Me. 539),—holding grantor under deed with covenant of warranty estopped to claim after-acquired title; *Clark v. Baker*, 14 Cal. 612, 76 A. D. 449, holding grantee entitled to benefit of after-acquired title under statute although deed without covenants; *Morrison v. Underwood*, 20 N. H. 369, holding grantee under deed with warranty entitled to benefit of quitclaim to grantor by lessee of portion conveyed; *Wark v. Willard*, 13 N. H. 389, holding grantee in unacknowledged deed with warranty entitled to benefit of after-acquired title; *Great Falls Co. v. Worcester*, 15 N. H. 412, holding grantor's heirs estopped by deed with warranty; *Brown v. Manter*, 21 N. H. 528, 53 A. D. 223, holding grantor in deed containing no grant but covenant of warranty estopped to set up title; *Foss v. Strachn*, 42 N. H. 40, holding grantor in warranty deed estopped to set up homestead rights; *Taggart v. Risley*, 4 Or. 235, holding grantor in deed without covenant of warranty showing intention to pass whole estate estopped to claim after-acquired title; *Tefft v. Munson*, 57 N. Y. 97, holding one without title, executing mortgage on land, estopped after acquiring title to dispute mortgage; *Parks v. Watson*, 29 Mo. 108, holding that giving of sheriff's deed of judgment debtor's interest not estop him to set up after-acquired interest; *Bell v. Twilight*, 26 N. H. 401, holding grantor in quitclaim with covenant to defend not estopped to claim after-acquired interest; *Hale v. Hollon*, 14 Tex. Civ. App. 96, 36 S. W. 288, holding grantor's equitable right to title subsequently acquired by inheritance inures to grantee.

Cited in reference notes in 49 A. D. 231, on effect of conveyance with warranty as conveyance of after-acquired title; 54 A. D. 635, on right of vendor in deed not containing covenant of warranty to assert after-acquired title; 31 A. D. 62, on estoppel of grantor to claim land by subsequently acquired title.

Cited in notes in 58 A. D. 584, as to when subsequently acquired title by grantor vests in grantee; 23 A. D. 673, on grantor's after-acquired title inuring to benefit of grantee; 23 L.R.A. 561, on doctrine of estoppel as applied to conveyance recorded before grantor obtained title.

Estoppel as to boundary.

Cited in *Hale v. Woods*, 9 N. H. 103, holding finding of referee as to boundary does not operate as estoppel against prior grantee.

Covenant of warranty.

Cited in note in 37 A. D. 130, on what amounts to covenant of warranty.

22 AM. DEC. 478, PLUMER v. SMITH, 5 N. H. 553.**Illegal contracts.**

Cited in reference note in 27 A. D. 267, on action on illegal contract.

Cited in note in 12 L.R.A.(N.S.) 605, on ethics of loans in violation of law.

Validity of consideration.

Cited in *Winchester v. Nutter*, 52 N. H. 507, 13 A. R. 93, sustaining right to recover for suppers furnished hunters who agreed that defeated side pay.

Cited in reference notes in 56 A. S. R. 480, on consideration for negotiable instruments; 25 A. D. 79, on sufficiency of act forbidden by law as consideration for promise.

—Suppression of criminal prosecution.

Cited in *Pierce v. Ricker*, 16 N. H. 322, 41 A. D. 728, holding note given to discharge criminal prosecution for adultery, void; *Clark v. Ricker*, 14 N. H. 44, holding note given in part to stop prosecution for adultery and partly for civil damages, void; *Clark v. Pease*, 41 N. H. 414, holding note given by one being prosecuted for malicious mischief, void; *Shaw v. Spooner*, 9 N. H. 197, 32 A. D. 348, holding note given in settlement of criminal prosecution for obtaining goods by fraud, void; *Davis v. Smith*, 68 N. H. 253, 73 A. S. R. 584, 44 Atl. 384, holding married woman's note given to prevent criminal prosecution against husband, void; *Hinds v. Chamberlin*, 6 N. H. 225, holding bond to indemnify one against prosecution for assault, void; *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061, holding consideration of agreement not to prosecute for embezzlement, void; *State v. Carver*, 69 N. H. 216, 39 Atl. 973, holding one agreeing for money to destroy evidence against another for illegal sale of liquors, criminally liable.

Cited in reference note in 61 A. D. 350, on invalidity of note given for compounding misdemeanor or suppressing criminal prosecution.

Funds used for illegal purpose.

Cited in *Waugh v. Beck*, 114 Pa. 422, 60 A. R. 354, 6 Atl. 923, 17 Pittsb. L. J. N. S. 197, 44 Phila. Leg. Int. 6, denying recovery by one knowingly lending money to be used in purchase of commodities on margin; *Severance v. Kimball*, 8 N. H. 386, holding money paid to stop prosecution for theft, recoverable; *Hill v. Spear*, 50 N. H. 253, 9 A. R. 205, denying recovery of consideration agreed to be paid for liquors sold without license; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24, denying agent's right to retain principal's money on ground furnished for illegal purpose.

Process issued for illegal purpose.

Cited in *State v. Weed*, 21 N. H. 262, 53 A. D. 188, holding officer not liable for serving process valid on face, although issued for illegal cause.

22 AM. DEC. 480, RICKER v. CROSS, 5 N. H. 570.**Delivery of property sold.**

Cited in *Meade v. Smith*, 16 Conn. 346, holding bill of sale not void because of property in another state where vendee went at once to take possession; *Call v. Gray*, 37 N. H. 428, 75 A. D. 141, holding mortgagee entitled to make selection of property where similar articles located in same building; *Clark v. Shannon & M. Co.* 117 Iowa, 645, 91 N. W. 923, holding title of vendee to stock

of goods under bill of sale and part payment with change of possession superior to subsequent mortgage; *Crawford v. Forristall*, 58 N. H. 114, holding title of subsequent vendee with possession and without notice of prior sale superior to prior vendee without possession; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, holding transfer of stock not superior to subsequent attachment for month's delay in record of transfer.

— Sufficiency of.

Cited in *Barrows v. Harrison*, 12 Iowa, 588, holding vendor directing agent to deliver property to vendee, sufficient delivery; *Vining v. Gilbreth*, 39 Me. 496, holding sale of shop effectual against vendor's creditors by delivery of key; *Neill v. Rogers Bros. Produce Co.* 41 W. Va. 37, 23 S. E. 702; *First Nat. Bank v. Northern R. Co.* 58 N. H. 203,—holding title to goods lawfully transferred by bill of lading, without delivery of goods; *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123, holding title to goods not present transferred by symbolical delivery.

Cited in reference note in 26 A. D. 628, on sufficiency of constructive delivery to pass title to chattels.

Cited in note in 5 E. R. C. 97, on what constitutes a change of possession of goods mortgaged or sold.

— When delivery unnecessary.

Cited in *Puckett v. Reed*, 31 Ark. 131, holding actual delivery of cotton at gin unnecessary to pass title; *Mahurin v. Harding*, 29 N. H. 128, 59 A. D. 401, holding sale of goods in another state complete without actual delivery; *Corning v. Records*, 69 N. H. 390, 76 A. S. R. 178, 46 Atl. 462, holding sale of chattels in custody of tenant valid against creditors without delivery; *Kinney v. First Nat. Bank*, 10 Wyo. 115, 98 A. S. R. 972, 67 Pac. 471, holding title of missing sheep transferred with others in satisfaction of mortgage; *Wade v. Moffett*, 21 Ill. 110, 74 A. D. 79, holding vendee of mule taking same in violation of terms of sale liable for price without offer by vendor to deliver; *Patrick v. Meserve*, 18 N. H. 300, holding mortgagee entitled to goods mortgaged located in distant place under agreement to take same in satisfaction of debt.

Distinguished in *Burnell v. Robertson*, 10 Ill. 282, holding sale of property in another place not superior to attachment before possession taken.

22 AM. DEC. 483, HUNT v. MORRIS, 12 N. J. L. 175.

Costs in action of trespass.

Cited in *Van Pelt v. Phillips*, 24 N. J. L. 560, holding for purpose of awarding costs court will take judicial notice that action was originally brought before justice and title pleaded.

22 AM. DEC. 485, DEN EX DEM. SWAN v. DESPREAUX, 12 N. J. L. 182.

Effect and validity of sheriff's deed.

Cited in *Henderson v. Hays*, 41 N. J. L. 387, holding sheriff's deed inoperative unless sale advertised; *Meyers v. Conover*, 65 N. J. L. 187, 46 Atl. 709, holding recitals in sheriff's deed prima facie evidence of truth in subsequent ejectment; *Everson v. State*, 66 Neb. 154, 92 N. W. 137, holding sheriff's deed prima facie evidence of grantee's right to property of judgment debtor; *Blatchford v. Conover*, 40 N. J. Eq. 205, 1 Atl. 16, holding proof of sheriff's deed and judgment necessary to make title to land; *Den ex dem. Arrowsmith v.*

Taylor, 16 N. J. L. 532, holding variance between sheriff's deed and judgment cured by statute; Den ex dem. Todd v. Philhower, 24 N. J. L. 796, holding that prior to Rev. Stat. p. 662, § 8 execution and judgment produced must be similar to those recited in sheriff's deed.

Cited in reference notes in 65 A. D. 424, on validity of sheriff's deed; 36 A. D. 102, on recitals in sheriff's deeds; 38 A. D. 768, on recitals in sheriff's deeds as evidence; 63 A. D. 361; 85 A. D. 84,—on effect of misrecital of judgment in sheriff's deed.

Cited in notes in 43 A. D. 52, on admissibility of sheriff's deed as evidence of title; 11 A. D. 709, on title under execution sale.

— Of guardian's deed.

Cited in Jackson v. Todd, 25 N. J. L. 121, holding guardian's deed without authority from court, inoperative.

Necessity of producing judgment under which sale was made.

Cited in reference notes in 44 A. D. 708, as to what purchaser under execution must show to recover in ejectment; 38 A. D. 712, on necessity for proof of judgment and execution to admissibility of sheriff's deed as evidence of title.

Cited in note in 13 A. D. 365, on necessity that execution purchaser seeking to recover property produce in evidence judgment under which sale was made.

22 AM. DEC. 489, BUTTS v. VOORHEES, 13 N. J. L. 13.

Forcible entry and detainer.

Cited in Cruiser v. State, 18 N. J. L. 206, sustaining indictment for forcible entry and detainer; Mercereau v. Bergen, 15 N. J. L. 244, 29 A. D. 684, holding evidence to show title to freehold against complainant, inadmissible in case of forcible entry and detainer.

Cited in reference notes in 30 A. D. 396; 65 A. D. 737,—on forcible entry and detainer.

— What constitutes.

Cited in Franklin v. Geho, 30 W. Va. 27, 3 S. E. 168, holding entry upon land and threatening occupants with violence, forcible entry and detainer; State, Hildreth, Prosecutor, v. Camp, 41 N. J. L. 306, holding threats of violence necessary to constitute forcible entry and detainer; Mason v. Powell, 38 N. J. L. 576, holding one liable for forcible entry by breaking into house in peaceable possession of another during latter's absence; Berry v. Williams, 21 N. J. L. 423, holding more than technical force required to constitute offense of forcible entry; Johnson v. West, 41 Ark. 535, holding refusal to vacate unless put out by law not forcible entry and detainer.

Cited in reference notes in 84 A. D. 680, on essential elements of forcible entry; 84 A. D. 680; 44 A. S. R. 331,—on what amounts to forcible entry.

Cited in notes in 18 A. D. 146, on what is a forcible entry; 121 A. S. R. 396, on character of force and of entry as forming ground for forcible entry and detainer.

Validity of bond.

Cited in Marryott v. Young, 33 N. J. L. 336, holding certiorari bond invalidated by dismissal of writ for want of prosecution.

Construction of statutes.

Cited in reference notes in 41 A. D. 109, on construction of words used in statute; 34 A. D. 121, on construction of doubtful or ambiguous statutes.

22 AM. DEC. 496, DEN EX DEM. WILLIAMSON v. SNOWHILL, 13 N. J. L. 23.**Conclusiveness of judgment.**

Cited in reference note in 38 A. D. 754, on conclusiveness of judgment in ejectment in action for mesne profits.

Possession of defendant in ejectment.

Cited in reference notes in 42 A. D. 537, on proof of defendant's possession to maintain ejectment; 43 A. D. 528; 57 A. D. 203,—on necessity and sufficiency of proof of defendant's possession in ejectment; 52 A. D. 567, on prima facie right of recovery in ejectment against tortious holder from long-continued possession.

Joinder of defendants.

Cited in reference note in 44 A. D. 46, on right to sue in one action all persons in possession of land claimed by plaintiff.

Time of entry.

Cited in Den ex dem. Bray v. McShane, 13 N. J. L. 35, holding that demise must be subsequent to time of entry of claimant in ejectment.

Amendment of declaration.

Cited in Den ex dem. Rutherford v. Fen, 20 N. J. L. 299, holding laches bar to amendment of declaration in ejectment.

Cited in reference note in 37 A. D. 245, on amendment of declaration in ejectment.

Termination of tenancies.

Cited in Den ex dem. McEowen v. Drake, 14 N. J. L. 523, holding uncertain tenancies terminable on six months' notice.

22 AM. DEC. 508, GRAY v. FOX, 1 N. J. EQ. 259.**Duty and liability of trustees, etc., as to investments.**

Cited in Drake v. Crane, 127 Mo. 85, 27 L.R.A. 653, 29 S. W. 990, holding trustee directed by will to invest fund bound to make profitable investment; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192, holding trustee holding national bank stock not authorized to invest in banking partnership continuing business after bank's surrender of charter; Garesche v. Levering Invest. Co. 146 Mo. 436, 46 L.R.A. 232, 48 S. W. 653, holding that power to trustees to invest and reinvest does not authorize them to change character of estate and convert into corporation; Dufford v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052, denying executor's authority to loan trust funds taking notes as security; Tucker v. Tucker, 33 N. J. Eq. 235, holding executor not authorized to invest in city bonds or bank stock; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221, holding guardian investing in city and railroad bonds relieved of personal liability; King v. Talbot, 50 Barb. 453; Ashhurst v. Potter, 29 N. J. Eq. 625,—holding trustees bound, unless otherwise directed by will, to invest in mortgages or United States bonds; Vreeland v. Schoonmaker, 16 N. J. Eq. 512, holding trustees making loans on private security personally liable for loss; Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, holding guardian obtaining order of court directing investment relieved of personal responsibility; Shepherd v. Newkirk, 21 N. J. L. 302, holding that decree of court approving guardian's previous loans does not relieve him from personal responsibility.

Cited in reference notes in 64 A. D. 342, on liability of trustee loaning money

without security in case of insolvency; 40 A. D. 508, on direction of court to make investments as protection to trustee.

Cited in notes in 9 L.R.A. 280, on investment by trustees; 57 A. R. 113, on what are proper investments by trustee; 40 A. D. 513, 514, on propriety of trustee investing funds in loans on personal security; 78 A. S. R. 198, 199, on power of executors as to investments; 4 L.R.A. 610, on liability of executor or administrator for trust moneys lost; 89 A. S. R. 293, on security to be taken on investments or loans by guardian.

Curing error in executor's account.

Cited in *Black v. Whitall*, 9 N. J. Eq. 572, 59 A. D. 423, sustaining equity's power to relieve against error in executor's account although account passed by orphans' court.

Effect of lack of jurisdiction.

Cited in reference notes in 36 A. S. R. 754, on effect of want of jurisdiction; 39 A. S. R. 331, on effect of proceedings without jurisdiction.

22 AM. DEC. 519, CRANE v. CONKLIN, 1 N. J. EQ. 346.

Conveyance or contract of drunkard.

Cited in *Hale v. Stery*, 7 Colo. App. 165, 42 Pac. 598, holding mortgage by drunkard, void; *O'Conner v. Rempt*, 29 N. J. Eq. 156, holding deed by drunkard, voidable; *Maxwell v. Pittenger*, 3 N. J. Eq. 156, holding drunkard's contract of sale enforceable unless vendor responsible for condition; *Hutchinson v. Tindall*, 3 N. J. Eq. 357, holding contract of drunkard valid in absence of fraud or undue influence.

Cited in reference notes in 59 A. D. 501, on contracts of intoxicated persons; 46 A. S. R. 556, on fraud in contracting with intoxicated persons; 31 A. D. 442, on how far intoxication affects validity of contract; 34 A. D. 353, on habitual intemperance of one party to contract as ground for refusing specific performance.

Cited in notes in 54 L.R.A. 452, on obtaining relief from contract made while intoxicated; 54 L.R.A. 444, on validity of contract made with intoxicated person where advantage has been taken of him; 54 L.R.A. 441, on degree of intoxication as affecting validity of contract made with intoxicated person; 54 L.R.A. 453, on who may show intoxication of party to contract.

Relief from contract for fraud or mental incompetency.

Cited in reference notes in 44 A. D. 463, on effect of weakness of intellect on contracts; 59 A. D. 615, on setting aside contracts in equity for weakness of mind; 27 A. D. 458, on circumstances indicating fraud and imposition coupled with mental weakness as ground for annulling contract; 40 A. D. 628, on fraud of vendor in concealing defects in title as ground for equitable relief for vendee; 41 A. D. 743, on relief in equity against judgments or decrees procured by fraud.

Cited in note in 5 L.R.A. (N.S.) 1038, on jurisdiction of equity to cancel instrument on ground of fraud.

Undue influence as ground for relief.

Cited in reference note in 59 A. D. 615, on setting aside contract for undue influence.

Want or inadequacy of consideration.

Cited in *Troxell v. Silverthorn*, 45 N. J. Eq. 330, 19 Atl. 622, holding release of dower without consideration and explanation of instrument, void; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9, holding contract not void for mere inadequacy

of price; *Kloeping v. Stellmacher*, 21 N. J. Eq. 328, holding mere inadequacy of price not ground for setting aside sheriff's deed.

Cited in reference notes in 57 A. D. 217, on inadequacy of consideration as evidence of fraud; 44 A. D. 463, on inadequacy of consideration as ground for relief; 59 A. D. 615; 60 A. D. 84,—on inadequacy of consideration as ground for setting contract aside.

Fraudulent representations.

Cited in *Culley v. Jones*, 164 Ind. 168, 73 N. E. 94, holding statement of value of property to one ignorant of same, fraudulent if untrue.

Equitable jurisdiction when legal question involved.

Cited in *Lehigh Zinc & I. Co. v. Trotter*, 43 N. J. Eq. 185, 10 Atl. 607, holding that equity will decree right to possession as incidental relief when no legal question involved; *Sheppard v. Nixon*, 43 N. J. Eq. 627, 13 Atl. 617, sustaining refusal of court of equity to entertain action to quiet title when remedy at law adequate.

Cited in reference notes in 25 A. D. 741; 28 A. D. 36,—as to when equity will relieve against judgment at law.

Cited in note in 27 A. D. 75, on dismissal of bill where objection is taken that adequate remedy at law exists.

Execution sale en masse.

Cited in *Aldrich v. Wilcox*, 10 R. I. 405, holding execution sale of property *en masse* when capable of division, void.

22 AM. DEC. 526, ATTY. GEN. v. STEVENS, 1 N. J. EQ. 369.

Power of court of equity.

Cited in *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *Stockton v. American Tobacco Co.* 55 N. J. Eq. 362, 36 Atl. 971,—denying equity's power to question validity of formation of corporation; *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844, denying equity's power to dissolve corporation for misuser; *Terhune v. Midland R. Co.* 38 N. J. Eq. 423, denying equity's power to dissolve consolidated railroad corporations at instance of bondholder of one on theory that organization fraudulent; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755, denying equity's power to restrain *de facto* corporation from exercising franchise; *McKinley v. Union County*, 29 N. J. Eq. 164, denying equity's power to enjoin unlawful use of public funds by county board in paying for bridge; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, sustaining equity's power to restrain company from laying gas mains in violation of rights of another company.

Cited in note in 2 L.R.A. 551, on jurisdiction of courts of equity over corporations.

Distinguished in *Union Water Co. v. Kean*, 52 N. J. Eq. 111, 27 Atl. 1015, sustaining equity's power to restrain corporation from using name of another and exercising powers granted by latter's charter; *Owen v. Whitaker*, 20 N. J. Eq. 122, denying power of equity to determine validity of election of directors of railroad company.

Exercise of implied powers.

Cited in *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1, holding power to build bridge across navigable stream implied in authority to build railroad; *Pennsylvania R. Co. v. New York & L. B. R. Co.* 23 N. J. Eq. 157, holding right to appropriate state lands under water granted by act authorizing railroad to

construct bridge; *Allen v. Jersey City*, 53 N. J. L. 522, 22 Atl. 257, holding power to cross streets implied from power to lay tracks; *Snyder v. Foster*, 77 Iowa, 638. 42 N. W. 506, holding in absence of statutory authority in supervisors to construct bridges over navigable streams county funds not available to pay claims for construction.

Cited in note in 27 A. D. 99, on powers of corporations.

De facto corporation.

Cited in *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357, holding *de facto* corporation formed by attempt in good faith to organize a corporation and the exercise for years of powers under charter granted; *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548, holding *de facto* corporation bound by acts of officers; *Hamilton v. San Diego County*, 108 Cal. 273, 41 Pac. 305, holding school district organized within when intended to be without city limits, *de facto* district not subject to collateral attack.

Cited in notes in 118 A. S. R. 254, on definition of *de facto* corporation; 118 A. S. R. 261, on user of corporate rights or powers as constituting corporation *de facto*.

Right to use navigable stream.

Cited in reference notes in 52 A. D. 669; 66 A. D. 165,—on right of public to use of navigable stream.

Regulation of navigable waters.

Cited in reference notes in 34 A. D. 489, on law relating to navigable streams; 42 A. D. 314, on legislative control over navigation on public rivers; 37 A. D. 59, on legislative regulation of public rights in navigable streams.

Cited in note in 81 A. D. 585, on state's power to regulate use of navigable streams.

Obstruction of navigation.

Cited in notes in 59 L.R.A. 48, on extent of sovereign's rights as against riparian owners to obstruct or destroy navigation; 59 L.R.A. 81, on right to object to obstruction of navigation where navigation is merely impaired.

Special act for erection of bridge over navigable stream.

Cited in reference notes in 44 A. D. 92, on necessity of special act for erection of bridge over navigable stream; 42 A. D. 728, on necessity of authority from legislature to erect bridge over navigable stream.

Bridge as nuisance.

Cited in *American Dock & Improv. Co. v. Public Schools*, 39 N. J. Eq. 409; *Thompson v. Patterson & H. R. Co.* 9 N. J. Eq. 526,—holding construction of draw-bridge over navigable stream not nuisance.

Injunction against nuisance.

Cited in *Allen v. Monmouth County*, 13 N. J. Eq. 68, denying injunction restraining erection of bridge built in good faith but technically nuisance.

Cited in note in 44 L.R.A. 566, on injunctions by municipalities against nuisances by railroads.

Taking of property taken for public use, and compensation therefor.

Cited in reference notes in 23 A. D. 632, on right to take private property for public purposes; 74 A. D. 555, on legislative power to take private property for public use without compensation; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use; 36 A. D. 385, on compensation for exercise of right of eminent domain.

Forfeiture of corporate franchise.

Cited in reference notes in 42 A. D. 109, on dissolution of corporation; 41 A. D. 120, on nonuser as ground for forfeiture; 35 A. D. 636, on forfeiture of corporate franchises by misuser or nonuser; 41 A. D. 120, on wanton and injurious exercise of corporate privileges as ground for forfeiture; 35 A. D. 562, on jurisdiction to declare forfeiture of corporate franchises.

Cited in notes in 96 A. D. 758, on power of courts to decree dissolution of corporation; 8 A. S. R. 200, on power of court of equity to decree forfeiture of corporate franchises; 2 L.R.A. 256, on remedy against corporation for misuser or nonuser of its corporate franchises; 8 L.R.A. 499, on forfeiture and dissolution of corporation for misuser of franchise.

22 AM. DEC. 537, RUSSELL v. LYTLE, 6 WEND. 390.**Validity and conclusiveness of accord and satisfaction.**

Cited in *Whitsett v. Clayton*, 5 Colo. 476, holding debtor's tender of new note as agreed with creditor bar to latter's suit on old demand; *Bradshaw v. Davis*, 12 Tex. 336, holding tender of goods within time stipulated agreed to be taken in discharge of antecedent debt, accord and satisfaction whether accepted or not.

Cited in reference notes in 45 A. D. 145, on accord and satisfaction; 16 A. S. R. 403, on plea of accord and satisfaction; 35 A. D. 571, on bar of action by accord executory; 52 A. D. 778, on part payment of liquidated debt as no satisfaction though accepted; 27 A. D. 579, on payment of less than due as satisfaction without release of debt.

Cited in notes in 100 A. S. R. 450, on necessity for satisfaction; 100 A. S. R. 454, on effect of tendering satisfaction; 64 A. D. 139, on payment of part of debt as extinguishing whole.

Distinguished in *Gray v. Herman*, 75 Wis. 453, 6 L.R.A. 691, 44 N. W. 248, holding third party's payment of goods defense to action although made without defendant's authority.

—Necessity and sufficiency of consideration.

Cited in notes in 20 L.R.A. 810, on necessity of consideration to validity of accord and satisfaction by part payment; 100 A. S. R. 429, on distinction between liquidated and unliquidated claims as to sufficiency of consideration for accord and satisfaction.

—Necessity of execution.

Cited in *Spire v. Lovell*, 17 Ill. App. 559; *Frentress v. Markle*, 2 G. Greene, 553; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 A. S. R. 285, 2 S. E. 713; *Long v. Scanlan*, 105 Ga. 424, 31 S. E. 436,—holding unexecuted accord not binding; *Elkan v. Hitchcock*, 15 Misc. 218, 36 N. Y. Supp. 788, holding unaccepted claim against third party in part payment not accord and satisfaction; *Woodward v. Miles*, 24 N. H. 289, holding agreement to accept new contract in satisfaction of former, good accord executed whether new contract performed or not; *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. Supp. 425, holding unexecuted agreement to pay tenant on condition of continued occupancy no bar to action for rent where he failed to remain; *Crane v. Maynard*, 12 Wend. 408 holding unaccepted accord not binding; *Young v. Jones*, 64 Me. 563, 18 A. R. 279; *Simmons v. Clark*, 56 Ill. 96,—holding actual payment of smaller sum necessary to satisfaction of larger; *Dorman v. Elder*, 3 Blackf. 490, holding readiness to deliver cattle no satisfaction of agreement to deliver hogs; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 A. D. 569, holding accord and tender of performance no bar to action:

Frost v. Johnson, 8 Ohio, 393, holding accord on mutual promises to perform, not good; *First Nat. Bank v. Leech*, 36 C. C. A. 262, 94 Fed. 310, holding agreement to accept third party's notes in part payment and to extend payment of balance, not good as accord and satisfaction unless executed; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037, holding oral agreement of future satisfaction insufficient to extinguish written obligation; *Tilton v. Alcott*, 16 Barb. 598, holding agreement of maker to convey land not than owned in satisfaction of matured notes, not accord and satisfaction; *Osborn v. Robbins*, 37 Barb. 481, holding unexecuted agreement as to settlement not discharge of matured note; *Panzerbeiter v. Waydell*, 21 Hun, 161, holding unexecuted agreement to settle pending action not accord and satisfaction; *De Lavallette v. Wendt*, 75 N. Y. 574, 31 A. R. 494, holding part execution with tender of balance, not good; *Bandman v. Finn*, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175 (dissenting opinion), on unexecuted accord and satisfaction; *Campbell v. Hurd*, 74 Hun, 235, 26 N. Y. Supp. 458 (dissenting opinion), on accord without satisfaction as permitting action on original claim; *Pettis v. Ray*, 12 R. I. 344, holding plea of readiness to execute accord, bad; *United States v. Clarke*, Hempst. 315, Fed. Cas. No. 14,812; *Daniels v. Hallenbeck*, 19 Wend. 408,—holding plea alleging executory accord, bad; *Guion v. Doherty*, 43 Miss. 538, holding plea of plaintiff's agreement to accept less sum as accord, demurrable; *Hawley v. Foote*, 19 Wend. 516, holding plea in action of assumpsit of plaintiff's acceptance of order on third party in payment, bad; *Heirn v. Carron*, 11 Smedes & M. 361, holding plea of accord and tender of sum with costs made in action of trespass, not demurrable; *Dolsen v. Arnold*, 10 How. Pr. 528, holding one alleging accord also required to show performance.

Cited in reference note in 51 A. S. R. 699, on necessity for complete execution to constitute accord and satisfaction.

Cited in note in 1 E. R. C. 400, on unexecuted accord as satisfaction.

22 AM. DEC. 539, DUNCAN v. SUN F. INS. CO. 6 WEND. 488.

Warranties and representations in policy.

Cited in *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75, holding statement in application as to use of insured building, warranty; *Smith v. Empire Ins. Co.* 25 Barb. 497, holding statement as to encumbrances on insured property, warranty; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285, holding statement as to nearness of other buildings, warranty; *Copp v. German American Ins. Co.* 51 Wis. 637, holding statement as to use of oil for lubricating purposes and existence of force pump on premises, promissory warranty; *Grant v. Lexington, F. L. & M. Ins. Co.* 5 Ind. 23, 61 A. D. 74, holding stipulation by assured that boat to be manned by certain number, promissory warranty; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352, holding representation distinguishable from warranty as statement before issuance of policy as to fact inducing risk.

Cited in reference notes in 79 A. D. 743, on warranties in insurance contracts; 59 A. D. 201, on distinction between warranties and representations; 30 A. D. 123, on distinction between and effect of warranties and representations in insurance contracts; 49 A. D. 238, on necessity for strict compliance with warranty in insurance policy.

Cited in notes in 16 A. D. 463, on distinction between representations and warranties; 40 A. D. 349, as to what constitutes warranty in insurance policy; 40 A. D. 349, as to when reference in policy to application, etc., constitutes representations therein warranties; 14 E. R. C. 178, on written statement in margin

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of policy of insurance as constituting express warranty; 40 A. D. 349, on necessity that warranty in policy be strictly kept.

Forfeiture of policy.

Cited in *Day v. Orient Mut. Ins. Co.* 1 Daly, 13, holding policy covering risk of certain voyage invalidated by entering prohibited port; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 A. D. 684, holding policy not avoided by immaterial misdescription of premises; *Schenck v. Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447, holding first policy not invalidated by void subsequent insurance; *Richards v. Protection Ins. Co.* 30 Me. 273, holding policy on goods not hazardous avoided by keeping of oil; *Fire Asso. v. Williamson*, 26 Pa. 196; *Howell v. Baltimore Equitable Soc.* 16 Md. 377,—holding policy to be void for hazardous trade invalidated although carried on by tenant of insured without latter's knowledge; *Leggett v. Aetna Ins. Co.* 10 Rich. L. 202, holding permanent hazard intended by clause invalidating policy for increase of risk.

Cited in notes in 12 L.R.A.(N.S.) 485, on effect upon insurance policy of breach of condition by tenant; 66 A. S. R. 696, on increase of hazard avoiding fire insurance policy, in matters outside knowledge or control of insured.

Loss covered by policy.

Cited in *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 A. D. 111, holding loss by explosion of powder covered by policy against damage by fire; *City F. Ins. Co. v. Corlies*, 21 Wend. 367, 34 A. D. 258, holding destruction of building by powder under police power to prevent fire spreading, loss covered by policy.

Matter forming part of policy.

Cited in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799, holding application attached to policy part thereof and latter affected by statements therein; *Throop v. North American F. Ins. Co.* 19 Mich. 423; *Deweese v. Manhattan Ins. Co.* 34 N. J. L. 244; *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. 468,—holding conditions annexed to policy effectual as part thereof; *Rafel v. Nashville M. & F. Ins. Co.* 7 La. Ann. 244, holding conditions attached to policy part of contract; *Imman v. Western F. Ins. Co.* 12 Wend. 452, holding proposals part of policy; *Dakan v. Union Mut. L. Ins. Co.* 125 Mo. App. 451, 102 S. W. 634, holding table attached to policy when delivered part thereof, although no reference thereto in policy; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516, holding prospectus of life insurance company with reference to forfeitures not part of policy and inadmissible to vary terms.

Cited in reference note in 57 A. D. 306, on proposals and conditions attached to policy as part of contract.

Cited in note in 30 A. D. 124, on application for insurance as part of policy.

22 AM. DEC. 545, GROFF v. JONES, 6 WEND. 522.

Validity of judicial sale.

Cited in *Frederick v. Wheelock*, 3 Thomp. & C. 210, holding execution sale on day noticed after posting of postponement notices, void; *Natchez v. Minor*, 10 Smedes & M. 246, holding sheriff's sale not vitiated by publication of notice instead of posting; *Jones v. Portsmouth & C. R. Co.* 32 N. H. 544, holding sale at which sheriff prevents bidding at request of creditor, void.

Cited in reference note in 34 A. D. 204, as to when sheriffs' sales will be set aside.

— Of land en masse.

Cited in *Ames v. Lockwood*, 13 How. Pr. 555, holding sheriff's sale of separate parcels *en masse*, void; *Day v. Graham*, 6 Ill. 435, holding sheriff's sale of town lots *en masse* when capable of division, void; *Fortin v. Sedgwick*, 133 Iowa, 233, 110 N. W. 460; *Rector v. Hartt*, 8 Mo. 448, 41 A. D. 650; *Mobile Cotton Press & Bldg. Co. v. Moore*, 9 Port. (Ala.) 679,—holding sheriff's sale of whole parcel when part sufficient irregular; *Williams v. Allison*, 33 Iowa, 278, holding sheriff's sale to judgment creditor of city lots *en masse* lying remote from each other for inadequate price, voidable; *Tillman v. Jackson*, 1 Minn. 183, Gil. 157, holding statute providing for separate sale of lots under execution, directory.

Cited in reference notes in 41 A. D. 661, on effect of sale of distinct tracts *en masse*; 28 A. S. R. 151, on validity of sales *en masse* under execution.

— Sale of unnecessary amount of land.

Cited in *Vanduyne v. Vanduyne*, 16 N. J. Eq. 93, holding sheriff required to sell only enough land to satisfy judgment whether so ordered in levy or not.

Cited in reference notes in 33 A. D. 746, on invalidity of levy for greater sum than amount of debt; 26 A. D. 424, on sale of more than is necessary to satisfy judgment; 48 A. D. 374; 52 A. D. 645,—on invalidity of sale of more than enough land to satisfy judgment; 13 A. D. 213, on effect of sheriff's sale of more land than is necessary; 28 A. D. 244, on fraud in sale of more land than is necessary to satisfy execution.

— Inadequacy of price.

Cited in *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; *Aldrich v. Wilcox*, 10 R. I. 405; *Boyd v. Ellis*, 11 Iowa, 97,—holding gross inadequacy of price strong evidence of fraud in sheriff's sale; *Hopton v. Swan*, 50 Miss. 845, holding sale of land worth \$8,000 under execution, bid in for \$30, void; *Reed v. Carter*, 3 Blackf. 376, 26 A. D. 422, holding sheriff's sale of land worth \$1,000 under execution for \$20, void; *Randolph v. Thomas*, 23 Ark. 69, holding inadequacy of price and sale of land in small parcels not ground to set aside sheriff's sale; *Lee v. Davis*, 16 Ala. 516, holding inadequacy of price and failure to declare interest sold sufficient to vacate sheriff's sale; *United States v. Drennen*, Hempst. 320, Fed. Cas. No. 14,992, holding it duty of sheriff to postpone sale when bid inadequate.

— Order of foreclosure sale.

Cited in *Breese v. Busby*, 13 How. Pr. 485, holding upon foreclosure of mortgage on lots those still owned by mortgagor to be sold first.

Remedy for void judicial sale.

Cited in *Hackley v. Draper*, 4 Thomp. & C. 614, holding remedy for receiver's fraudulent sale by action to set same aside; *O'Donnell v. Lindsay*, 7 Jones & S. 523, holding action in equity to set aside sheriff's sale remedy for inadequacy of price; *Bridgman v. Wilcut*, 4 G. Greene, 563, sustaining jurisdiction of district court over action to set aside levy and sale.

Sale under criminal lien.

Cited in *Hitchcock v. Roney*, 17 Ill. 231, denying stranger's right to quash levy and sale by people under lien created by arrest of property owner.

Motion for judgment.

Cited in *Howard v. McKnight*, 25 Wend. 688, denying right of party to renew motion for judgment before demand for payment of costs as stipulated by other party.

Effect of reversal of judgment.

Cited in reference note in 28 A. S. R. 151, on title of innocent purchaser under judgment, afterward appealed and reversed.

22 AM. DEC. 546, ROGERS v. MULLINER, 6 WEND. 597.**Protection in issuing or executing process.**

Cited in notes in 21 A. D. 195, on requisites of process which will protect officer; 14 L.R.A. 143, on civil liability for irregular issuance of warrants, attachments, and the like.

— Of magistrate.

Cited in *Harrison v. Clark*, 4 Hun, 685, holding justice issuing civil warrant on defective affidavit, protected; *Blythe v. Tompkins*, 2 Abb. Pr. 468, holding justice liable for issuing warrant void on face for illegal sale of liquors; *Shadbolt v. Bronson*, 1 Mich. 85, holding justice issuing execution on judgment stayed longer than allowed by statute, trespasser; *Hoose v. Sherrill*, 16 Wend. 33, holding magistrate not trespasser in issuing summons instead of warrant.

Cited in notes in 24 A. D. 50, on judicial liability; 19 A. D. 491, on liability of magistrate issuing warrant for arrest; 54 A. D. 263, on liability of magistrate or justice committing person to prison for false imprisonment.

Distinguished in *Gardner v. Bain*, 5 Lans. 256, holding justice issuing warrant against keeper of disorderly saloon upon complaint protected under statute; *Davis v. Marshall*, 14 Barb. 97, holding magistrate and officer liable for issuance and execution of attachment without bond.

— Of officer executing.

Cited in *Field v. Parker*, 4 Hun, 342, holding constable executing process which justice had general jurisdiction to issue, protected; *State v. Weed*, 21 N. H. 262, 53 A. D. 188, holding officer not bound to look beyond precept for authority; *Beach v. Botsford*, 1 Dougl. (Mich.) 199, 40 A. D. 45, holding proof of valid judgment necessary to protection of officer in taking property in replevin; *Earl v. Camp*, 16 Wend. 562, holding ministerial officer protected when process regular on face; *Wilson v. Sawyer*, 37 Ala. 631, holding sheriff not entitled to commissions for execution of process regular on face issued on void judgment.

— Of prosecutor.

Cited in *Von Latham v. Rowan*, 17 Abb. Pr. 237, 38 Barb. 339, holding one complaining of nuisance not liable for act of justice in issuing warrant although facts insufficient; *Ex parte Thompson*, 1 Flipp. 507, Fed. Cas. No. 13,934, holding one obtaining writ of replevin by fraud liable although regular on face.

Cited in note in 18 L.R.A. 357, 358, on lack of jurisdiction or of legal grounds of criminal prosecution as affecting liability for false imprisonment of complainant who acts in good faith.

Distinguished in *Teal v. Fissel*, 28 Fed. 351, 18 W. N. C. 71, holding prosecutor of crime not liable for magistrate's error in issuance of warrant.

Jurisdiction of magistrate.

Cited in *Reno v. Pinder*, 20 N. Y. 298, holding constable's return indorsed by justice at former's direction sufficient to show latter's jurisdiction; *Bumpus v. Fisher*, 21 Tex. 561, holding jurisdiction of justice of action for cruel treatment to slave, presumed.

22 AM. DEC. 551, EVERETT v. COFFIN, 6 WEND. 603.**Bill of lading as evidence of title.**

Cited in reference note in 39 A. D. 336, on nature and effect of bills of lading.

Cited in note in 38 A. D. 417, on effect of bill of lading as evidence of title.

What constitutes conversion.

Cited in *Sprights v. Hawley*, 39 N. Y. 441, 100 A. D. 452 (affirming 40 Barb. 397), holding mortgagor's sale of chattels as own after default of a conversion; *Niles v. Smith*, 2 Code Rep. 31, holding one entitled to purchase horse guilty of conversion by selling to another; *The Hattie Palmer*, 15 C. C. A. 479, 36 U. S. App. 369, 68 Fed. 380, denying carrier's liability for conversion for failing to unload freight when no one present to receive it or pay charges; *Hoffman v. Carow*, 22 Wend. 285, holding auctioneer's sale of stolen goods, conversion; *Mead v. Thompson*, 78 Ill. 62, holding creditor bidding in property wrongfully attached liable for conversion with assignee of bid who removed property; *Boyce v. Brockway*, 31 N. Y. 490, holding sale of butter after notice of another's ownership, conversion; *Kentgen v. Parks*, 2 Sandf. 60, holding refusal of one to whom agent had wrongfully sold note to deliver upon principal's demand, evidence of conversion; *Schroepel v. Corning*, 5 Denio, 236 (dissenting opinion), on receiving payment belonging to another as conversion.

Cited in notes in 24 A. S. R. 797, on conversion by selling chattels of another; 24 A. S. R. 812, on liability of agent or servant for conversion.

Defense to action for conversion.

Cited in *Anderson v. Nichols*, 5 Bosw. 121, holding good faith in sale of stock no protection against conversion; *Cheshire R. Co. v. Foster*, 51 N. H. 400, holding belief in one's ownership of goods no defense to conversion; *Gunning v. Quinn*, 81 Hun, 522, 30 N. Y. Supp. 1015, holding possession under attorney's lien defense to conversion; *Byrne v. Weidenfeld*, 113 App. Div. 451, 99 N. Y. Supp. 412; *Clark v. Costello*, 79 Hun, 588, 29 N. Y. Supp. 937,—holding possession of property as pledgee defense to action for conversion.

Cited in reference note in 23 A. S. R. 774, on defense in action of trover.

—Lien as.

Cited in *Bailey v. Adams*, 14 Wend. 201, on right of one to set up another's lien on chattels to defeat trover.

Demand as prerequisite to action for conversion.

Cited in *Milligan v. Brooklyn Warehouse & Storage Co.* 34 Misc. 55, 68 N. Y. Supp. 744, holding demand unnecessary before bringing action for conversion where property has been sold.

Cited in reference note in 28 A. D. 176, on necessity of demand in trover where there has been a conversion.

Transfer of title.

Cited in *Robinson & L. v. Pogue & Son*, 86 Ala. 257, 5 So. 685, holding that title passes by consignment of goods to purchaser although bill of lading sent to seller's agent; *Mayer v. Wiltberger*, Ga. Dec. pt. 2, p. 20; *Lyde v. Taylor*, 17 Ala. 270,—holding that bona fide purchaser of chattels from life tenant acquires only latter's interest.

Cited in notes in 55 A. D. 300, as to when consignee acquires title to consigned goods; 13 L.R.A. 717, as to when vendee of personal property will not acquire title.

Rights of true owner as against purchaser from third person.

Cited in *Florence Sewing Mach. Co. v. Warford*, 1 Sweeny, 433, sustaining

right of true owner to recover stolen goods wherever found; *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541; *Williams v. Merle*, 11 Wend. 80, 25 A. D. 604,—holding purchaser of another's goods from third party for value, without protection against true owner; *Calais S. B. Co. v. Scudder*, 2 Black, 372, 17 L. ed. 282 (reversing 1 Cliff. 370, Fed. Cas. No. 12,565) (dissenting opinion), on conveyance of good title to boat as against true owner; *Cobb v. Dows*, 10 N. Y. 335. (reversing 9 Barb. 230), holding that sale of grain upon order specifying wrong warehouse creates liability as for money had and received.

Lien for freight and charges.

Cited in reference notes in 65 A. S. R. 61, on lien for freight; 52 A. D. 288, on general lien of master on cargo; 29 A. D. 508; 31 A. D. 49,—on master's lien on cargo for freight and charges.

Cited in notes in 5 E. R. C. 285, on lien of carrier for freight; 70 L.R.A. 384, on what contract between master and ship will support maritime lien on ship and cargo for disbursements.

Boarding-house keeper's lien.

Cited in *Barnett v. Walker*, 39 Misc. 323, 79 N. Y. Supp. 859, denying boarding-house keeper's lien on machine brought on premises where legal title and right to possession in another.

Satisfaction of lien.

Cited in *Spangler v. Butterfield*, 6 Colo. 356, denying right to remove property before satisfaction of storage charges; *Mount v. Williams*, 11 Wend. 77, holding trover not maintainable for boards until discharge of lien for work.

Waiver or loss of lien.

Cited in *Kirtley v. Morris*, 43 Mo. App. 144, holding artisan's lien not waived by claiming more than legal right; *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799, holding lien not waived by refusal to surrender goods without stating ground; *Collins v. Butts*, 10 Wend. 399, holding lien for work on goods waived by refusing to deliver for reason other than nonpayment of charges; *Thatcher v. Harlan*, 2 Houst. (Del.) 178, holding lien for labor on chattel waived by detention as security for general account; *Paulling v. Meade*, 23 Cal. 505, holding warehouseman's lien waived by statement to one about to take goods on process that he has no lien.

Cited in reference notes in 52 A. D. 288, on waiver of master's lien on cargo; 16 A. S. R. 319, on loss of lien for freight charges by delivery to consignee.

Cited in notes in 63 A. D. 414, on waiver of lien by refusal to deliver property; 42 A. D. 259, as to when warehouseman's lien does not exist or is lost.

Waiver of performance.

Cited in *Hill v. Heller*, 27 Hun, 416, holding vendee's offer to accept part of goods contracted for not waiver of full performance where offer, not accepted.

Power to borrow as creating personal liability.

Cited in *Snow v. Goodrich*, 14 Me. 235, holding master of boat with power to borrow money to purchase return cargo personally liable on bill drawn in own name for that purpose.

22 AM. DEC. 556, McCARTEE v. CHAMBERS, 6 WEND. 649.

Liability of committee.

Cited in *Fredendall v. Taylor*, 23 Wis. 538, 99 A. D. 203, holding committee of unincorporated association individually liable for work done for exhibition.

Power of agent to bind principal.

Cited in *MacRoberts v. Eastman*, 2 Mich. N. P. 35, sustaining power of agent to bind undisclosed principal.

Cited in reference note in 69 A. D. 678, on power of voluntary charitable associations, etc., to bind members by contract.

Plea in abatement.

Cited in *Stillson v. Hill*, 18 Ill. 262, holding plea in abatement denying co-partnership not waived by filing plea of nonassumpsit; *New York Dry-Dock Co. v. Treadwell*, 19 Wend. 525, holding judgment for plaintiff when issue of fact joined with plea in abatement, final; *Straus v. Weil*, 5 Coldw. 120, holding judgment striking out plea in abatement made to process, final; *Myers v. Erwin*, 20 Ohio, 381, sustaining plaintiff's right to final judgment upon decision in his favor when plea in abatement met by replication; *Hamburger v. Baker*, 35 Hun, 455, holding plaintiff entitled to judgment when plea in abatement decided against defendant; *Harrell v. Hill*, 15 Tex. 270, holding answer in action for trespass in taking horse and issue upon plea in abatement property submitted to jury at same time.

Defect of parties.

Cited in *Chase v. Deming*, 42 N. H. 274, denying partner's right to plead liability of partner not joined where former previously claimed latter not in firm.

Demurrer to void plea.

Cited in *Mayfield v. Barnard*, 43 Miss. 270, holding upon demurrer to avoid plea matter must be finally disposed of.

22 AM. DEC. 557, JACKSON EX DEM. RUSSELL v. ROWLAND, 6 WEND. 666.**Impeachment of witness.**

Cited in reference note in 45 A. D. 230, on impeachment of witness by evidence of general bad character.

Expression of opinion by court.

Cited in reference note in 39 A. D. 657, on court's right to express opinion on controverted facts.

Cited in note in 72 A. D. 545, on examples of charges upon weight of evidence.

Delivery of instrument.

Cited in *Brooks v. People*, 15 Ill. App. 570, denying delivery of guardian's bond returned by court for additional surety; *Hoboken City Bank v. Phelps*, 34 Conn. 92, holding bond not to be delivered until signed by all, ineffective before such signature; *Richards v. Merrimack & C. R. Co.* 44 N. H. 127, sustaining corporate mortgage securing bonds to be issued in future to raise money to pay debts.

— Deed.

Cited in *Hathaway v. Payne*, 34 N. Y. 92; *Stanton v. Miller*, 58 N. Y. 192; *Van Tassel v. Burger*, 119 App. Div. 509, 104 N. Y. Supp. 273,—holding deed deposited in escrow not invalidated by grantor's death before final delivery for relation back to first delivery; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161, holding deed placed in escrow for delivery when grantor's title matured not effectual until final delivery; *Taft v. Taft*, 59 Mich. 185, 60 A. R. 291, 26 N. W. 426, holding deed to be delivered after grantor's death, void; *Wolcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675; *Green v. Putnam*, 1 Barb. 500,—holding delivery in escrow ineffectual to pass estate; *Robbins v. Rascoe*, 120 N. C. 79, 58 A. S. R.

774, 38 L.R.A. 238, 26 S. E. 807 (dissenting opinion), on delivery of deed to third party; *Calhoun County v. American Emigrant Co.* 93 U. S. 124, 23 L. ed. 826, holding deed delivered in escrow inoperative until performance of condition; *Everts v. Agnes*, 4 Wis. 343, 65 A. D. 314, holding delivery of deed by depositary before performance of condition, void; *Stanton v. Miller*, 65 Barb. 58, 1 Thomp. & C. 23; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26,—holding performance of condition after death of grantor in deed placed in escrow effectual to pass title; *Brown v. Austen*, 22 How. Pr. 394, 35 Barb. 341, holding unconditional delivery of deed to third person for grantee effectual to pass title; *Derry Bank v. Webster*, 44 N. H. 264, holding merely sending deed for record, no delivery; *Brown v. Brown*, 1 Woodb. & M. 325, Fed. Cas. No. 1,994, holding delivery of deed to grantee not rendered ineffectual by retaking by grantor for safe-keeping; *Clark v. Gifford*, 10 Wend. 310, holding grantor's declaration that instrument delivered as his deed when given to third person, evidence of delivery to grantee.

Cited in reference notes in 30 A. D. 89, on necessity of delivery to validity of deed; 44 A. D. 707, on necessity and sufficiency of delivery of deed; 37 A. D. 680, on delivery of deed as escrow; 48 A. S. R. 45, as to when deeds delivered in escrow become operative.

Cited in notes in 53 A. S. R. 552, on delivery to third person for use of grantee as delivery of deed; 5 L.R.A. 697, as to when escrow takes effect; 53 A. S. R. 554, on delivery of deed to take effect on death of grantor.

Deed procured by fraud.

Cited in *Newton v. Newton*, 52 App. Div. 96, 64 N. Y. Supp. 981, holding deed secured through fraud, inoperative.

Transcript of judgment.

Cited in *Sill Stove Works v. Scott*, 62 App. Div. 566, 71 N. Y. Supp. 181, holding filing transcript prima facie evidence of jurisdiction of justice to render judgment; *Atchison v. Rosalip*, 4 Chand. (Wis.) 12, 3 Pinney (Wis.) 288; *Williams v. Rice*, 6 S. D. 9, 60 N. W. 153,—holding authentic transcript of judgment of justice's court not void for failure to show jurisdiction; *Dickinson v. Smith*, 25 Barb. 102, holding lien established by transcript and docketing of judgment.

Cited in note in 2 L.R.A. 831, on transcript of justice's judgments filed with county clerk.

Collateral attack on judgment.

Cited in *Vilas v. Reynolds*, 6 Wis. 214, holding judgment prima facie correct unimpeachable collaterally.

Right to deny landlord's title.

Cited in *Roe v. Doe*, 48 Ga. 165, 15 A. R. 656; *Cherokee Strip Live Stock Assn. v. Cass Land & Cattle Co.* 138 Mo. 394, 40 S. W. 107; *Despard v. Walbridge*, 15 N. Y. 374; *Bigler v. Furman*, 58 Barb. 545; *Terry v. Ferguson*, 8 Port. (Ala.) 500,—holding tenant estopped to deny landlord's title when sued for nonpayment of rent; *Plumer v. Plumer*, 30 N. H. 558, holding tenant estopped to deny landlord's title by occupancy and payment of rent; *Den ex dem. Howell v. Ashmore*, 22 N. J. L. 261; *Gallagher v. Bennett*, 38 Tex. 291,—sustaining right of tenant to deny landlord's title in suit for rent where latter induced former to take lease by fraud and is not able to reimburse him in case of his eviction; *Russell v. Fabyan*, 27 N. H. 529, holding outstanding title superior to landlord's no

defense to action for rent; *Willis v. McKinnon*, 35 App. Div. 131, 54 N. Y. Supp. 1079 (dissenting opinion), on right of tenant to deny landlord's title.

Cited in reference notes in 27 A. D. 466, on estoppel of tenant to deny landlord's title; 39 A. D. 334, on tenant's right to dispute landlord's title during tenancy.

Cited in notes in 11 E. R. C. 77, on estoppel of tenant to deny landlord's title; 21 L. ed. U. S. 780, on right of tenant to dispute landlord's title; 89 A. S. R. 71, on condition of title as affecting estoppel of tenant to deny landlord's title.

— By showing transfer or extinguishment.

Cited in *Teich v. Arms*, 5 Cal. App. 475, 90 Pac. 962; *Tewksbury v. Magraff*, 33 Cal. 237; *Daniels v. Bowe*, 25 Iowa, 403, 95 A. D. 797; *Simers v. Saltus*, 3 Denio, 214; *Mulligan v. Cox*, 23 Misc. 695, 52 N. Y. Supp. 111; *Lawrence v. Miller*, 1 Sandf. 516; *Randolph v. Carlton*, 8 Ala. 606,—holding tenant not estopped in action for rent to show expiration of landlord's title; *Lane v. Young*, 66 Hun, 563, 21 N. Y. Supp. 838, holding tenant not estopped in action for rent by landlord's heir to claim expiration of landlord's title; *Bettison v. Budd*, 17 Ark. 546, 65 A. D. 442; *Houston v. Farris*, 71 Ala. 570,—sustaining tenants' right to show expiration of landlord's title since leasing; *Pentz v. Kuester*, 41 Mo. 447, sustaining right of tenant when sued by landlord for unlawful detainer to show title in another; *Chaffin v. Brockmeyer*, 33 Mo. App. 92, sustaining tenant's right to show title not in landlord but in reversioner; *Robertson v. Biddell*, 32 Fla. 304, 13 So. 358, sustaining tenant's right to show landlord's sale of demised premises during term; *McGuffie v. Carter*, 42 Mich. 497, 4 N. W. 211, sustaining tenant's right in proceedings to recover possession to show conveyance by landlord; *Jones v. Scoggins*, 11 Ga. 119, sustaining right to show outstanding title in third person to defeat recovery in ejectment; *Moffat v. Strong*, 9 Bosw. 57, sustaining right of tenant out of possession to show eviction by title paramount when sued for rent; *Lodge v. Martin*, 31 App. Div. 13, 52 N. Y. Supp. 385, denying landlord's right to collect rent after condemnation of premises for public use.

Cited in notes in 15 E. R. C. 306, on right of tenant to show that landlord's title has expired by operation of law; 89 A. S. R. 76, on effect of termination of landlord's title on estoppel of tenant to deny title.

— By tenants setting up own title.

Cited in *Clemm v. Wilcox*, 15 Ark. 102, denying right of tenant holding over to set up title in himself to defeat recovery for rent; *Pope v. Harkins*, 16 Ala. 321, denying tenant's right to set up outstanding time in himself when sued for rent; *Tilghman & W. v. Little*, 13 Ill. 239, sustaining right of tenant purchasing under judgment to set up same when sued by landlord for rent; *Shields v. Lozear*, 34 N. J. L. 496, 3 A. R. 256, sustaining right of tenant holding over to show maturity of mortgage on demised premises held by him; *Hetzel v. Barber*, 69 N. Y. 1, holding title acquired by tenant on sheriff's sale bar to action for rent; *Hilton v. Bender*, 2 Hun, 1, 4 Thomp. & C. 270; *Weichselbaum v. Curlett*, 20 Kan. 709, 27 A. R. 204,—sustaining tenant's right to purchase premises on tax sale; *Stout v. Merrill*, 35 Iowa, 47, denying right of tenant by purchase tax deed of premises and set up same when sued for rent.

Cited in reference note in 65 A. D. 452, on right of tenant to set up title acquired under judgment after he became tenant.

Cited in notes in 89 A. S. R. 82, 85, on acquisition of landlord's title by tenant; 53 L.R.A. 938, on right of tenant to acquire title derived from judicial sale during

tenancy; 53 L.R.A. 934, on right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy.

Attornment.

Cited in *O'Donnell v. McIntyre*, 37 Hun, 623, holding attornment to stranger, void; *Miller v. Williams*, 15 Gratt. 213; *Andrews v. Richardson*, 21 Tex. 287,—holding tenant bound to attorn to true owner.

Surrender of leased premises.

Cited in *Pierce v. Brown*, 24 Vt. 165, holding tenant's purchase of mortgaged premises after breach of condition, adverse to landlord not requiring surrender; *Ladd v. Smith*, 6 Or. 316, holding surrender of leased premises not presumed by landlord's acceptance of keys.

Expiration of vendor's title.

Cited in *Holden v. Andrews*, 38 Cal. 119, sustaining right of vendee holding under contract of purchase to show expiration of vendor's title; *Dobson v. Culpepper*, 23 Gratt. 352, sustaining right of vendee of land to show in action for breach of contract vendor's conveyance to another; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426, holding grantee not estopped by going into possession to show grantor's loss of title by paramount lien.

Notice to quit.

Cited in note in 42 A. D. 136, on effect of mortgage of premises by owner on necessity of giving notice to quit.

Title by adverse possession.

Cited in *Hulick v. Scovil*, 9 Ill. 159, holding one in possession claiming adversely not required to show valid title in himself to defeat other adverse claimant; *Reformed Church v. Schoolcraft*, 5 Lans. 206 (dissenting opinion), on undisputed occupancy for twenty years as establishing title by adverse possession.

22 AM. DEC. 563. JACKSON EX DEM. DIES v. WINNE, 7 WEND. 47.

Validity of marriage.

Cited in *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81,—sustaining marriage *per verba de presenti*; *Hilton v. Roylance*, 25 Utah, 129, 95 A. S. R. 821, 58 L.R.A. 723, 69 Pac. 660, sustaining marriage under law of Mormon church as valid common-law contract; *Re McLaughlin*, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651, holding marriage without license under statute requiring one not valid as common-law marriage; *Duncan v. Duncan*, 10 Ohio St. 181, holding promise of future marriage followed by cohabitation, void; *Cheney v. Arnold*, 15 N. Y. 345, 69 A. D. 609, holding contract to marry *per verba de futuro* followed by cohabitation, void; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Caujolle v. Ferrie*, 23 N. Y. 90 (affirming 26 Barb. 177); *United States v. Simpson*, 4 Utah, 227, 7 Pac. 257; *Cochran v. Cunningham*, 15 Ala. 448, 50 A. D. 186,—holding cohabitation unnecessary to marriage contracted by mutual consent; *Jaques v. Public Administrator*, 1 Bradf. 499, holding marriage with lunatic not followed by cohabitation, void; *Franklin v. Franklin*, 154 Mass. 515, 26 A. S. R. 266, 13 L.R.A. 843, 28 N. E. 681, holding coition unnecessary to validity of marriage contract.

Cited in reference notes in 26 A. D. 485, on requisites to completion of marriage; 79 A. S. R. 361, on validity of common-law marriages; 62 A. S. R. 810, on essentials of contract of marriage; 26 A. S. R. 268, as to necessity of cohabitation to validity of marriage; 95 A. S. R. 844, on coition and cohabitation as essential to consummation of otherwise valid marriage.

Cited in notes in 9 A. D. 73, on marriage *per verba de præsenti*; 17 E. R. C. 174, on validity of common-law marriage; 11 L.R.A. 587, on form necessary to validity of contract of marriage; 124 A. S. R. 112, on necessity of cohabitation to validity of common-law marriage.

— As affected by force or fraud.

Cited in *Barnett v. Kimmell*, 35 Pa. 13; *Pyle v. Pyle*, 10 Phila. 58, 30 Phila. Leg. Int. 208, 5 Legal Gaz. 195, 1 Legal Chron. 306; *Frost v. Frost*, 42 N. J. Eq. 55, 6 Atl. 282,—holding marriage to escape prosecution in bastardy proceedings not void on ground of constraint; *Collins v. Collins*, 26 Phila. Leg. Int. 229, 2 Brewst. (Pa.) 515, holding marriage vitiated by arrest under process based on false charge of fornication; *Tait v. Tait*, 3 Misc. 218, 23 N. Y. Supp. 597, holding marriage induced by false representations of woman as to pregnancy, valid; *Lee v. State*, 44 Tex. Crim. Rep. 354, 61 L.R.A. 904, 72 S. W. 1005, holding marriage to which woman's consent obtained by fraud, void; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836, holding marriage contract vitiated by fraud; *State v. Murphy*, 6 Ala. 765, 41 A. D. 79, on fraud as affecting marriage contract.

Cited in note in 43 L.R.A. 817, on sufficiency of duress by arrest or imprisonment to avoid marriage.

Proof of marriage.

Cited in *Hutchins v. Kimmell*, 31 Mich. 126, 18 A. R. 164, holding cohabitation as husband and wife evidence of marriage; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609; *Davis v. Davis*, 7 Daly, 308; *Clayton v. Wardell*, 4 N. Y. 230; *Renholm v. Public Administrator*, 2 Redf. 456,—holding marriage provable by declarations and conduct of parties.

Rescission of contract.

Cited in *Pratt v. Morrow*, 45 Mo. 404, 100 A..D. 381, holding verbal rescission of sealed contract for sale of land made after payments due without new consideration unenforceable unless followed by abandonment; *Sickles v. Carson*, 26 N. J. Eq. 440, denying annulment of marriage contract where action not brought in good faith.

Executory and conditional devise.

Cited in *Hoxie v. Hoxie*, 7 Paige, 187, holding devise to certain children to take on reaching majority, executory; *McLaughlin's Estate*, 2 Bradf. 107, holding direction in will to sell when youngest child reaches majority, conditional.

Cited in reference note in 32 A. D. 689, on effect and construction of specific bequests.

Descent of property.

Cited in *Taylor v. Gould*, 10 Barb. 388, holding that in absence of provision in will, property descends to heirs until vesting of contingent estate.

Survival of power of sale.

Cited in *Clark v. Hornthal*, 47 Miss. 434 (dissenting opinion), on naked power of sale as surviving grantee's death.

22 AM. DEC. 567, JEFFERSON INS. CO. v. COTHEAL, 7 WEND. 72.

Admissibility of opinion evidence.

Cited in *Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co.* 5 Utah, 3, 11 Pac. 515 (dissenting opinion), on admissibility of opinion of witness on subject on which jury competent to pass: *Parker v. Chambers*, 24 Ga. 518, holding opinion as to whether sending slave to another was gift or loan, inadmissible; *Keller v. New*

York C. R. Co. 2 Abb. App. Dec. 480, 24 How. Pr. 172, holding opinion as to delay of train long enough for passengers to alight, too speculative; *Ayres v. Water Comrs.* 22 Hun, 297, denying admissibility of expert's answer as to how he would fill excavation on issue as to whether it was properly refilled; *Cooper v. State*, 23 Tex. 331, holding opinion of witness as to position of one committing murder, inadmissible on murder trial; *Kennedy v. People*, 39 N. Y. 245, 1 Cow. Crim. Rep. 119, 5 Abb. Pr. N. S. 147, denying admissibility in murder case of opinion of surgeons as to probable position of deceased when blow struck; *Hartung v. People*, 4 Park. Crim. Rep. 319 (dissenting opinion), on admissibility of testimony of medical expert in murder case; *State v. Watson*, 65 Me. 74, holding opinion of firemen as to course of fire incompetent on question as to whether fire communicated from one building to another; *New York v. Pentz*, 24 Wend. 68, holding opinion of bystanders that building blown up to stop fire would have burned inadmissible in action for destruction by city; *Cook v. People*, 2 Thomp. & C. 404, holding question asked prosecutrix in seduction as to consent to intercourse in absence of promise of marriage, too speculative.

Cited in reference notes in 41 A. D. 464, on opinion evidence; 53 A. D. 101; 57 A. D. 569,—on admissibility of opinion evidence; 58 A. D. 305; 64 A. D. 328,—on opinion of witness as evidence; 48 A. D. 73, on evidence as to opinions or belief of witnesses; 51 A. D. 391, on admissibility of expert testimony; 75 A. D. 452, on competency of persons of skill to give their opinions; 54 A. D. 582, as to when expert testimony will be received.

Cited in notes in 66 A. D. 229, on competency of expert testimony on question of art, science, or skill only; 71 A. D. 538, 539, on opinion evidence as to probable effect if parties had acted in different manner.

—As to value or damages.

Cited in *Mish v. Wood*, 34 Pa. 451, holding opinion of experts as to value of similar articles admissible in action for conversion; *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810, holding opinion evidence admissible as to the merchantable quality and condition of gambier; *Milwaukee & M. R. Co. v. Eble*, 4 Chand (Wis.) 72, 3 Pinney (Wis.) 334, holding opinion of experts as to effect on value of remaining land of condemnation of part, admissible; *Bissell v. Wert*, 35 Ind. 54, holding opinion of witness as to damage from unskillful sowing of clover, incompetent in action for breach of contract; *Whitmore v. Bowman*, 4 G. Greene, 148, holding opinion of witness as to amount of damage for loss of chattels by mismanagement of boat, inadmissible.

—As to physical condition.

Cited in *Washington v. Cole*, 6 Ala. 212, holding opinion of physician as to soundness of slave admissible in action for price; *Matteson v. New York C. R. Co.* 62 Barb. 364, holding opinion of physician as to cause of spinal trouble inadmissible in negligence action.

—As to mental condition.

Cited in *Dewitt v. Barley*, 9 N. Y. 371, holding opinions of nonexpert witnesses as to grantor's soundness of mind inadmissible in action relating to deed; *Culver v. Haslam*, 7 Barb. 314, holding question to witness as to competency of party to make deed, improper, because question for jury; *People v. Strait*, 148 N. Y. 566, 42 N. E. 1045, 12 N. Y. Crim. Rep. 145, holding nonexpert witness entitled to state impression whether acts of accused show unsoundness of mind; *Walker v. Walker*, 34 Ala. 469, holding opinion of subscribing witness as to testator's sanity, admissible; *People v. Nino*, 149 N. Y. 317, 43 N. E. 853, 12 N. Y. Crim. Rep. 228.

holding jury entitled to facts on which expert bases opinion as to sanity of one on trial for murder.

— **As to insurance matters.**

Cited in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, denying admissibility of opinion of insurance expert as to concealment of disease as material to risk; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 A. D. 280, holding opinion of witnesses as to habitual drunkard as insurable risk, inadmissible in action on policy; *Rawls v. American L. Ins. Co.* 36 Barb. 357, holding opinion of physician as to drunkard as good insurable risk, too speculative; *Hartman v. Keystone Ins. Co.* 21 Pa. 466, holding opinion of officer of life insurance company as to risk of certain occupations inadmissible; *Co-operative Life Assn. v. Leflore*, 53 Miss. 1, on whether medical examiner may testify whether he would have approved of application for insurance if advised of previous illness of applicant; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647, holding question of physician for insurer where policy would have been issued if true of insured's health known, improper; *Merchants' & M. Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Handy (Ohio) 408, holding opinions of underwriters as to nature of risk inadmissible in action on policy; *Hill v. Lafayette Ins. Co.* 2 Mich. 476, on whether witnesses may state that fact of pending litigation was material to fire insurance risk; *Cornish v. Farm Buildings F. Ins. Co.* 74 N. Y. 295; *Thayer v. Providence Washington Ins. Co.* 70 Me. 531,—holding opinion of insurance as to whether vacancy of building is an increase of risk, incompetent; *Carroll v. Home Ins. Co.* 51 App. Div. 149, 64 N. Y. Supp. 522, denying admissibility in action on policy of opinion of witnesses as to use of building as saloon as increasing risk; *Roby v. American Central Ins. Co.* 11 N. Y. S. R. 93, holding opinion of witness as to installation of fan as increasing risk, inadmissible.

Cited in note in 66 A. D. 384, on expert evidence in insurance cases.

Warranties and representations in policy.

Cited in *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352, holding statements in application not made part of policy, not warranties; *Campbell v. Merchants' & F. Mut. F. Ins. Co.* 37 N. H. 35, 72 A. D. 324, holding insured's unintentional misstatement of fact does not avoid policy where agent aware of exact facts; *Wilkins v. Germania F. Ins. Co.* 57 Iowa, 529, 10 N. W. 916, holding statement in application that building two stories high when small addition but one, not material warranty; *Lyon v. Commercial Ins. Co.* 2 Rob. (La.) 266, holding question whether insured's failure to disclose existence of gambling places in vicinity material misrepresentation, for jury; *Snyder v. Farmers' Ins. & Loan Co.* 13 Wend. 92, holding survey furnished insurance company by insured showing position of buildings, representation not warranty; *Thomas v. Fame Ins. Co.* 108 Ill. 91, sustaining right of insurance company to avail itself of misdescription in survey of buildings furnished whether material to risk or not; *Fitzgerald v. Supreme Council Catholic Mut. Ben. Assn.* 39 App. Div. 251, 56 N. Y. Supp. 1005, holding statement of ages of relatives at time of death not warranty requiring absolute verity.

Cited in reference notes in 30 A. D. 123, on distinction between and effect of warranties and representations in insurance contracts; 76 A. D. 589, 73 A. S. R. 254,—on creation of warranty in policy by construction.

Cited in notes in 16 A. D. 463, on distinction between representations and warranties; 40 A. D. 349, as to what constitutes warranty in insurance policy; 40 A. D. 349, as to when reference in policy to application, etc., constitutes represen-

tations therein warranties; 14 E. R. C. 178, on written statement in margin of policy of insurance as constituting express warranty.

— **As to use and care of property.**

Cited in *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 A. D. 362, holding statement that watchman in mill nights not warranty of presence all night; *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75, holding statement in application that property used as gristmill when also used as carpenter shop, material misrepresentation; *Waterbury v. Dakota F. & M. Ins. Co.* 6 Dak. 468, 43 N. W. 697, holding policy not avoided by agent's misstatement in application of insured's replies as to stovepipes; *Carter v. Humboldt F. Ins. Co.* 17 Iowa, 456, holding statement in application for insurance that first floor occupied by stores not warranty that every room so occupied; *Hobby v. Dana*, 17 Barb. 111, holding statement in application for insurance that building used as tavern representation of such use.

— **As to title and encumbrances.**

Cited in *Connecticut F. Ins. Co. v. Manning*, 160 Fed. 382, holding statement as to amount of encumbrance on property, material to risk.

— **As to health or habits of insured.**

Cited in *Boehm v. Commercial Alliance L. Ins. Co.* 9 Misc. 529, 30 N. Y. Supp. 660, holding declarations to physician as to medical attendance not warranties; *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, 14 A. R. 8, holding statement that insured in usual health no warranty of good health; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, holding negative answer to question as to affliction by certain diseases not warranty requiring exact reply; *Higbee v. Guardian Mut. L. Ins. Co.* 66 Barb. 462, holding statement in application for insurance as to use of liquor, warranty.

Warranty in bond.

Cited in *American Bonding & T. Co. v. Burke*, 36 Colo. 49, 85 Pac. 692, holding employer's statements in application for bond for employee, warranties invalidating bond if false.

Performance of warranties.

Cited in *Cowan v. Phenix Ins. Co.* 78 Cal. 181, 20 Pac. 408, holding allegation of insured's performance of every warranty unnecessary in action on policy.

Matter forming part of policy.

Cited in *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 A. D. 345, holding warranty, not representation, part of policy; *Miller v. Mutual Ben. L. Ins. Co.* 31 Iowa, 216, 7 A. R. 122; *Hartford Protection Ins. Co. v. Harmer*. 2 Ohio St. 452, 59 A. D. 684,—holding survey not part of policy unless expressly made so; *Williams v. New England Mut. F. Ins. Co.* 31 Me. 219, holding application not made part of policy by mere reference.

Cited in reference notes in 23 A. S. R. 464, on what may be included in fire insurance contract; 59 A. D. 201, as to when applications, surveys, or proposals are part of insurance policy so as to make them warranties.

Cited in notes in 16 A. D. 465; 30 A. D. 124,—on application for insurance as part of policy; 19 L.R.A. (N.S.) 90, as to what reference in policy to application will make it a part of policy; 16 A. D. 464, on necessity of inserting warranty in policy.

Insurable interest.

Cited in *Graham v. Firemen's Ins. Co.* 2 Disney (Ohio) 255, holding personal

interest of insured in property unnecessary; *Barnes v. Union Mut. F. Ins. Co.* 45 N. H. 21, sustaining mortgagee's right to insure property in own name; *Platho v. Merchants' & Mfrs. Ins. Co.* 38 Mo. 248, holding parol evidence admissible to show insured's interest in property covered.

Who entitled to enforce policy.

Cited in *Brown v. Hartford Ins. Co.* Fed. Cas. No. 2,009, holding action on fire insurance policy procured by trustee for benefit of and payable to *cestui que trust* should be brought by latter; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 A. D. 337, sustaining right of surviving members of firm to enforce policy; *Murdock v. Chenango County Mut. Ins. Co.* 2 N. Y. 210, denying right of tenants in common insuring against loss to bring joint action on policy after conveyance by one to other; *Farrow v. Commonwealth Ins. Co.* 18 Pick 3, 29 A. D. 564; *Forgay v. Atlantic Mut. Ins. Co.* 2 Robt. 79; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121,—holding one to whom loss payable party to bring action on fire insurance policy; *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281, sustaining right of one to whom policy issued to maintain action for all owners under words "to whom it may concern;" *Walsh v. Washington Marine Ins. Co.* 32 N. Y. 427, holding that policy issued to benefit of whom it may concern inures to benefit of all; *Henshaw v. Mutual Safety Ins. Co.* 2 Blatchf. 99, Fed. Cas. No. 6,387, sustaining right of one insuring vessel for benefit of whom it may concern to bring action in own name; *Marittima v. Phenix Ins. Co.* 59 Hun, 361, 12 N. Y. Supp. 811, holding one taking policy covering vessel as security for loan entitled to enforce same in case of loss; *Kent v. Aetna Ins. Co.* 84 App. Div. 428, 82 N. Y. Supp. 817, sustaining right of mortgagee to enforce policy to extent of debt; *Aldrich v. Equitable Safety Ins. Co.* 1 Woodb. & M. 272, Fed. Cas. No. 155, holding consignee of insured cargo entitled to recover portion of loss equal to sum due on transaction; *Wood v. Rutland & A. Mut. F. Ins. Co.* 31 Vt. 552, holding equitable assignee of insurance policy bound to sue in name of insured; *Hurlburt v. Pacific Ins. Co.* 2 Sumn. 471, Fed. Cas. No. 6,919; *Goodall v. New England Mut. F. Ins. Co.* 25 N. H. 169,—holding agent insuring principal's property in own name proper party plaintiff.

Cited in reference note in 33 A. D. 37, on insurance for whom it may concern.

Avoidance of policy.

Cited in *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238, holding policy to "S. and others" not avoided by sale where vendee gave back mortgage to S.; *Allen v. Lafayette Ins. Co.* 34 La. Ann. 763, holding policy not avoided by allegation in action for loss that goods in rear of warehouse instead of in warehouse, where same roof over all; *Richards v. Protection Ins. Co.* 30 Me. 273, holding policy on goods not hazardous avoided by keeping of oil; *Grant v. Howard Ins. Co.* 5 Hill, 10, holding provision in policy that it should be void if "house building or repairing" be carried on, inapplicable to repairs to property itself.

Cited in reference notes in 37 A. D. 46, on materiality of description of property in insurance policy; 81 A. D. 530, as to when error in description of property in insurance policy is not fatal; 40 A. D. 351, on effect upon insurance of misrepresentations by assured; 59 A. D. 202, as to when misrepresentation will avoid insurance policy; 41 A. D. 497, on effect of false or inaccurate representations in application for insurance.

Cited in notes in 30 A. D. 101, on what is a misdescription of insured property and its effect; 74 A. D. 498, on necessity that misrepresentation or concealment be fraudulently made to avoid insurance policy.

Waiver of proof of loss.

Cited in *Westlake v. St. Lawrence Mut. Ins. Co.* 14 Barb. 206, holding payment of portion of loss waiver of furnishing of preliminary proofs.

Action for fraud.

Cited in *Hatchett v. Gibson*, 13 Ala. 587, holding failure to store cotton in fireproof warehouse as claimed not basis of action for fraud.

22 AM. DEC. 574, JACKSON EX DEM. HENDRICKS v. ANDREWS, 7 WEND. 152.**When possession is adverse.**

Cited in *Humbert v. Trinity Church*, 24 Wend. 587, holding tenant in common in possession presumed to hold for himself and cotenant; *Hall v. McCormick*, 7 Tex. 289, on question whether statute runs in favor of one in possession under fraudulent conveyance.

Cited in reference note in 26 A. D. 103, on requisites to title by adverse possession.

Sale pending action.

Cited in *Leitch v. Wells*, 48 N. Y. 585, holding doctrine of constructive notice by *lis pendens* not applicable to stocks; *Diamond v. Lawrence County*, 37 Pa. 353, 78 A. D. 429, holding that purchasers of bonds given by county in aid of railroad pending action for subscription take with notice of facts; *Norton v. Birge*, 35 Conn. 250, holding rights of parties not changed by purchase pending action to determine title; *Carr v. Cates*, 96 Mo. 271, 9 S. W. 659, holding title of purchaser pending appeal of action involving title not aided by failure to give supersedeas bond; *Griswold v. Miller*, 15 Barb. 520, holding one purchasing property with knowledge that lunacy commission for grantor pending, not bona fide purchaser; *Skeel v. Spraker*, 8 Paige, 182, on purchase of premises pending action.

Cited in reference notes in 26 A. D. 466; 48 A. D. 111; 11 A. S. R. 856,—on doctrine of *lis pendens*; 35 A. D. 155, on purchase *pendente lite*; 29 A. D. 136, on what is champerty.

Cited in notes in 14 A. D. 775; 2 L.R.A. 48,—on doctrine of *lis pendens*; 56 A. S. R. 857, 859, on the law of *lis pendens*; 2 L.R.A. 49, on validity of alienation pending suit in which *lis pendens* has been filed; 15 A. D. 322, on buying and selling dormant titles or things in litigation.

Distinguished in *Parks v. Jackson*, 11 Wend. 442, 25 A. D. 656, holding purchase of land under contract not void because pending action affecting title where purchase price paid and valuable improvements made.

Rights of purchaser from one without title.

Cited in *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793, holding one taking possession under deed of land to which he knew grantor had no title, trespasser.

Cited in note in 55 A. D. 413, on deed of property of which grantor is disseised.

Assignment of action.

Cited in *Arents v. Long Island R. Co.* 36 App. Div. 379, 55 N. Y. Supp. 401, holding agreement to prosecute claim to judgment and assign rights thereunder not assignment of action.

Ejectment against several defendants.

Cited in *Love v. Wilbourn*, 27 N. C. (5 Ired. L.) 344, sustaining right of plaintiff in ejectment to declare on same title against all though occupying in severalty; *Rogers v. Arthur*, 21 Wend. 598, holding in action of ejectment against several defendants occupying in severalty recovery against one entitles others to

judgment in own favor; *Smythe v. New Orleans Canal & Bkg. Co.* 34 Fed. 825, sustaining equity's refusal to entertain ejectment where defendants would be as many as in action at law.

Conclusiveness of judgment establishing title.

Cited in *Gould v. Stanton*, 16 Conn. 12, sustaining right of court in action to set aside deed as fraudulent to settle question of title.

22 AM. DEC. 578, GILLET v. MEAD, 7 WEND. 193.

Right of action for seduction.

Cited in *Hamilton v. Lomax*, 6 Abb. Pr. 142, 26 Barb. 615, denying right of person seduced to maintain action for seduction; *Cheney v. Arnold*, 15 N. Y. 345, 69 A. D. 609, holding action for seduction maintainable at suit of father of daughter seduced.

Cited in reference note in 44 A. D. 741, on parent's right to sue for seduction of daughter.

Cited in note in 20 A. D. 644, on parent's right to maintain action for daughter's seduction.

Proof of promise of marriage in action for seduction.

Cited in *Kip v. Berdan*, 20 N. J. L. 239; *Whitney v. Elmer*, 60 Barb. 250; *Haynes v. Sinclair*, 23 Vt. 108; *Comer v. Taylor*, 82 Mo. 341,—denying right of parent to prove promise of marriage in action for daughter's seduction; *White v. Campbell*, 13 Gratt. 573; *Parker v. Monteith*, 7 Or. 277,—holding *contra*; *Johnson v. Noble*, 13 N. H. 286, 38 A. D. 485, on admissibility of promise of marriage in action by parent for debauching of daughter.

Cited in note in 44 A. D. 175, 176, on admissibility of evidence of promise of marriage in action for seduction.

Proof of seduction in action for breach of promise.

Distinguished in *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441, holding that seduction may be pleaded in action for breach of promise of marriage as element of punitive damages.

Grounds for new trial.

Cited in *Waring v. United States Teleg. Co.* 44 How. Pr. 69, 4 Daly, 233; *Stiles v. Tilford*, 10 Wend. 338; *Wisconsin State Bank v. Dutton*, 11 Wis. 372; *Deerfield v. Northwood*, 10 N. H. 269,—holding admission of incompetent evidence not ground for new trial where jury instructed to disregard it; *Clark v. Brooks*, 2 Abb. Pr. N. S. 385, 2 Daly, 159, holding new trial proper when erroneous evidence admitted in absence of proof beyond reasonable doubt that jury not influenced.

Cited in reference note in 26 A. D. 684, on effect of caution to jury not to consider inadmissibility of evidence to prevent new trial.

22 AM. DEC. 582, HYDE v. STONE, 7 WEND. 354.

Rights and liabilities of father as guardian.

Cited in *Whitlock v. Whitlock*, 1 Dem. 160, denying right of father as natural guardian to receive legacy given minor son; *Selden's Appeal*, 31 Conn. 548, holding upon resignation of guardian father as natural guardian entitled to receive rents of land of minor children; *Linton v. Walker*, 8 Fla. 144, 71 A. D. 105, holding payment to father as natural guardian for child, not binding on latter; *Rhea v. Bagley*, 63 Ark. 374, 36 L.R.A. 86, 38 S. W. 1039 (dissenting opinion), on liability of father making gift of land to minor children to account for rents

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during minority; *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637, denying father's control over property of emancipated minor child purchased with own funds.

Cited in reference note in 29 A. D. 89, on extent of guardianship by nature.

Cited in notes in 11 L.R.A. 440, on guardians by nature; 89 A. S. R. 268, on general nature and extent of guardianship over person of ward; 89 A. S. R. 276, on right of natural guardian to custody of ward.

Rights of next of kin.

Cited in *Herrington v. Lowman*, 22 App. Div. 266, 47 N. Y. Supp. 863, holding next of kin entitled to intestate's personal property as tenants in common.

Distinguished in *Beecher v. Crouse*, 19 Wend. 306; *Woodin v. Bagley*, 13 Wend. 453,—holding next of kin not entitled to maintain trover for distributive share; *Cullen v. O'Hara*, 4 Mich. 132, denying right of next of kin to gold coin belonging to estate before distribution.

Right to maintain action against cotenant.

Cited in reference notes in 66 A. D. 473, on right of tenant in common of personality to sue in assumpsit cotenant who has sold the common property; 40 A. D. 653, on remedy of one cotenant for sale or destruction of common property by the other cotenant.

Cited in note in 16 A. S. R. 661, on sale by one tenant in common of chattels.

—Trespass or trover.

Cited in *Tyler v. Taylor*, 8 Barb. 585, holding trover not maintainable against cotenant for sale of horse owned in common; *White v. Osborn*, 21 Wend. 72, sustaining right to maintain trover for common property wrongfully sold by cotenant; *Arthur v. Gayle*, 38 Ala. 259, holding action maintainable by tenant in common of a remainder in slaves against cotenant selling slaves as his own; *Hall v. Page*, 4 Ga. 428, 48 A. D. 235, denying right to maintain trover against cotenant for possession of note; *Sharp v. Benoist*, 7 Mo. App. 534, denying right of part owner to recover possession of horse from vendee of co-owner; *Herrin v. Eaton*, 13 Me. 193, 29 A. D. 499, sustaining right to maintain trespass against cotenant for loss of goods received as common carrier; *Warren v. Aller*, 1 Pinney (Wis.) 479, 44 A. D. 406, sustaining right to maintain trespass against cotenant for destruction of crop owned in common.

Cited in reference notes in 24 A. D. 37; 52 A. D. 77,—on trover against cotenant; 24 A. D. 164, as to when tenant in common may maintain trover against cotenant; 36 A. D. 372, on maintenance of trover or trespass by one tenant in common against another; 27 A. D. 574, on destruction of common chattel by cotenant as conversion; 69 A. D. 508, on remedy of cotenant for conversion or sale of common property.

Who are tenants in common.

Cited in *Hawley v. Keeler*, 62 Barb. 231, holding patrons of cheese factory receiving cheese in proportion to quantity of milk delivered, tenants in common of cheese made.

Admissibility of admissions or offers of compromise.

Cited in *Vail v. Judson*, 4 E. D. Smith, 165, holding principal not bound by admissions of agent after termination of authority; *Hamblett v. Hamblett*, 6 N. H. 333, holding admission of fact not inadmissible because made pending compromise; *Stanford v. Bates*, 22 Vt. 546, holding evidence of admissions as to book account made by adverse party after commencement of suit and pending settlement, admissible; *Columbus v. Howard*, 6 Ga. 213, sustaining admissibility of admissions of city counsel pending action against city for death of slave; *Mead v. Degolyer*, 16

Wend. 644 (dissenting opinion), on admissibility of offer made in compromise of pending action.

Cited in reference notes in 40 A. D. 198, on admissibility of declarations against interest; 52 A. D. 262, on competency of admissions of party against interest as evidence.

Right to interest.

Cited in *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422, holding interest not recoverable on unliquidated damages; *Cook v. New York C. & H. R. R. Co.* 10 Hun, 426, denying right of jury to allow interest on sum awarded for negligent death; *Brentner v. Chicago, M. & St. P. R. Co.* 68 Iowa, 530, 23 N. W. 245, holding interest on value of stock killed on railroad not recoverable before verdict; *Blackie v. Cooney*, 8 Nev. 41, sustaining right to interest on value of property taken without proof of special damage; *Wilson v. Troy*, 60 Hun, 183, 14 N. Y. Supp. 721, holding interest recoverable from time of accident on damages for injury to horse; *Thomas v. Sternheimer*, 29 Md. 268, holding interest recoverable on value of horse taken by government from time of taking; *Derby v. Gallup*, 5 Minn. 119, Gil. 85, holding in action of trover interest on value of goods taken recoverable to time of trial; *McCormick v. Pennsylvania C. R. Co.* 49 N. Y. 303, holding interest recoverable from time of conversion; *Rhemke v. Clinton*, 2 Utah, 230, sustaining right to interest on value of property wilfully destroyed; *Godbe v. Young*, 1 Utah, 55, holding interest allowable on account stated; *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40, holding right to interest on damages for negligent injuries for jury to determine; *Wilson v. Troy*, 135 N. Y. 96, 31 A. S. R. 817, 18 L.R.A. 449, 32 N. E. 44, holding allowance of interest in discretion of jury in estimating damages for injury to property; *Dana v. Fiedler*, 1 E. D. Smith, 463 (dissenting opinion), on right to interest on damages for breach of contract.

Cited in note in 14 E. R. C. 563, on right to collect interest.

Appointment of administrator.

Cited in *Gregg v. Houseman*, 16 N. Y. S. R. 67, holding appointment of administrator unnecessary in action by next of kin to recover share in estate; *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, denying right of executrix of testator's son, in action by executor to settle accounts, to compel adjustment of son's interest in estate of which father executor at time of death, no administrator having been appointed to succeed him; *Segelken v. Meyer*, 94 N. Y. 473, 5 N. Y. Civ. Proc. Rep. 1, sustaining right of next of kin to maintain action for personal property without appointment of administrator where former's right thereto clear; *Austin v. Snider*, 17 Colo. App. 182, 68 Pac. 125, holding one entitled to whole estate entitled to sue on bond without appointment of administrator.

Cited in note in 15 L.R.A. 491, on necessity of administration in devolution of decedent's personality.

Action by administrator de bonis non.

Cited in *Homans v. New York L. Ins. Co.* 55 Misc. 574, 106 N. Y. Supp. 929, sustaining power of administrator *de bonis non* to recover for services rendered by intestate domiciled in another country under whose laws personality descends to heirs.

Action by guardian.

Cited in *Thomas v. Bennett*, 56 Barb. 197, holding guardian entitled to sue in own name for money due ward.

Rights of widow in personality.

Cited in *Fox v. Burns*, 12 Barb. 677, sustaining title of purchaser from widow of chattel mortgagor under sale made more than year after mortgage due.

22 AM. DEC. 586, CULVER v. AVERY, 7 WEND. 380.**Action for false representations.**

Cited in *Krumm v. Beach*, 25 Hun, 293, holding fraudulent representations gravamen of action for fraud and deceit; *Crandall v. Bryan*, 15 How. Pr. 48, 5 Abb. Pr. 162, holding fraud accompanied by damage basis of action relating to real and personal property; *Dwight v. Chase*, 3 Ill. App. 67, holding false representation as to income of business as inducement to purchase, actionable; *Oehlhof v. Solomon*, 73 App. Div. 329, 76 N. Y. Supp. 716, holding purchaser of business on representation that landlord would consent to assignment of lease not obliged to wait till eviction before bringing action for deceit; *Terrill v. Grove*, 2 Mich. N. P. 3, holding knowledge of falsity of representations necessary to maintenance of action for deceit; *Horner v. Fellows*, 1 Dougl. (Mich.) 51, holding sale of fanning mill represented to do good work not fraudulent unless vendor knew otherwise; *Ely v. Mumford*, 47 Barb. 629, holding rescission of contract unnecessary to maintain action for deceit.

Cited in reference notes in 80 A. D. 183, on actions for fraudulent representations generally; 45 A. D. 216, as to when action for deceit or false representations lies; 61 A. S. R. 796, on fraudulent purchase of goods on credit; 44 A. D. 463, on liability of one affirming what he knows to be false or does not know to be true.

Cited in notes in 18 A. S. R. 555, on actions for false representations; 11 A. S. R. 350, on false representations which will vitiate or avoid contract.

—Relating to land.

Cited in *Carvill v. Jacks*, 43 Ark. 439, holding fraudulent representations or deceit in sale of land accompanied by damages actionable; *Mitchell v. Zimmerman*, 4 Tex. 75, 51 A. D. 717; *Newell v. Horn*, 45 N. H. 421,—sustaining vendee's right to maintain action against vendor for false representations as to extent of land conveyed; *Whitney v. Allaire*, 1 N. Y. 305, holding action maintainable for false representations as to extent of premises demised; *Wright v. Phipps*, 90 Fed. 556, holding representations as to land merged in covenants; *Peabody v. Phelps*, 9 Cal. 213, holding action for fraudulent representations as to title not maintainable by one taking possession under deed with covenants; *Ward v. Wiman*, 17 Wend. 193, sustaining action against grantor for fraudulent representations that land free of encumbrances although deed contains covenant against encumbrances; *Haight v. Hayt*, 19 N. Y. 464, holding action maintainable against vendor for false representations as to encumbrance even in absence of warranty; *Krumm v. Beach*, 96 N. Y. 398, sustaining right of vendee induced to purchase land by false representations to rescind contract or sue for fraud; *Gwinther v. Gerding*, 3 Head, 197, sustaining right of vendee to elect to rescind contract of sale and bring action for deceit; *Tyner v. Cotter*, 67 Wis. 482, 30 N. W. 782, holding action for fraudulent representations as to perfect title maintainable although vendee took only quitclaim deed, vendor refusing to give other; *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87, holding complaint in action for false representations as to ownership of land conveyed sufficient without alleging knowledge of falsity; *Ring v. Ogden*, 45 Wis. 303, holding second conveyance by grantor actionable tort when made to defeat prior deed.

Cited in reference notes in 28 A. D. 181, on fraud in sale of real estate; 84 A. S. R. 814, on fraudulent representations as to title to land; 37 A. D. 405, on action of deceit for false representations in sale of land; 68 A. D. 120, on vendee's right of action for vendor's concealment or misrepresentation as to title to land;

39 A. D. 733, on vendor's liability to action for false affirmations; 35 A. D. 408, on fraudulent representation as to title to land rendering person making it responsible.

Cited in note in 2 A. D. 79, on fraudulent representations by vendor of land regarding title as actionable.

Measure of damages for false representations.

Cited in *Brisbane v. Pomeroy*, 13 Daly, 358, holding measure of damages for fraudulently representing one joining in deed to be wife difference between value of land under disability to convey and value without dower.

Liability of public officers.

Cited in notes in 18 A. S. R. 562, on liability of public officer for false representations; 95 A. S. R. 79, on defenses available to ministerial officer for non-feasance and misfeasance.

Right to new trial.

Cited in *Honsee v. Hammond*, 39 Barb. 89; *Morss v. Sherrill*, 63 Barb. 21; *People v. Townsend*, 37 Barb. 520,—denying right to new trial where evidence contradictory, on ground that verdict against weight; *Brooks v. Moore*, 67 Barb. 393, holding verdict of jury conclusive when supported by some evidence.

Cited in reference notes in 33 A. D. 656; 65 A. D. 436,—as to when verdict will be set aside as against evidence.

22 AM. DEC. 590, HUBBARD v. ELMER, 7 WEND. 446.

Power of agent.

Cited in *Decker v. Sexton*, 19 Misc. 59, 43 N. Y. Supp. 167, denying implied power of general agent to waive provision as to when lease to become operative; *Craighead v. Peterson*, 72 N. Y. 279, 28 A. R. 150, holding agent empowered to draw note or check on bank where principal had account not authorized to draw note at other bank; *Blum v. Robertson*, 24 Cal. 127, holding one dealing with attorney in fact bound to know extent of authority.

Agent's liability to principal.

Cited in *Rogers v. Bradford*, 1 Pinney (Wis.) 418, holding agent liable to principal for failure to inform him of important transactions.

Admissibility of declarations.

Cited in *White v. Miller*, 71 N. Y. 118, 27 A. R. 13, holding declarations of seller as to defective character of seed made eight months after sale, inadmissible in action for breach of warranty.

— Of agent.

Cited in *Mt. Morris Electric Light Co. v. United States Horse & C. Show Soc.* 9 Misc. 180, 29 N. Y. Supp. 584, holding principal not bound by admissions of agent not within scope of employment; *Woods v. Clark*, 24 Pick. 35; *Innis v. The Senator*, 1 Cal. 459, 54 A. D. 305,—holding declarations of agent inadmissible against principal except as part of *res gestæ*; *Converse v. Blumrich*, 14 Mich. 108, 90 A. D. 230, holding declarations of agent subsequent to transaction, inadmissible; *Butterfield v. Blanchard*, 2 N. Y. Code Rep. 31, holding declarations of agent after sale as to principal's debt to vendor, inadmissible against principal; *New York L. Ins. & T. Co. v. Beebe*, 7 N. Y. 364, holding principal not estopped to deny false statement of agent to borrow money on former's mortgage as to ownership thereof.

Cited in reference notes in 13 A. S. R. 22, on admissions of agent as evidence against principal; 41 A. D. 487, on admissibility against principal of declara-

tions of agent; 39 A. D. 656, on agent's declarations after transaction to which agency extends as evidence against principal.

22 AM. DEC. 592, GILBERT v. DICKERSON, 7 WEND. 449.

Liability for conversion.

Cited in *White v. Phelps*, 12 N. H. 382, holding mortgagor's sale in exclusion of rights of mortgagee, conversion; *Moulton v. Robinson*, 27 N. H. 550, holding sheriff selling whole property on execution against one tenant, guilty of conversion; *Fiero v. Betts*, 2 Barb. 633, holding purchaser from sheriff under execution sale against one tenant not liable to action of trespass by other tenant; *Osborn v. Schenck*, 83 N. Y. 201 (affirming 18 Hun, 202), holding one taking chattel mortgage on mill and machinery from one tenant not liable to cotenant for conversion.

— Of cotenant.

Cited in *Dear v. Reed*, 37 Hun, 594, holding mere possession by one tenant of wool owned in common, not conversion; *Perry v. Granger*, 21 Neb. 579, 33 N. W. 261; *Weld v. Oliver*, 38 Mass. 559,—holding tenant's sale of common property as own, conversion; *Person v. Wilson*, 25 Minn. 189, holding partner's sale of firm property as own, conversion; *Dyckman v. Valiente*, 42 N. Y. 549, holding co-owners transferring boat without accounting for cotenant's share, guilty of conversion; *Kilgore v. Wood*, 56 Me. 150, holding tenant purchasing cotenant's interest and selling without payment of purchase price to latter not guilty of conversion; *Winner v. Penniman*, 35 Md. 163, 6 A. R. 385, holding joint tenant's surrender of note without authority liable to cotenant for conversion.

Cited in reference notes in 22 A. D. 586; 24 A. D. 36; 52 A. D. 77,—on trover against cotenant; 27 A. D. 574, on destruction of common chattel by cotenant as conversion; 24 A. D. 164, as to when tenant in common may maintain trover against cotenant; 60 A. D. 508, on remedy of cotenant for conversion or sale of common property.

Cited in notes in 24 A. S. R. 817, on conversion by cotenant in chattels; 12 L.R.A. 262, on liability of tenant in common in action of trover for conversion of the property.

Liability of cotenant for repairs.

Cited in *The Two Marys*, 10 Fed. 919, holding shipwright entitled to enforce lien for work against interest of tenant not consenting when repairs necessary.

Liability to cotenant.

Cited in *Tinney v. Stebbins*, 28 Barb. 290, holding loss or injury to common property necessary to entitle tenant to maintain action against cotenant; *Herrin v. Eaton*, 13 Me. 193, 29 A. D. 499, holding tenant losing article owned in common liable to cotenant; *Robinson v. Dickey*, 143 Ind. 205, 52 A. S. R. 417, 42 N. E. 679, denying right of tenant to maintain trover against cotenant in exclusive possession of chattels but not denying other's title.

Possession by cotenants.

Cited in *King v. Phillips*, 1 Lans, 421, holding trustee of school district owning schoolhouse in common with others not entitled to exclude other trustees.

Right to waive tort.

Cited in *White v. Brooks*, 43 N. H. 402, holding tenant whose interest sold by cotenant entitled to waive tort and sue for money had and received.

Necessary parties plaintiff.

Cited in *Brown v. Ravenscraft*, 88 Md. 216, 44 Atl. 170, holding all of common owners necessary parties plaintiff in replevin.

Time, mode, and necessity of objection for nonjoinder.

Cited in *Zabriskie v. Smith*, 13 N. Y. 322, 64 A. D. 551; *Butler v. Boynton*, 117 Mo. App. 462, 94 S. W. 723,—holding defect of parties plaintiff in action of trespass waived by failure to object; *Tripp v. Riley*, 15 Barb. 333, sustaining right of one tenant to sue stranger for conversion when no objection made to defect of parties.

Cited in reference notes in 43 A. D. 259, on form of objection to nonjoinder of parties; 46 A. D. 630, on how nonjoinder of plaintiffs or defendants must be taken advantage of; 41 A. D. 296, as to when and how objection of nonjoinder is made; 27 A. D. 721, as to time and mode of taking objection of want of proper parties; 67 A. D. 258, on taking advantage of nonjoinder of party plaintiff in *ex delicto* action; 37 A. D. 69; 69 A. D. 87,—on nonjoinder of parties as matter for plea in abatement.

Cited in note in 1 E. R. C. 164, on how advantage may be taken of nonjoinder of plaintiff in tort.

22 AM. DEC. 595, MAYNARD v. BEARDSLEY, 7 WEND. 560.**Witness's understanding of slander or libel.**

Cited in *Gribble v. Pioneer-Press Co.* 37 Minn. 277, 34 N. W. 30, holding witness's opinion as to meaning of libelous statement, inadmissible; *Smith v. Sun Pub. Co.* 50 Fed. 399; *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 91, 14 U. S. App. 173, 55 Fed. 240; *People v. Parr*, 42 Hun. 313, 5 N. Y. Crim. Rep. 34; *White v. Sayward*, 33 Me. 322,—holding testimony of witnesses inadmissible to show that they considered plaintiff one meant in libelous statement; *Weed v. Bibbins*, 32 Barb. 315; *Smith v. Gaffard*, 33 Ala. 163,—holding witness's understanding of slanderous charge, inadmissible; *Julian v. Kansas City Star Co.* 209 Mo. 35, 107 S. W. 496 (dissenting opinion), on admissibility of witness's understanding of libel.

Cited in reference notes in 63 A. D. 269, on admissibility of witness's understanding of words to which he has testified; 52 A. D. 770, on admissibility of testimony as to how witness understood alleged libelous publication; 74 A. S. R. 368, on opinion evidence as to whether publication was considered libelous.

Justification for libel.

Cited in reference note in 40 A. S. R. 699, on previous publication by plaintiff as justification for libel.

Provocation for slander or libel.

Cited in *Israel v. Israel*, 109 Mo. App. 366, 84 S. W. 453, holding evidence of great provocation admissible in mitigation of damages for slander; *Shockey v. McCauley*, 101 Md. 461, 61 Atl. 583, 4 A. & E. Ann. Cas. 921, holding evidence of provocation admissible in mitigation of damage for slanderous charge of theft; *Birchard v. Booth*, 4 Wis. 67, holding of approbrious language spoken at time of assault admissible in reduction of damages; *Moore v. Clay*, 24 Ala. 235, 60 A. D. 461, holding evidence of statements derogatory of character admissible to reduce damages for slander; *Morely v. Dunbar*, 24 Wis. 183, holding evidence of malicious conduct provoking assault admissible in reduction of damages; *Miles v. Harrington*, 8 Kan. 425, holding heat and passion no defense to slanderous charge of perjury; *Gould v. Weed*, 12 Wend. 12; *Child v. Homer*, 13 Pick. 503, holding evidence of recent provocative publication admissible in mitigation of damage for libel; *Sheffill v. Van Deusen*, 15 Gray, 485, 77 A. D. 377, holding evidence of provocation given at another time inadmissible; *Coxe v. Whitney*, 9 Mo. 527, holding

evidence of remote publication of libel concerning wife not admissible in mitigation of damages for assault and battery; *Porter v. Henderson*, 11 Mich. 20, 82 A. D. 59, holding evidence that on unconnected occasion plaintiff called defendant liar not admissible in mitigation of damages for slander charging perjury; *Weston v. Grand Rapids Pub. Co.* 128 Mich. 375, 87 N. W. 258, holding publication not reply to libelous article inadmissible to show provocation; *Quinby v. Minnesota Tribune Co.* 38 Minn. 528, 8 A. S. R. 693, 38 N. W. 623, holding evidence of publication inducing libelous article inadmissible where former irrelevant to libel; *Goldsmith v. Joy*, 61 Vt. 488, 15 A. S. R. 923, 4 L.R.A. 500, 17 Atl. 1010, holding provocation not amounting to justification not admissible to mitigate damages for assault; *Bush v. Prosser*, 13 Barb. 221, holding evidence of lewd conduct by plaintiff's family not admissible in mitigation of damages for charge of keeping house of ill fame.

Mitigation of damages in libel or slander.

Cited in reference notes in 36 A. D. 603, on mitigation of damages in libel; 71 A. D. 274, on right to show general bad character of plaintiff in mitigation of damages in action for libel or slander.

Cited in note in 28 L.R.A. 724, on time and connection of charges to mitigate damages in libel cases.

22 AM. DEC. 603, WOOD v. JACKSON, 8 WEND. 9.

Validity of conveyance.

Cited in *Newton v. Jay*, 107 App. Div. 457, 95 N. Y. Supp. 413, 35 N. Y. Civ. Proc. Rep. 89, holding deed of trust in contemplation of marriage made by one without debts, valid; *High v. Nelms*, 14 Ala. 350, 48 A. D. 103, sustaining right of creditors to set aside voluntary conveyance by father to child; *Watson v. Le Row*, 6 Barb. 481, holding antecedent creditor entitled to require grantee in voluntary conveyance to show absence of fraud.

Cited in reference notes in 29 A. D. 125; 30 A. D. 338,—on validity of voluntary conveyances; 49 A. D. 719, on validity of voluntary conveyances against existing and subsequent creditors and purchasers; 71 A. S. R. 546, on purging conveyance of fraud.

Cited in note in 13 L.R.A. 640, on effectiveness of voluntary conveyance.

Effect of reversal of judgment.

Cited in *Womack v. Circle*, 32 Gratt. 324, holding judgment of conviction although reversed conclusive as to probable cause in action for malicious prosecution.

Cited in reference notes in 26 A. D. 415, on rights of parties on reversal of judgment; 54 A. D. 455, on reversal of erroneous judgment as affecting rights of third persons acquired thereunder.

Cited in note in 96 A. S. R. 133, on reversal of judgment as terminating its effect as *res judicata* and as a merger.

— On purchaser's title.

Cited in *Hening v. Punnett*, 4 Daly, 543; *Graham v. Bleakie*, 2 Daly, 55,—holding purchaser's title not divested by subsequent reversal of judgment of foreclosure; *Holden v. Sackett*, 12 Abb. Pr. 473; *McAusland v. Pundt*, 1 Neb. 211, 93 A. D. 358,—holding vendee of property from one purchasing under judgment not divested of title by reversal; *Winterson v. Hutchings*, 10 Misc. 396, 31 N. Y. Supp. 127, holding assignee of judgment purchasing land on execution sale bound to restore same to debtor upon reversal of judgment on appeal; *Clarke v. Daven-*

port, 1 Bosw. 95, holding title of purchaser not affected by misapplication of proceeds by grantor selling under order of court.

Cited in reference note in 71 A. D. 689, on effect of reversal of judgment on sale under execution.

Cited in notes in 21 L.R.A. 54, on protection of stranger purchasing at execution or judicial sale on reversal of decree; 96 A. S. R. 136, on restitution after reversal of judgment where property has been transferred under it to stranger.

Title of purchaser at sheriff's sale.

Cited in note in 25 A. D. 610, on vesting of title in purchaser at sheriff's sale.

Correction of judgment.

Cited in *Richardson v. Jones*, 12 Gratt. 53, 65 A. D. 240, denying right to correct judgment by confession under Code § 181.

Marriage as consideration.

Cited in *Lionberger v. Baker*, 88 Mo. 447, holding conveyance in consideration of marriage, valid; *Vance v. Vance*, 21 Me. 364, holding marriage good consideration for antenuptial contracts; *Cohen v. Knox*, 90 Cal. 266, 13 L.R.A. 711, 27 Pac. 215, sustaining conveyance in consideration of marriage between grantee and another.

Cited in reference notes in 43 A. D. 320, on marriage as consideration for promise; 54 A. S. R. 671, on marriage as a valuable consideration.

Cited in note in 12 L.R.A. 464, on sufficiency of marriage as consideration to support promise.

Proof admissible under general issue.

Cited in *Miller v. Beck*, 68 Mich. 76, 35 N. W. 899, holding proof of title by adverse possession admissible under general issue; *Young v. Rummell*, 2 Hill, 478, 38 A. D. 594, holding former recovery in assumpsit admissible under general issue in assumpsit; *Smith v. Pettit*, 2 N. Y. Leg. Obs. 257, holding evidence of former recovery admissible under general issue in subsequent assumpsit.

Cited in note in 26 A. D. 610, on admissibility and effect of former recovery as evidence under general issue.

Availability of estoppel.

Cited in reference notes in 87 A. D. 318, as to whether estoppel is available at law; 63 A. S. R. 173, on equitable estoppel as a defense; 37 A. D. 469, on estoppel by receipt of proceeds of execution sale.

Necessity of pleading estoppel.

Cited in reference notes in 29 A. D. 407, on how to take advantage of estoppel; 36 A. D. 439, on failure to plead estoppel; 44 A. D. 349, on necessity of pleading estoppel.

Cited in note in 27 A. S. R. 345, on evidence of estoppel where there was no opportunity to plead it.

Estoppel of heir.

Cited in *Giddings v. Steele*, 28 Tex. 732, 91 A. D. 336, holding heir bringing action on land certificate established by administrator estopped from denying administrator's capacity.

Cited in note in 39 A. D. 60, on estoppel of heir to deny validity of execution sale by receiving surplus proceeds.

Judicial notice of matters on appeal.

Cited in reference note in 47 A. S. R. 765, on judicial notice on writ of error, as confined to facts in bill of exceptions.

Conclusiveness of judgment.

Cited in *Demarest v. Daig*, 11 Abb. Pr. 9, holding decision of referee on accounting by receiver conclusive between parties; *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161, holding judgment in replevin as to possession not conclusive as to title; *Greenup v. Crooks*, 50 Ind. 410, holding judgment in action to establish mechanics' liens that mortgage superior thereto conclusive as to position of mortgage in subsequent foreclosure; *Ryerss v. Rippey*, 25 Wend. 432, holding judgment in ejectment not vacated within three years conclusive as to title then established; *Denver City Irrig. & Water Co. v. Middaugh*, 12 Colo. 434, 13 A. S. R. 234, 21 Pac. 565 (dissenting opinion), on conclusiveness of judgment in condemnation proceedings; *Edwards v. Baker*, 145 Ind. 281, 44 N. E. 467, upholding power of court in collateral proceeding to determine whether adjudication was within matter submitted to court for adjudication.

Cited in reference notes in 35 A. S. R. 72, on conclusiveness of judgments; 40 A. D. 131, on conclusiveness of prior judgments and how pleaded; 41 A. D. 682, 683, on conclusiveness of former judgment as to matters directly in issue only; 44 A. D. 129, on judgment affecting parties and privies only; 29 A. D. 372, on conclusiveness of erroneous judgments until reversed.

Cited in notes in 1 L.R.A. 573, on conclusiveness of judgments; 96 A. D. 776, on conclusiveness of judgment as to issue or point involved; 11 L.R.A. 309, on who are bound by judgment or decree; 1 L.R.A. 119, on liability of sureties of re-elected officer.

Former judgment as bar.

Cited in *Davidson v. Shipman*, 6 Ala. 27, holding former judgment bar only as to points in issue and determined; *King v. Chase*, 15 N. H. 9, 41 A. D. 675, defining "matter in issue" as that upon which plaintiff proceeds and defendant controverts by pleadings; *Baker v. Rand*, 13 Barb. 152, holding former action bar to subsequent one where defense same in both; *Vanlandingham v. Ryan*, 17 Ill. 25, holding former judgment bar only as to matters determined on merits; *Embury v. Conner*, 3 N. Y. 511, 53 A. D. 325, holding judgment of court having jurisdiction final as to all matters which might have been litigated; *York Bank v. Asbury*, 1 Biss. 230, Fed. Cas. No. 18,142, holding subsequent action on note barred when all matters passed upon in prior suit; *Palmer v. Sanger*, 143 Ill. 34, 32 N. E. 390; *Coutant v. Feaks*, 2 Edw. Ch. 330; *Babcock v. Camp*, 12 Ohio St. 11; *Althrop v. Beckwith*, 14 Ill. App. 628,—holding former judgment no bar unless matters necessarily involved; *Carl v. Knott*, 16 Iowa, 379, holding estoppel confined to the issues joined and settled; *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176, holding decree as to matters not necessarily involved, not conclusive; *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595, holding judgment of foreclosure in which deed not involved no bar to subsequent action based on deed; *Whitney v. Marshall*, 138 Ind. 472, 37 N. E. 964, holding judgment setting aside sale as fraudulent as to creditors and cutting off dower not conclusive as to dower as that not necessarily involved; *Quackenbush v. Ehle*, 5 Barb. 469, holding subsequent action for services not barred by prior suit when that matter not involved; *Dunkel v. Wiles*, 11 N. Y. 420, holding judgment in trespass conclusive only as to particular portion of land entered; *White v. Coatsworth*, 6 N. Y. 137, holding verdict in summary proceedings that no rent due conclusive as to rent in replevin of property distrained; *Knox v. Hexter*, 10 Jones & S. 8, holding tenant's recovery of damages for landlord's delay in giving possession no bar to latter's action for rent; *Mulcahy v. Devlin*, 2 N. Y. City Ct. 218, holding judgment as to ownership of deposit conclusive upon defendant's agent in action brought against him personally; *Bar-*

ras v. Bidwell, 3 Woods, 5, Fed. Cas. No. 1,039, holding adjudication in former action in which matter set up as counterclaim bar to subsequent action based on claim; Candee v. Burke, 1 Hun, 546, 4 Thomp. & C. 143, holding judgment in former action relating to land not involving adverse title not bar to subsequent action in which that title set up; McKnight v. Dunlop, 4 Barb. 36, holding one setting up former recovery bound to show that same subject litigated; Boyle v. Wallace, 81 Ala. 352, 8 So. 194, holding recovery in ejectment not conclusive between parties; Caperton v. Schmidt, 26 Cal. 479, 85 A. D. 187, holding recovery in ejectment conclusive between parties so long as no change in title; Beebe v. Elliott, 4 Barb. 457, holding judgment in ejectment conclusive in subsequent action of trespass between grantee of former plaintiff and same defendant; Harris v. Harris, 36 Barb. 88, holding judgment establishing lost will conclusive as to will in subsequent ejectment; Crandall v. Gallup, 12 Conn. 365, holding plea by estoppel in ejectment, proper; Yates v. Yates, 81 N. C. 397, holding judgment in action to recover land in which plaintiff's deed was declared forgery, bar subsequent action involving validity of same deed; Doe ex dem. McCall v. Carpenter, 18 How. 297, 15 L. ed. 389, holding judgment in partition no bar to subsequent ejectment where parties different; Vaughan v. O'Brien, 57 Barb. 491, 39 How. Pr. 515, holding former judgment reversed on technical grounds no bar to subsequent action; Dunlap v. Glidden, 34 Me. 517, holding judgment by default in trespass no estoppel to defendant's subsequent assertion of title; Broadhead v. McConnell, 3 Barb. 175, holding decision sustaining officer's jurisdiction against contention of one arrested no bar to same objection in action against sureties on bond; Calkins v. Allerton, 3 Barb. 173, holding judgment of trover against one who justifies the taking by the command of another conclusive against latter; Fessenden v. Barrett, 50 Fed. 690, holding judgment in action to foreclose mortgage on one parcel purchased on tax sale no bar to subsequent action as to another parcel purchased on tax sale by another town; Long v. Baugas, 24 N. C. (2 Ired. L.) 290, 38 A. D. 694, holding verdict against plaintiff in detinue not evidence in another action to show want of title; Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 343, 16 L. ed. 654, holding former recovery in action in which special and general counts interposed no bar to subsequent suit on special count; Burwell v. Knight, 51 Barb. 267, holding prior judgment by default no bar to subsequent action in which same defense interposed; Westervelt v. Westervelt, 14 Jones & S. 298, holding judgment in special proceedings no bar to subsequent action; Re Shelbourne, 19 Nat. Bankr. Reg. 359, Fed. Cas. No. 12,745; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Smith v. Frankfield, 13 Hun, 489,—holding reversed judgment no bar to subsequent action; Smith v. Frankfield, 77 N. Y. 414, holding efficacy of judgment as estoppel destroyed by reversal; Spicer's Case, 5 Ct. Cl. 34, holding sustaining of demurrer to action on contract no bar to subsequent action on same claim; Burns v. Howard, 9 Abb. N. C. 321, holding judgment of justice of peace not estoppel when application for new trial pending.

Cited in reference notes in 24 A. D. 502, on *res judicata* as estoppel; 62 A. S. R. 609, on limits to rule of *res judicata*; 24 A. D. 615; 26 A. D. 609,—as to when former judgment is a bar or estoppel.

Cited in notes in 7 L.R.A. 578, on doctrine of *res judicata*; 15 A. D. 405, on effect of prior judgments between the same parties.

— Proof of matters considered.

Cited in Perkins v. Walker, 19 Vt. 144, holding parol evidence as to matter involved in prior action admissible in subsequent suit in which prior action set

up as bar; *Sans v. New York*, 31 Misc. 559, 64 N. Y. Supp. 681, sustaining admissibility in action for salary of evidence of justice granting mandamus for reinstatement that right to salary not passed on; *United States ex rel. Coffman v. Norfolk & W. R. Co.* 114 Fed. 682, holding pleadings, evidence and opinion of court in former action admissible to show matters passed on; *Robinson v. New York, L. E. & W. R. Co.* 64 Hun, 41, 18 N. Y. Supp. 728, holding opinion of appellate court inadmissible to show adjudication as to validity of contract; *Evans v. Billingsley*, 32 Ala. 395, holding proof presented and charge of court admissible to show matter considered by former jury; *Kerr v. Hays*, 35 N. Y. 331; *Re Henry Ulfelder Clothing Co.* 98 Fed. 409,—holding extrinsic evidence competent to show what matters passed on in former action when record not clear; *Fayerweather v. Ritch*, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58, holding evidence of trial judge as to matters tried before him on former suit not admissible in subsequent action; *Young v. Purdy*, 4 Dem. 455, holding attorney's affidavit admissible to explain record in former action; *Hearn v. Boston & M. R. Co.* 67 N. H. 320, 29 Atl. 970, holding testimony of jurors not admissible to show matters passed on in former trial; *Washington, A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 580, 18 L. ed. 550, holding evidence of jurors competent to identify contract involved in former action; *Chamberlain v. Gaillard*, 26 Ala. 504; *Rake v. Pope*, 7 Ala. 161,—sustaining right of party setting up former adjudication to show matters litigated by evidence outside record; *Lawrence v. Hunt*, 10 Wend. 80, 25 A. D. 539, holding record in former action admissible although between different parties where one affected was party to such action; *Wilcox v. Lee*, 26 How. Pr. 418, 1 Robt. 355, 1 Abb. Pr. 250, sustaining right of plaintiff in action for price of goods to which former judgment interposed as bar to show such judgment based on ground that action premature; *Bowe v. Wilkins*, 105 N. Y. 322, 11 N. E. 839, sustaining admissibility of evidence as to matters involved in prior action against sheriff for wrongful taking; *Doty v. Brown*, 4 N. Y. 71, 53 A. D. 350, holding parol proof admissible to show grounds on which prior judgment rendered; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626; *Andrews v. Cross*, 17 Abb. N. C. 96; *Rogers v. Libbey*, 35 Me. 200; *White v. Madison*, 26 N. Y. 117, 26 How. Pr. 481; *Johnson v. Albany & S. R. Co.* 5 Lans. 222; *Reynolds v. Garner*, 66 Barb. 310; *Stuyvesant v. New York*, 1 N. Y. Leg. Obs. 101; *Birckhead v. Brown*, 5 Sandf. 134; *Carmony v. Hooper*, 5 Pa. 305; *Foster v. Wells*, 4 Tex. 101; *Coville v. Gilman*, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Hargus v. Goodman*, 12 Ind. 629,—holding parol evidence admissible to show matters litigated in former action; *Kelley v. Public Works*, 25 Gratt. 755, holding parol evidence admissible to show particular claims litigated in former action; *Driscoll v. Damp*, 16 Wis. 106, holding parol evidence admissible to show identity of subject-matter of prior action; *Stedman v. Patchin*, 34 Barb. 218, holding parol evidence admissible to show on which causes of action alleged in complaint judgment in former trial based; *Royce v. Burt*, 42 Barb. 339, holding parol evidence not admissible in subsequent action to show that prior judgment in ejectment not based on breach of warranty as shown by record; *Pierce v. Tuttle*, 58 N. Y. 650, holding parol evidence competent in action for conversion to show ownership of grain passed on in prior ejectment; *Briggs v. Wells*, 12 Barb. 567; *Davis v. Talcott*, 14 Barb. 611; *Vestal v. State*, 3 Tex. App. 648,—holding parol evidence admissible to show what matters litigated in former action when record silent or ambiguous; *Frantz v. Ireland*, 66 Barb. 386, sustaining admissibility of parol evidence to identify premises recovered in ejectment when record indefinite; *Lorillard v. Clyde*, 122 N. Y. 41, holding parol evidence of subject of

prior litigation not admissible to contradict record; *Neftel v. Lightstone*, 77 N. Y. 96, sustaining right after judgment to show theory on which case tried.

Cited in reference notes in 30 A. S. R. 755, on parol evidence as to judgment; 37 A. S. R. 455, on parol evidence to show grounds of former judgment.

Cited in notes in 42 L. ed. U. S. 358, on parol evidence as to judgments; 44 A. S. R. 562, on proof of *res judicata* by extrinsic evidence; 26 A. D. 610, on admissibility of evidence *aliunde* as to matters passed upon in former action between same parties; 63 A. D. 632, on admissibility of parol evidence to show matters passed upon in former action; 44 A. S. R. 571, on right to examine jurors as to their conclusion on matters submitted to them.

— Pleading former judgment.

Cited in *Miller v. Manice*, 6 Hill, 114, holding recovery in former action not admissible in subsequent trover unless pleaded; *Chase v. Walker*, 26 Me. 555; *Ankeny v. Fairview Mill. Co.* 10 Or. 390; *Gray v. Gillilan*, 15 Ill. 453, 60 A. D. 781,—holding former judgment no bar unless pleaded.

Cited in reference note in 36 A. D. 373, on effect of neglect to plead former recovery.

Cited in note in 63 A. D. 632, on distinction between pleading former recovery in bar and proving it under general issue.

Estoppel by verdict.

Cited in *Danziger v. Williams*, 37 Phila. Leg. Int. 184, on estoppel by verdict.

Cited in note in 96 A. D. 783, on verdict as estoppel.

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Vested rights in streets.

Cited in *Buffalo N. Y. & P. R. Co. v. Overton*, 35 Hun, 157; *Badeau v. Mead*, 14 Barb. 328,—holding right in streets shown in map and along which land bounded, appurtenant to lands conveyed; *Bell v. Todd*, 51 Mich. 21, 16 N. W. 304, holding purchaser closing street on his land shown in plat estopped to deny same right to adjoining owner; *Farnsworth v. Taylor*, 9 Gray, 162; *Vick v. Vicksburg*, 1 How. (Miss.) 379, 31 A. D. 167; *Rector v. Hartt*, 8 Mo. 448, 41 A. D. 650; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369,—holding grantee buying with reference to recorded plat showing street entitled to have same kept open; *Haynes v. Thomas*, 7 Ind. 38, holding covenant that street shall remain open to full width implied in deed of land bordering same; *Rogers v. Bollinger*, 59 Ark. 12, 26 S. W. 12, holding description of city lot as bounded by alley implied covenant as to existence of alley; *Fisher v. Beard*, 32 Iowa, 346, sustaining right of purchasers of lots with reference to public square to have square kept intact; *Carroll v. Asbury*, 28 Pa. Super. Ct. 354, holding original owner not entitled to land in bed of street dedicated by him after vacation by public authorities where land sold bounded by it; *Crawford v. Delaware*, 7 Ohio St. 459, holding purchasers along unimproved street presumed to take with view of reasonable improvement; *People v. Lambier*, 5 Denio, 9, 47 A. D. 273, holding street running to water not cut off by alluvial deposits; *Com. ex rel. Atty. Gen. v. Kepner*, 1 Pearson (Pa.) 182, denying right of town to erect fire house on land dedicated for street; *Blashfield v. Empire State Tel. & Tel. Co.* 18 N. Y. Supp. 250, holding construction of telephone line in highway, additional burden; *Knabe v. Levelle*, 23 N. Y. Supp. 818, holding grantee of lot bordering alley entitled to damages from owner of lot on other side excavating under alley; *Griffin v. Martin*, 7 Barb. 297 (dissenting opinion), on right of public in highway.

Distinguished in *Re Fourth Ave.* 11 Abb. Pr. 189, holding width of street as laid out at execution of deed, intended in deed referring to same without giving width.

Way by necessity.

Cited in *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104, holding grantee of lot bordering street not entitled to way by necessity across adjoining lots to side street; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506, sustaining statute permitting owner of mining claim to have access thereto.

Cited in note in 57 A. D. 767, on implied grant of easement in way.

Right of way as rural servitude.

Cited in note in 100 A. D. 115, on right of way as rural servitude.

Easements of light and air.

Cited in reference notes in 66 A. D. 455, on implied easement of light and air; 55 A. D. 247, on obstruction of ancient lights.

Land bounding street or stream.

Cited in *Bissell v. New York C. R. Co.* 23 N. Y. 61; *Adams v. Rivers*, 11 Barb. 390,—holding land to center of street included in land bounded by street; *Hughes v. Mississippi & M. R. Co.* 12 Iowa, 261, holding fee to center of street not conveyed by deed of land bounded by street; *Bartow v. Draper*, 5 Duer, 130, holding grant of land bordering on street in New York city not pass fee in street; *Buck v. Squiers*, 22 Vt. 484 (dissenting opinion), on portion of highway as included in land bounding same; *Dunklee v. Wilton R. Co.* 24 N. H. 489, holding artificial water course regarded between parties as natural stream by bounding land along same.

Cited in reference notes in 30 A. S. R. 853, on highways or streets as boundaries; 86 A. D. 749, on estate conveyed by grant of town lots bounded by streets; 74 A. D. 366, on abutter's ownership to center of street; 54 A. D. 681, on conveyance of lot on street as passing interest or right in street; 32 A. S. R. 441, on effect of conveyance of city lot bounded by street as shown by plat; 14 L.R.A. (N.S.) 881, on right of grantee to claim easement, implied covenant, or estoppel, as against grantor, by call in deed for street or alley in which grantor owns the fee, where the description is by reference to plat.

Cited in note in 122 A. S. R. 218, on easement in unopened street where grant refers to plat or map.

Taking land for public use.

Cited in *Bloodgood v. Mowhawk & H. R. River Co.* 18 Wend. 9, 31 A. D. 313, sustaining power of legislature to authorize taking of private lands for railroad purposes; *New Orleans M. & C. R. Co. v. New Orleans*, 26 La. Ann. 517, sustaining power of legislature to grant railroad right of way over city street; *People v. Kerr*, 27 N. Y. 188, holding construction of railroad on surface of street without change of grade appropriation to public use; *People v. White*, 11 Barb. 26, holding original owner entitled to land taken for canal purposes and afterwards abandoned; *State ex rel. Hernandez v. Flanders*, 24 La. Ann. 57 (dissenting opinion); *State, Belden, v. Fagan*, 22 La. Ann. 545 (dissenting opinion),—on power to take private property for private use; *Taylor v. Porter*, 4 Hill, 140, 40 A. D. 274 (dissenting opinion), on validity of statute authorizing laying out private road.

Cited in reference notes in 33 A. D. 535, on subject of eminent domain; 23 A. D. 772; 26 A. D. 644,—on uses justifying exercise of power of eminent domain; 74

A. D. 555, on public uses for which private property may be taken; 23 A. D. 632, on right to take private property for public street.

Cited in notes in 25 A. D. 622, on eminent domain; 4 L.R.A. 786, on constitutional restrictions on right of eminent domain; 23 A. D. 319, on public use for which private property may be taken; 22 A. D. 692, on highways, bridges, ferries as public use justifying exercise of power of eminent domain.

— **Compensation for land taken.**

Cited in reference notes in 36 A. D. 385, on compensation for exercise of right of eminent domain; 32 A. S. R. 270, on power of municipal corporation to appropriate property without compensation; 66 A. D. 153, on power of legislature to prescribe mode of ascertaining amount of compensation in eminent domain; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use; 38 A. D. 430, on right of owner of limited interest in property taken for public use to compensation.

Cited in notes in 42 L. ed. U. S. 273, on compensation for laying out highway; 9 L.R.A. (N.S.) 811, on necessity of paying in full for land taken in eminent domain proceedings on allowing set-off against damages to remainder; 15 L.R.A. 413, as to damages on condemnation of fee of land on which there is an existing highway.

Distinguished in *Re Buffalo*, 131 N. Y. 293, 27 A. S. R. 592, 15 L.R.A. 413, 30 N. E. 233, sustaining substantial award to owners of land adjoining street where fee in street taken by city.

— **Deduction of benefits.**

Cited in *Gutschow v. Washington County*, 74 Neb. 794, 105 N. W. 548, denying right to deduct benefits from damages caused by taking land for drain where special benefits already assessed; *Re New York*, 190 N. Y. 350, 16 L.R.A. (N.S.) 335, 83 N. E. 299 (modifying 120 App. Div. 849, 105 N. Y. Supp. 750), holding owner of land taken for public purpose entitled to full value without deduction for benefits; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367, holding increased value of property remaining to be considered in assessing damages for land taken in condemnation proceedings; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, Gil. 392, 88 A. D. 100, holding benefits from construction of railroad not to be deducted from award when indirect; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Walker v. Manchester*, 58 N. H. 438; *Betts v. Williamsburgh*, 15 Barb. 255; *Trinity College v. Hartford*, 32 Conn. 452,—holding benefit to be derived from laying out street to be deducted from damages for land taken; *Long Island R. Co. v. Bennett*, 10 Hun, 91; *Re Furman Street*, 17 Wend. 649,—holding benefits from opening new street to be considered in estimating value of land taken; *Eldridge v. Binghamton*, 120 N. Y. 309, 24 N. E. 462 (affirming 42 Hun, 202), holding benefits properly set off against damages to remainder and against value of part taken; *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *Donnelly v. Brooklyn*, 121 N. Y. 9, 24 N. E. 17,—holding reduction of award for property taken by benefits to remainder not void as taking property without compensation; *Miller v. Newark*, 35 N. J. L. 460, holding quantity and character of remaining land to be considered in awarding damages for land taken for highway.

Cited in reference notes in 66 A. D. 153, on right to offset resulting benefits against value of property taken for public use; 53 A. D. 215, as to whether resulting benefits to owner of property taken for public use may be considered.

Cited in note in 45 A. D. 532, as to how far benefits may be considered as offsets under eminent domain acts.

Public aid of railroad.

Cited in *Stewart v. Polk County*, 30 Iowa, 9, 1 A. R. 238, sustaining act taxing property in aid of railroad; *Clarke v. Rochester*, 5 Abb. Pr. 107, 14 How. Pr. 193, 24 Barb. 446, sustaining act authorizing city to purchase stock in aid of railroad.

Assessment for public improvements.

Cited in *Re United States*, 66 How. Pr. 517, holding assessment for river improvement not void as taking private property for public use without compensation; *Williams v. Cammack*, 27 Miss. 209, 61 A. D. 508, holding sale of land for nonpayment of assessment for levee purposes not taking property for public use without compensation; *Jordan v. Hyatt*, 3 Barb. 275, holding assessment for public use without notice to owners, void; *People ex rel. Post v. Brooklyn*, 6 Barb. 209, sustaining assessment to raise money for public sewer; *Wyman v. New York*, 11 Wend. 486, holding purchasers on streets not opened not liable to assessment for opening same to pay vendor for land taken.

Cited in note in 55 A. D. 289, on apportionment of taxes and assessments.

— On property benefited.

Cited in *Hammett v. Philadelphia*, 65 Pa. 146, 3 A. R. 615, 26 Phila. Leg. Int. 188, sustaining power of city under statute to assess cost of paving upon lots benefited; *Garrett v. St. Louis*, 25 Mo. 505, 69 A. D. 475; *Re Hancock Street*, 18 Pa. 26,—sustaining statute assessing on lots benefited cost of extending street; *Alexander v. Baltimore*, 5 Gill, 383, 46 A. D. 630, sustaining ordinance assessing cost of improving street in proportion to benefits derived; *Re Washington Ave.* 69 Pa. 352, 8 A. R. 255, 29 Phila. Leg. Int. 28, 4 Legal Gaz. 21, holding assessment for street improvement on frontage basis, valid; *Warren v. Henly*, 31 Iowa, 31, sustaining statute imposing cost of paving street on abutting owners; *Law v. Madison, S. & G. Turnip. Co.* 30 Ind. 77, sustaining statute authorizing assessment for cost of gravel road to extent of benefit received; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 A. D. 266 (reversing 9 Barb. 535), sustaining assessment for cost of grading and paving street in proportion to benefits received; *Woodruff v. Fisher*, 17 Barb. 224, sustaining assessment for cost of draining land and improving river imposed upon land benefited; *Spring v. Russell*, 3 Watts, 294, sustaining statute apportioning damages caused by opening market upon lots benefited.

Determination of question of benefit.

Cited in *Schall v. Norristown*, 3 Luzerne Leg. Reg. 77, 6 Legal Gaz. 157, holding benefit to property owners of public improvement question of expediency of which legislature are exclusive judges.

Constitutionality of statutes.

Cited in *Bull v. Read*, 13 Gratt. 78, sustaining act providing for free school system; *People ex rel. Underwood v. Daniell*, 50 N. Y. 274, sustaining constitutionality of courts-martial; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425, sustaining legislative regulation of rates of transportation; *Lincoln v. Smith*, 27 Vt. 328, sustaining statute prohibiting sale of intoxicating liquors; *Com. v. Byrne*, 20 Gratt. 165, sustaining liquor license tax; *Re Meador*, 1 Abb. U. S. 317, Fed. Cas. No. 9,375, 2 Legal Gaz. 193, sustaining tax on tobacco imposed to raise revenue; *Ex parte Hill*, 38 Ala. 458, sustaining act making one furnishing substitute liable to military duty; *Smith v. Smith*, 1 How. (Miss.) 102, holding statute

permitting surety to move for judgment without determination by jury as to suretyship and sum due, unconstitutional.

Inapplicability of provisions of Federal Constitution to states.

Cited in *People v. Scannell*, 37 Misc. 345, 75 N. Y. Supp. 500, 16 N. Y. Crim. Rep. 321; *Boring v. Williams*, 17 Ala. 510,—holding provision in Federal Constitution as to jury trial not applicable to states; *State v. Shumpert*, 1 S. C. 85, holding state court not bound by provision of Federal Constitution relating to necessity of indictment by grand jury; *Noles v. State*, 24 Ala. 672, holding states not restricted to common-law indictments by Federal Constitution requiring indictment by grand jury.

Cited in reference notes in 42 A. S. R. 887, on amendments to constitution; 30 A. D. 456, on nature of amendments to Federal Constitution; 49 A. S. R. 581, on effect upon states of amendments to Federal Constitution; 35 A. D. 626, on inapplicability to state courts of amendment to Federal Constitution as to jury trial.

Cited in notes in 79 A. D. 208, on inapplicability to state courts of provision against compulsory reference of action at law; 12 A. D. 548, as to when United States Constitution is not applicable in state courts.

Right to jury trial.

Cited in *Hart v. Albany*, 9 Wend. 571, 24 A. D. 165, denying jury trial in summary proceedings for abatement of nuisance; *Astor v. New York*, 5 Jones & S. 539, denying right to jury trial in action to set aside assessment; *Mille Lacs County v. Morrison*, 22 Minn. 178, denying right to jury trial in proceedings to enforce payment of taxes; *Dorsey v. Barry*, 24 Cal. 449, holding one contesting election not entitled to jury trial; *Re Smith*, 10 Wend. 449, denying right to jury trial of charges upon application to compel reinstatement in medical society; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558, holding cases regarded as civil when constitution adopted included in provision with reference to jury trials; *Newcomb v. Smith*, 2 Pinney (Wis.) 131, 1 Chand. (Wis.) 71 (dissenting opinion), on right to jury trial; *Field v. Walker*, 17 Ala. 80, holding issue of freedom of colored person *vel non* not triable on habeas corpus.

Cited in notes in 41 L. ed. U. S. 113, 114, on constitutional right of trial by jury and its extent; 48 A. D. 185, as to when legislature may dispense with trial by jury.

—In condemnation proceedings.

Cited in *Ingram v. Maine Water Co.* 98 Me. 566, 57 Atl. 893; *Langford v. Ramsey County*, 16 Minn. 375, Gil. 333; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *Mt. Washington Road Co's Petition*, 35 N. H. 134; *People ex rel. Eckerson v. Haverstraw*, 151 N. Y. 75, 45 N. E. 384 (reversing 80 Hun, 385, 30 N. Y. Supp. 325); *Kendall v. Post*, 8 Or. 141; *Re Bradley*, 108 Iowa, 476, 79 N. W. 280,—denying to jury trial in condemnation proceedings; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774, holding water company not entitled to jury trial of damages sustained by condemnation of water rights; *Wixom v. Bixby*, 127 Mich. 379, 86 N. W. 1001, denying right to jury trial in assessment of damages for taking land for drainage purposes; *Anderson v. Caldwell*, 91 Ind. 451, 46 A. R. 613, sustaining statute providing for assessment of damages in drainage cases by court without jury; *Louisiana & F. Pl. Road Co. v. Pickett*, 25 Mo. 535, sustaining statute authorizing jury of five to assess damages for construction of macadamized road; *Colt v. Eves*, 12 Conn. 243, holding provision of city charter requiring jury in condemnation proceedings to be chosen from free—
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holders of city, valid; *Menges v. Albany*, 47 How. Pr. 244, holding statute requiring choice of appraisers by lot in condemnation proceedings, void; *Striker v. Kelly*, 7 Hill, 9 (dissenting opinion), on appointment of commissioners of award in proceedings to open street.

Cited in reference note in 53 A. D. 215, on constitutionality of assessment of damages by commissioners for taking private property for public use.

Cited in note in 48 A. D. 190, on right to jury trial in eminent-domain proceedings.

Competency of commissioners to assess damages.

Cited in *Re Southern Boulevard*, 3 Abb. Pr. N. S. 447, holding commissioner appointed to award damages for land taken for street not incompetent for ownership of part condemned.

Impressions of witness.

Cited in *Franklin v. Macon*, 12 Ga. 257, holding evidence of witness as to impression made on him admissible.

Right to deny landlord's title.

Cited in *Child v. Chappell*, 9 N. Y. 246, holding lessee of wharf not estopped after end of term from claiming right to use same without lessor's consent.

Establishment of highway.

Cited in *Smith v. State*, 23 N. J. L. 712, holding highway established by long user; *Macon v. Franklin*, 12 Ga. 239, holding dedication complete by user where public accommodation materially affected by interruption; *Grinnell v. Kirtland*, 48 How. Pr. 17, 6 Daly, 356, 2 Abb. N. C. 386, holding use for twenty years of land sold as bounded along street never opened insufficient to show dedication; *United States v. Chicago*, 7 How. 185, 12 L. ed. 660, denying power of city to open street over government land although streets laid out by government; *Howe v. Alger*, 4 Allen, 206, holding covenant that street legally laid out not implied in conveyance of land bounding street where grantor without interest in adjoining land.

— By dedication.

Cited in *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Booraem v. North Hudson County R. Co.* 40 N. J. Eq. 557, 5 Atl. 106; *Re One-Hundred & Sixteenth Street*, 1 App. Div. 436, 37 N. Y. Supp. 508; *Post v. Pearsall*, 22 Wend. 425 (affirming 20 Wend. 111); *Willoughby v. Jenks*, 20 Wend. 96; *Re Eleventh Ave.* 81 N. Y. 436; *Union Burial Ground Soc. v. Robinson*, 5 Whart. 18; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *Oswald v. Grenet*, 22 Tex. 94; *Winter v. Payne*, 33 Fla. 470, 15 So. 211,—holding land dedicated to public use by owner's making town plot with spaces for streets with reference to which deeds made; *People v. Beaubien*, 2 Dougl. (Mich.) 256, holding unacknowledged plat showing street, no dedication; *Williams v. Wiley*, 16 Ind. 362, sustaining implied dedication of land for public street; *Stone v. Brooks*, 35 Cal. 489; *Kittle v. Pfeiffer*, 22 Cal. 484,—holding bounding lots by open space as street, sufficient dedication; *Zearing v. Raber*, 74 Ill. 409, holding owner platting land showing street and selling lots with reference thereto estopped to deny existence of street; *Denver v. Clements*, 3 Colo. 472, holding grantor estopped to claim street not public by selling lots bounded by plat filed as street; *Saunders v. Chicago*, 212 Ill. 206, 72 N. E. 13, denying power of owner to vacate portion of plat after sale of lots; *Adams v. Saratoga & W. R. Co.* 11 Barb. 414, holding dedication of land for public street not subject to revocation; *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333, 11 N. Y. Crim. Rep. 17, holding acceptance after absolute dedication necessary to constitute public

highway; *Pierpont v. Harrisville*, 9 W. Va. 215, holding record of plat showing streets no dedication; *Logansport v. Dunn*, 8 Ind. 378; *Doe ex dem. Stump v. Attica*, 7 Ind. 641,—holding map showing public square, proof of dedication; *Re Thirty-Second Street*, 19 Wend. 128, holding dedication shown by commissioner's map bounding land by street; *Re Wall Street*, 17 Barb. 617, on what constitutes a dedication of public street; *Clements v. West Troy*, 16 Barb. 251, holding alley not made public highway by designation in plat of village and sale of lots bounding it; *Clark v. Elizabeth*, 37 N. J. L. 120, holding land dedicated for street purposes by adoption of map made by legislative committee showing streets; *Champlin v. Laytin*, 18 Wend. 407, 31 A. D. 382, holding dedication affected by platting street and selling lots with reference thereto; *Rowan v. Portland*, 8 B. Mon. 232, holding representation of open spaces to be streets sufficient dedication without insertion in plat of words showing dedication; *Dubuque v. Maloney*, 9 Iowa, 450, 74 A. D. 358, holding title to street not vested in city after sale of lots according to plat showing street; *Evansville v. Evans*, 37 Ind. 229, holding dedication of land for highway provable by acts *in pais*, regardless of lapse of time; *Clark v. McCormick*, 174 Ill. 164, 51 N. E. 215, holding dedication of street not in compliance with statute and not accepted by city, valid as common-law dedication; *First Evangelical Church v. Walsh*, 57 Ill. 363, 11 A. R. 21, holding plat of lots of ten acres each not made in conformity with statute, showing street, not dedication thereof; *McCormick v. Baltimore*, 45 Md. 512, holding immediate use for street of land dedicated for purpose unnecessary in absence of express condition.

Cited in reference notes in 27 A. D. 84; 31 A. D. 188,—on dedication of land to public use; 26 A. D. 101, on mode of establishing dedication of land for public square, common, or street; 78 A. D. 370, on presumption of dedication of land for public highway.

Cited in notes in 1 L.R.A. 856, on dedication to street uses by laying out and platting; 57 A. S. R. 759, 761, on time of user as evidence of dedication of highway.

Leasing public property for private use.

Cited in *Re Public Common*, 10 Kulp, 209, denying right of municipal corporation to lease for private use lands dedicated to it for public use.

Right to take away privilege granted.

Cited in *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159, 62 A. D. 372, denying right to take away privilege given by statute or contract without new agreement for the purpose.

Fencing railroad lands.

Cited in *Williams v. Michigan C. R. Co.* 2 Mich. 259, 55 A. D. 59, holding railroad company not bound to fence right of way against cattle.

22 AM. DEC. 635, WENDELL v. JACKSON, 8 WEND. 183.

Title of state to land under water.

Cited in note in 53 A. S. R. 291, on title to land covered by navigable waters.

Preference of debts due stato.

Cited in reference note in 26 A. D. 575, on preference of debts due state in settlement of decedent's estates.

Cited in note in 29 L.R.A. 243, on what priority of states in payment from assets of debtor is based on.

Grant as evidence of title.

Cited in *Clark v. Holdridge*, 12 App. Div. 615, 43 N. Y. Supp. 115, holding grant from state *prima facie* evidence of title to land.

Ejectment by state.

Cited in *Wright v. Phipps*, 90 Fed. 556; *People v. Livingston*, 8 Barb. 253; *Genesee Valley Canal R. Co. v. Slaughter*, 49 Hun, 35, 1 N. Y. Supp. 554, 14 N. Y. Civ. Proc. Rep. 420; *People v. Van Rensselaer*, 9 N. Y. 291 (reversing 8 Barb. 189); *People v. Trinity Church*, 22 N. Y. 44 (affirming 30 Barb. 537); *People v. Deniston*, 17 Wend. 312,—holding want of occupation for forty years *prima facie* sufficient to authorize recovery in ejectment by state.

Parol evidence as to description.

Cited in *Robinson v. Kime*, 70 N. Y. 147, holding parol evidence admissible to show location of monuments which have disappeared since conveyance; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668, holding parol evidence incompetent to charge monuments in deed; *Tymason v. Brooks*, 14 Wend. 671 (reversing 13 Wend. 300), holding parol evidence inadmissible to show that lands lost were within limits designated by grantor in previous negotiations if they were omitted from the deed.

Mistake in description.

Cited in *Seaman v. Hogeboom*, 21 Barb. 398; *Sayers v. Lyons*, 10 Iowa, 249,—holding deed not vitiated by immaterial mistakes in description; *Calton v. Lewis*, 119 Ind. 181, 21 N. E. 475, holding deed not void for failure to name state in which land located; *Benjamin v. Welch*, 73 Hun, 371, 26 N. Y. Supp. 158, holding rejection of erroneous description proper in giving effect to testator's intentions; *Barrows v. Webster*, 50 N. Y. S. R. 353, 21 N. Y. Supp. 828, holding map describing street as wider than laid out not competent in ejectment to establish street line; *Second Methodist Episcopal Church v. Humphrey*, 49 N. Y. S. R. 467, 21 N. Y. Supp. 89, holding grants presumed to have been made in actual view of premises; *McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795, holding proceedings for establishment of highway not void for indefiniteness where termini and intermediate cause defined by fixed objects.

Cited in reference note in 53 A. D. 162, on sufficiency and effect of inconsistent description in deed part of which is true and part false.

Cited in notes in 4 L.R.A. 426, on descriptions in deeds; 27 L. ed. U. S. 147, as to when deed is avoided by misdescription therein; 30 A. D. 736, 737, on rejection of false particulars in description of land.

Courses as covenant of quantity.

Cited in *Roat v. Puff*, 3 Barb. 353, holding statement of quantity conveyed at end of description by metes and bounds not warranty.

Extent of lands conveyed.

Cited in *Fletcher v. Phelps*, 28 Vt. 257, holding that lands bounded by tributaries to navigable lake extend to low-water mark; *Hathaway v. Power*, 6 Hill, 453, holding that deed by lot number includes all therein although less quantity stated in description; *Elliott v. Lewis*, 10 Hun, 486, holding that survey should commence at point of beginning although more land thereby included.

Fixed objects or points as controlling description.

Cited in *Egelhoff v. Simpson*, 50 App. Div. 595, 64 N. Y. Supp. 336; *Harris v. Oakley*, 17 N. Y. S. R. 198, 2 N. Y. Supp. 305; *Cronk v. Wilson*, 40 Hun, 269,—holding courses and distances bound to yield to fixed monuments; *People ex rel. Burnham v. Jones*, 112 N. Y. 597, 20 N. E. 577, holding that description by metes and bounds yields to natural monuments; *White v. Williams*, 48 N. Y. 344, holding courses and distances controlled by fixed monuments; *Meyer v. Boyd*, 51 Hun, 291, 4 N. Y. Supp. 328, holding that courses and dis-

tances yield to established streets; *Singer v. New York*, 47 App. Div. 42, 62 N. Y. Supp. 347, holding that fenced street as boundary means street as actually laid out and not as shown by maps; *Abbey v. McPherson*, 7 Kan. App. 177, 41 Pac. 978, holding courses controlled by another's land along which parcel described located; *Masten v. Olcott*, 101 N. Y. 152, 4 N. E. 274, holding designation of parcel as "sawmill lot" controlling over courses and distances which could be located only by survey; *Gove v. White*, 20 Wis. 426, holding well-established place of beginning controlling in description in deed; *Raymor v. Timerson*, 46 Barb. 518, holding fence starting point of land described as beginning at corner; *Doe ex dem. Miller v. Cullum*, 4 Ala. 576; *Bruckner v. Lawrence*, 1 Dougl. (Mich.) 19; *Schoonmaker v. Davis*, 44 Barb. 463; *Piercy v. Crandall*, 34 Cal. 334,—holding location of natural objects controlling in description of land when courses conflict; *Hanse v. Mead*, 27 Hun, 162 (dissenting opinion); *White v. Williams*, 48 Barb. 222 (dissenting opinion),—on controlling effect of natural objects on courses and distances; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Danziger v. Boyd*, 21 Jones & S. 398,—holding monuments not controlling when exact quantity stated and former would violate intention of parties.

Cited in reference notes in 27 A. D. 229, on question of boundary; 34 A. D. 105, as to which boundaries will prevail; 42 A. D. 551, on courses and distances yielding to monuments only; 39 A. S. R. 826, on monuments and natural objects prevailing over courses and distances.

Cited in notes in 30 A. D. 741, on quantity at least reliable of descriptions of land; 31 A. D. 154, on superiority of monuments over courses and distances; 30 A. D. 737, on preference of monuments to courses and distances in description of land.

Irreconcilable terms in deed.

Cited in *Brookman v. Kurzman*, 94 N. Y. 272, 66 How. Pr. 237, *Clayton v. County Court*, 58 W. Va. 253, 2 L.R.A. (N.S.) 598, 52 S. E. 103,—holding words irreconcilable with established terms in deed properly rejected.

Place of execution of instrument.

Cited in *Thayer v. Marsh*, 11 Hun, 501, to point that mortgage is presumed to have been made in view of land encumbered.

22 AM. DEC. 644, COLVIN v. COLVIN, 2 PAIGE, 385.

Remarriage without modification of divorce decree.

Cited in *Moore v. Hegeman*, 92 N. Y. 521, 44 A. R. 408, holding remarriage of parties after decree of divorce without having decree modified, void; *Moore v. Moore*, 8 Abb. N. C. 171, holding divorced husband remarrying former wife without court's consent not discharged from liability for alimony; *Bailey v. Bailey*, 45 Hun, 278, holding one marrying in good faith before reversal of decree of divorce not guilty of adultery.

Setting aside divorce decree.

Cited in *Rush v. Rush*, 46 Iowa, 648, 26 A. R. 179, holding decree of divorce may be set aside on ground of fraud; *Stephens v. Stephens*, 62 Tex. 337, sustaining power of court to vacate divorce decree for lack of personal service.

Cited in notes in 61 A. D. 460, 464, on possibility for and grounds for vacating and annulling divorces; 60 L.R.A. 296, on attempt by wife to vacate decree obtained in her name without her consent.

Collateral attack on annulment decree.

Cited in *Wood v. Wood*, 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 113 N. W. 492.

holding decree annulling marriage not collaterally attacked by petition for new trial for fraud.

22 AM. DEC. 646, STRIKER v. MOTT, 2 PAIGE, 387. Reversed in 6 Wend. 465.

Right to partition.

Cited in *Myers v. Rasback*, 2 N. Y. Code Rep. 13, 4 How. Pr. 83, holding partition maintainable under Code; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482, holding joint owner not entitled to sale of property held in common except when division impossible.

Cited in reference notes in 35 A. S. R. 620, on partition between cotenants and reversioners; 80 A. D. 699, on partition of reversionary interest.

— Who may maintain.

Cited in *Johnson v. Brown*, 74 Kan. 346, 86 Pac. 503, holding tenant owning in fee simple entitled to maintain partition against cotenants owning life interest in balance; *Savage v. Savage*, 19 Or. 112, 20 A. E. R. 795, 23 Pac. 890; *Tabler v. Wiseman*, 2 Ohio St. 207, denying right of remaindermen to maintain partition; *Wood v. Clute*, 1 Sandf. Ch. 199, 2 N. Y. Leg. Obs. 407, holding widow with dower right not entitled to maintain partition; *Rhorer v. Brockhage*, 13 Mo. App. 397, denying right of purchaser from mother of minor having homestead right to maintain partition against child.

Cited in reference note in 83 A. D. 678, on who may compel partition.

Cited in notes in 1 L.R.A. 637, as to who cannot maintain partition; 32 A. S. R. 779, on right of tenant in possession to maintain partition against contingent remainderman or reversioner; 32 A. S. R. 780, 781, on right of contingent remainderman or reversioner to maintain partition.

Parties to partition suit.

Cited in reference note in 54 A. D. 547, as to when reversioner must be party to partition suit.

Sale instead of partition.

Cited in reference notes in 57 A. D. 200, on sale of premises to make partition; 49 A. D. 663, on sale of premises on partition; 49 A. S. R. 932, on partition by sale where division will work injustice.

Basis of partition.

Cited in *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, holding value of property not quantity basis of partition; and citing annotation also on this point.

Power to sell.

Distinguished in *Catton v. Taylor*, 42 Barb. 578, holding direction to executors to sell property and divide proceeds, not power coupled with interest.

Special or active trusts.

Cited in note in 78 A. D. 407, on construction of statute of uses regarding special or active trusts.

22 AM. DEC. 648, COLTON v. ROSS, 2 PAIGE, 396.

Alternative prayer for relief.

Cited in *Kilgour v. New Orleans Gaslight Co.* 2 Woods, 144, Fed. Cas. No. 7,764; *Cleland v. Casgrain*, 92 Mich. 139, 52 N. W. 460; *Lyons v. McCurdy*, 90 Ala. 497, 8 So. 52,—holding that alternative prayer does not of itself make bill void as multifarious; *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620, holding one

uncertain of particular relief entitled to ask relief in alternative; *Wiltshire v. Marfleet*, 1 Edw. Ch. 654, holding party not entitled to alternative relief under general prayer for further relief; *Laird v. Boyle*, 2 Wis. 431, holding bill demanding specific but not general relief properly dismissed where party entitled to some but not that prayed for; *Re Patterson*, 79 Hun, 371, 29 N. Y. Supp. 451, holding petition for final accounting and further relief properly denied when allegations false; *Evans v. Burton*, 5 N. Y. S. R. 216, holding under Civil Code party entitled only to relief demanded; *Cohn-Baer-Myers & A. Co. v. Realty Transfer Co.* 117 App. Div. 215, 102 N. Y. Supp. 122; *Marquat v. Marquat*, 7 How. Pr. 417 (dissenting opinion),—on right to alternative relief under general prayer.

Cited in reference notes in 65 A. D. 73, 118, on prayer for general relief; 27 A. D. 90, on framing of bill with double aspect; 90 A. D. 248, on framing prayer for relief in bill in alternative; 60 A. D. 660, on relief granted under disjunctive prayer for general relief.

Cited in note in 3 A. D. 378, on relief in equity under general prayer.

—Consistent with general prayer.

Cited in *Thayer v. Lane*, Walk. Ch. (Mich.) 200, holding party entitled only to relief consistent with case made by bill; *Ex parte Branch*, 53 Ala. 140; *Ex parte Pettillo*, 80 N. C. 50; *Graham v. Cook*, 48 Ala. 103,—holding one entitled under general prayer for further relief to such only as is consistent with relief asked for; *Hart v. McKeen*, Walk. Ch. (Mich.) 417, holding bill framed with a double aspect must be consistent with itself; *Gooding v. Riley*, 50 N. H. 400, holding bill asking redemption of mortgage and accounting of rents received by mortgagee not demurrable as praying inconsistent relief; *Terry v. Rosell*, 32 Ark. 478, holding bill not demurrable because asking for cancelation of mortgage or foreclosure and accounting under same; *Collins v. Knight*, 3 Tenn. Ch. 183, holding bill attacking judgment as irregular and asking to be subrogated to rights of creditors thereunder demurrable as praying inconsistent relief; *Beach v. Beach*, 11 Paige, 181, 3 N. Y. Leg. Obs. 202, holding bill for divorce for adultery not demurrable because of allegations as to cruel treatment; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, sustaining bill asking that conveyance be set aside or in alternative lien be established for part unpaid; *Schiffer v. Lauterbach*, 7 App. Div. 223, 40 N. Y. Supp. 40, holding specific performance of certain contracts not denied because others incomplete; *Pennock v. Ela*, 41 N. H. 189, holding under bill asking specific performance of contract to convey amendment demanding accounting of payments made admissible; *Corning v. Troy Iron & Nail Factory*, 10 N. Y. Leg. Obs. 7, 6 How. Pr. 89, holding one entitled to damages for overflow of water and injunction against future injury; *Cole v. Savage*, Clarke Ch. 482, denying right to enforce mortgage and demand cancelation as usurious; *Casady v. Woodbury County*, 13 Iowa, 113, denying right to reform contract under bill asking specific performance; *Ellis v. Hill*, 162 Ill. 557, 44 N. E. 858, denying right to redemption of mortgage under bill asking general relief in partition; *Wiley v. Knight*, 27 Ala. 336, holding under general prayer for reformation of mortgage party not entitled to decree establishing prior lien.

Conclusiveness of probate proceedings.

Cited in *Burger v. Hill*, 1 Bradf. 360, holding surrogate's decision as to validity of will conclusive; *Newman v. Waterman*, 63 Wis. 612, 53 A. R. 310, 23 N. W. 696, holding probated will of land conclusive in ejectment against heir omitted by mistake; *Post v. Mason*, 26 Hun, 187, holding probate of will of personal property conclusive after expiration of year; *Pierce v. Prescott*, 128 Mass. 140, hold-

ing order directing distribution of proceeds of estate not subject to attack in collateral proceeding; *Mutual Ben. L. Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. ed. 314, holding grant of letters of administration conclusive evidence of administrator's right to sue.

Cited in notes in 21 L.R.A. 684, on facts established by probate decree; 21 L.R.A. 686, on conclusiveness of probate decree in chancery; 75 A. D. 722, on probate and administration proceedings and their effect as *res judicata*; 19 A. R. 149, on collateral attack upon letters of administration.

Jurisdiction of equity — As to probate matters.

Cited in *Heyer v. Burger*, Hoffm. Ch. 1, denying jurisdiction of court of chancery to determine validity of will of personal property; *Booth v. Kitchen*, 7 Hun, 255, denying jurisdiction of supreme court of action to establish legacies revoked by subsequent codicil; *Brady v. McCosker*, 1 N. Y. 214 (affirming 1 Barb. Ch. 329), denying equity's jurisdiction to set aside will for fraud where remedy at law adequate; *Re Jackman*, 26 Wis. 104 (dissenting opinion), on equity's jurisdiction over probate proceedings; *Re Hathaway*, 9 Hun, 79 (dissenting opinion), on power of supreme court to appoint surrogate; *Griffis v. Stoddard*, 2 Mich. N. P. 37, holding that impeachment of will for fraud does not deprive probate court of jurisdiction to retain bill.

Cited in reference notes in 47 A. D. 632, on equity jurisdiction in will cases; 54 A. S. R. 902, on equity jurisdiction to try validity of will of personalty; 29 A. D. 249, on original jurisdiction of probate courts to try validity of will of personalty.

Cited in notes in 11 A. D. 657, on relief against fraudulent will; 54 A. S. 219, on proceedings or judgments subject to equitable relief.

— Adequate remedy at law.

Cited in *DeBussierre v. Holladay*, 55 How. Pr. 210, 4 Abb. N. C. 111, holding party not entitled to equitable relief when adequate remedy at law; *Bowen v. Idley*, 6 Paige, 46, holding adequate remedy at law defense to action in chancery to set aside will of land; *Bingham v. Weiderwax*, 1 N. Y. 509, holding sale of premises under mortgage which grantee assured no defense to action for breach of covenant of seisin.

Cited in reference note in 63 A. S. R. 448, on remedy at law as ground for dismissal in equity.

Objection to jurisdiction raised on appeal.

Cited in *Clarke v. Sawyer*, 2 N. Y. 498, holding objection to court's jurisdiction where parties have submitted on merits too late when first raised on appeal.

Action to establish will.

Cited in *Everitt v. Everitt*, 41 Barb. 385, holding action to establish last will not controlled by statute as to limitation of actions.

22 AM. DEC. 652, KLINE v. L'AMOREUX, 2 PAIGE, 419.

Rights and liability of infant or lunatic.

Cited in reference note in 28 A. D. 684, on infant's right to recover on *quantum meruit* for excess of value of services over compensation agreed on.

Cited in notes in 5 L.R.A. 178, as to when acts of infant are void; 42 A. S. R. 753, on liability of incompetent persons.

— For necessities.

Cited in *Streever v. Birch*, 62 Hun, 298, 17 N. Y. Supp. 195, holding infant liable

for necessities furnished; *McKanna v. Merry*, 61 Ill. 177; *Atchison v. Bruff*, 50 Barb. 381,—holding infant liable for necessities in keeping with condition in life; *Ryan v. Boltz*, 16 Jones & S. 152, holding infant not liable for board and lodging for which guardian having means had promised to pay; *Nichol v. Steger*, 2 Tenn. Ch. 328; *Elrod v. Myers*, 2 Head, 33,—denying storekeeper's recovery for necessities furnished infant living with guardian who supplies him; *L'Amoureux v. Crosby*, 2 Paige, 422, 22 A. D. 655, denying innkeeper's right to recover for supplies furnished infant against orders of guardian; *Englebert v. Troxell* (*Englebert v. Pritchett*), 40 Neb. 195, 42 A. S. R. 665, 26 L.R.A. 177, 58 N. W. 852, holding services of guardian *ad litem* in defending foreclosure suit not necessities for which infant liable; *Patten v. Moore*, 32 N. H. 382, holding payment of consideration necessary to constitute one bona fide purchaser; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460 (dissenting opinion), on liability of insane person on contract for necessities.

Cited in reference notes in 23 A. D. 659; 36 A. D. 298,—on infants' contracts for necessities; 24 A. D. 359, on infant's liability for necessities; 26 A. D. 748, on liability of infants on contracts for necessities; 67 A. D. 261, on power of infant under care of parent or guardian to make binding contract for necessities; 40 A. D. 625, as to what are necessities.

Cited in note in 18 A. S. R. 647, 648, on effect of infant's being already supplied with necessities upon contract for.

Personal advantage of guardian.

Cited in *Wilcox v. Smith*, 26 Barb. 316, holding guardian not entitled to personal advantage from estate of ward.

22 AM. DEC. 655, L'AMOREUX v. CROSBY, 2 PAIGE, 422.

Action or judgment against incompetent.

Cited in *Williams v. Cameron*, 26 Barb. 172, holding action against lunatic for destruction of property before payment of purchase price properly referred to referee; *Brown v. Betts*, 13 Wend. 29, sustaining right to maintain summary proceeding against habitual drunkard; *King v. Robinson*, 33 Me. 114, 54 A. D. 614, holding plaintiff not required to appoint guardian for incompetent defendant; *Smith v. Ketaltas*, 27 App. Div. 279, 50 N. Y. Supp. 471, holding permission of court necessary before commencement of action against one judicially declared incompetent; *Grant v. Humbert*, 114 App. Div. 462, 100 N. Y. Supp. 44, holding lease of court not necessary before bringing action on note against inmate of hospital for whom no committee appointed; *Crippen v. Culver*, 13 Barb. 424; *Sternbergh v. Schoolcraft*, 2 Barb. 153,—holding judgment against habitual drunkard on note when property in custody of committee not void; *Re McLaughlin*, *Clarke*, Ch. 113, denying motion to set aside judgment confessed by attorney for drunkard after appointment of commission.

Powers of incompetent person.

Cited in *Mohr v. Tulip*, 40 Wis. 67, holding lunatic's mortgage voidable; *Blinn v. Schwarz*, 177 N. Y. 252, 101 A. S. R. 806, 69 N. E. 542, holding lunatic's deed, voidable; *Sander v. Savage*, 75 App. Div. 333, 78 N. Y. Supp. 189, holding conveyance by lunatic for tenth of value, void; *O'Reilly v. Sweeney*, 54 Misc. 408, 105 N. Y. Supp. 1033, holding breach of lunatic's promise of marriage not basis of action for damages; *Hughes v. Jones*, 116 N. Y. 67, 15 A. S. R. 386, 5 L.R.A. 632, 22 N. E. 446, holding deed by one subsequently adjudged incompetent not absolutely void.

Cited in reference notes in 41 A. S. R. 345, on liability of insane person on contract; 59 A. D. 615, on setting aside contract for intoxication.

Cited in notes in 54 L.R.A. 450, on validity of contract made with an habitual drunkard; 17 L.R.A.(N.S.) 1068, on right to affirmative relief in equity from contract upon ground that it was procured from complainant while intoxicated; 71 A. S. R. 426, on contracts of insane persons; 17 L.R.A. 296, on who may elect against a will on behalf of an insane widow.

— After inquisition.

Cited in *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 A. D. 499,—holding contract by habitual drunkard after inquisition found, void; *Wadsworth v. Sherman*, 14 Barb. 169, holding indorser on bill of exchange incompetent to waive notice of dishonor after appointment of committee; *Re Patterson*, 4 How. Pr. 34, denying power of habitual drunkard to make will while commission unrevoked; *Lewis v. Jones*, 50 Barb. 645, holding will by incompetent person during existence of commission not absolutely void; *Griswold v. Miller*, 15 Barb. 520, holding conveyance taken by one with knowledge of pendency of lunacy proceedings against grantor, properly set aside; *Stannard v. Burns*, 63 Vt. 244, 22 Atl. 460, holding adjudication of insanity not conclusive against ability of ward to contract for necessities; also citing annotation on this point.

Cited in reference note in 28 A. D. 647, on invalidity of contracts of lunatics after office found.

Cited in note in 107 A. S. R. 547, on contracts of persons found by inquisition to be habitual drunkards.

Nature of inquisition.

Cited in reference note in 28 A. D. 647, on nature of inquisition of lunacy.

Inquisition as proof of incompetency.

Cited in *Field v. Lucas*, 21 Ga. 447, 68 A. D. 465, holding inquisition prima facie evidence of incompetency as to those not parties to proceeding; *Redden v. Baker*, 86 Ind. 191, holding adjudication of insanity not changed by marriage of insane female ward.

Cited in reference notes in 36 A. D. 580; 47 A. D. 474; 75 A. D. 219,—on effect of inquisition as evidence; 26 A. D. 130, on inquisition of lunacy as prima facie evidence only.

Presumption as to incapacity.

Cited in *Banker v. Banker*, 63 N. Y. 409, holding inquisition prior to marriage presumptive proof of incapacity to enter relation; *Van Deusen v. Sweet*, 51 N. Y. 378, holding inquisition as to sanity stating that grantor incompetent when deed given, presumptive proof of incapacity; *R. A. Schoenberg & Co. v. Ulman*, 51 Misc. 83, 99 N. Y. Supp. 650, holding referee presumed to be insane where adjudication of lunacy entered on same date decision signed; *Re Lapham*, 19 Misc. 71, 44 N. Y. Supp. 90, holding no presumption of sanity at time will made where testator adjudged insane month prior thereto; *Demilt v. Leonard*, 11 Abb. Pr. 252, 19 How. Pr. 140, holding finding of insanity after judgment presumptive evidence of existence before; *Gridley v. Boggs*, 62 Cal. 190, holding acts of lunatic before inquisition presumptive evidence of incompetency.

Cited in reference note in 56 A. D. 429, on inquisition of lunacy raising presumption of incapacity.

Jurisdiction of equity over insane persons.

Cited in reference notes in 70 A. S. R. 649, on equity jurisdiction over insane

persons; 44 A. S. R. 266, on jurisdiction of chancery over care and custody of insane persons.

Conclusiveness of probate decree.

Cited in *Modawell v. Holmes*, 40 Ala. 391, holding decree of probate court rendered on final settlement of guardian of incompetent person, conclusive.

Compensation of incompetent's committee.

Cited in *Re Colah*, 6 Daly, 51, holding committee of incompetent person entitled to compensation.

Relief against judgment.

Cited in notes in 39 L.R.A. 780, on relief against judgments against insane persons; 54 A. S. R. 253, as to parties who may obtain equitable relief against judgment, decree, or other judicial determination; 89 A. D. 191, as to how infant may proceed when aggrieved by decree.

22 AM. DEC. 659, CORNING v. WHITE, 2 PAIGE, 567.

Preference created by creditors' bill.

Cited in *Lane v. Harris*, 16 Ga. 217, holding one filing creditor's bill entitled to priority in distribution of assets; *United States Bank v. Burke*, 4 Blackf. 141; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Young v. Clapp*, 40 Ill. App. 312,—holding lien on debtor's equitable assets giving preference created by creditor's bill; *First Nat. Bank v. Hirschowitz*, 46 Fla. 588, 35 So. 22, holding bill to subject estate of married woman to payment of her debts superior to claims of prior creditors guilty of laches; *Arnold v. Treviranus*, 78 App. Div. 589, 79 N. Y. Supp. 732, holding preference acquired by commencement of creditors' suit before debtor's filing petition in bankruptcy; *Pool v. Ragland*, 57 Ala. 414, holding bill to reach property fraudulently conveyed not affected by debtor's subsequent bankruptcy; *Smith v. Gordon*, Fed. Cas. No. 13,052, holding priority created by assignee in bankruptcy not defending creditor's action for discovery of property; *Ex parte General Assignee*, Fed. Cas. No. 5,035, holding lien created by commencement of creditor's action superior to subsequent decree in bankruptcy; *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440, holding that trustee in bankruptcy takes estate subject to equitable lien created by filing creditors' bill before petition in bankruptcy; *Storm v. Waddell*, 2 Sandf. Ch. 494, 3 N. Y. Leg. Obs. 367; *Mathews v. Mobile Mut. Ins. Co.* 75 Ala. 85,—holding bill to reach debtor's equitable assets superior to subsequent judgments; *Clark v. Figgins*, 31 W. Va. 156, 13 A. S. R. 860, 5 S. E. 643, holding creditor first filing bill to set aside fraudulent transfer of personal property entitled to preference; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 538, 17 L.R.A. 345, 29 N. E. 37 (reversing 40 Ill. App. 385), holding judgment creditors filing creditors' bill against debtor entitled to preference over those whose claims not reduced to judgments; *Bridgman v. McKissick*, 15 Iowa, 260, holding junior judgment creditor first filing creditors' bill entitled to preference over senior creditor; *Mandeville v. Campbell*, 45 App. Div. 512, 61 N. Y. Supp. 443; *Voorhees v. Seymour*, 26 Barb. 569; *Field v. Sands*, 8 Bosw. 685; *Clafin v. Gordon*, 39 Hun. 54; *Wheeler v. Wheeden*, 9 How. Pr. 293; *Marshall v. United States Trust Co.* 42 Misc. 306, 86 N. Y. Supp. 617; *Hopkins v. Gallatin Turnp. Co.* 4 Humph. 403; *Hone v. Henriquez*, 13 Wend. 240, 27 A. D. 204,—holding creditors entitled to liens on property of insolvent in order in which creditors' suits filed; *Kinmouth v. White*, 61 N. J. Eq. 358, 48 Atl. 952, holding priorities of judgment creditors determined by order of levies in actions to vacate fraudulent transfers; *Clafin v. Lisso*, 27 Fed. 420, holding priority of lien determined

by date of commencement of action to set aside husband's fraudulent conveyance to wife; *Safford v. Douglas*, 4 Edw. Ch. 537, holding creditor filing pleading first entitled to priority where all actions started same day; *Boynton v. Rawson*, Clarke, Ch. 584, holding issuance of process necessary to give preference in lien on debtor's equitable assets; *Smith's Case*, Fed. Cas. No. 12,997, holding preference not created by merely filing creditors' bill without service of injunction against bankrupt; *M'Cutchen v. Miller*, 31 Miss. 65 (dissenting opinion), on right to preference of creditor filing creditors' bill; *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 A. S. R. 601, 47 N. E. 262, holding plaintiff in creditor's action after return of execution unsatisfied not entitled to equitable lien as against estate of one dying pending action; *Small v. Westchester F. Ins. Co.* 51 Fed. 789, holding appointment of receiver does not operate by relation back to vest property in him at date of fire thereby violating policy as to ownership.

Cited in reference notes in 54 A. S. R. 203, on obtaining preference by creditors' suit; 60 A. S. R. 609, on priority of lien in creditors' suit.

Cited in note in 17 L.R.A. 345, on priority as to proceeds of creditors' bills.

Distinguished in *Trow v. Lovett*, 122 Mass. 571, holding judgment creditor failing to issue execution not entitled to preference by filing creditors' bill prior to bankruptcy of debtor.

Loss or enforcement of creditors' lien.

Cited in *Myrick v. Selden*, 36 Barb. 15, holding lien in nature of attachment lost by delay of eight years in enforcement; *Greenwood v. Brodhead*, 8 Barb. 593, sustaining partner's right to enforce lien on balance of assets left after discharge of debts; *Hammond v. Hudson River Iron & Mach. Co.* 20 Barb. 378, sustaining right of judgment creditor to reach debtor's property fraudulently taken under prior judgment; *Roper v. McCook*, 7 Ala. 318, holding exhaustion of legal remedy necessary before judgment creditor can subject equitable estate to judgment; *Cresswell v. Smith*, 8 Lea, 688 (reversing 2 Tenn. Ch. 416), sustaining creditor's right under statute to maintain bill for discovery where execution returned unsatisfied; *Jeffres v. Cochrane*, 47 Barb. 557, holding lien in favor of judgment creditor created by commencement of action to reach debtor's equitable assets not obtainable by execution; *Becker v. Torrance*, 31 N. Y. 631, holding claim of judgment creditor levying execution superior to that of another obtaining order in supplementary proceedings; *Lyon v. Robbins*, 46 Ill. 276, holding judgments rendered after fraudulent conveyance by debtor not liens in order of rendition; *Hubbard v. Hamilton Bank*, 7 Met. 340, holding attachment of bank's property not dissolved by subsequent appointment of receiver; *Gage v. Smith*, 79 Ill. 219, holding receiver properly appointed by return of execution unsatisfied and upon affidavit of existence of property; *Re Hinds*, Fed. Cas. No. 6,510, holding no lien on debtors' equitable assets created by judgment only; *Tomlinson & W. Mfg. Co. v. Shatto*, 34 Fed. 380, sustaining power of court to compel judgment debtor to convey to receiver in supplementary proceedings land to which he is shown to be entitled subject to mortgages; *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 827, holding equitable lien created by filing creditors' bill.

Cited in reference note in 90 A. D. 295, on creditors' bill as lien.

Criticized in *Spencer v. Spencer*, 9 R. I. 150, holding lien on property subject to payment of alimony not created by filing petition for divorce.

— For benefit of all creditors.

Cited in *Tallmadge v. Sill*, 21 Barb. 34, holding creditor not bound to enforce equitable lien against debtor's property for benefit of all creditors; *Mallory v.*

Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205, holding one filing creditors' bill not obliged to sue for benefit of all creditors; Jackman v. Robinson, 64 Mo. 289, holding in action by creditor of decedent to subject land fraudulently conveyed to payment of debt, other creditors not necessary parties; Todd v. Lee, 15 Wis. 366, holding that creditor seeking to charge married woman's estate with payment of debt should sue for all to save expense; Bostwick v. Beizer, 10 Abb. Pr. 197, holding receiver in supplementary proceedings trustee for all judgment creditors.

Cited in reference notes in 27 A. D. 207, on validity of assignment for benefit of creditors; 25 A. D. 655, on right of debtor to put all creditors on equality by assigning property.

Prerequisites to creditors' bill.

Cited in reference note in 90 A. D. 288, on necessity of creditor's exhausting remedy at law before filing creditors' bill.

Jurisdiction of equity to reach assets.

Cited in reference note in 36 A. D. 45, on jurisdiction of equity to enforce creditor's demand.

Cited in note in 25 A. D. 313, on creditor's right to resort to equity to reach assets.

Right of receiver to assets fraudulently transferred.

Cited in Metcalf v. Del Valle, 64 Hun, 245, 19 N. Y. Supp. 16, holding receiver of judgment debtor not entitled by virtue of appointment to life insurance policies fraudulently transferred.

Assignee taking subject to equities.

Cited in Smith v. Felton, 43 N. Y. 419, holding that assignees for creditors of insolvent bank take firm note held by bank subject to right of set-off though note due at time of assignment.

Set-off against insolvent.

Cited in note in 2 L.R.A. 273, on right of debtor of insolvent bank to set off demand.

Effect of insolvency assignment after suit commenced.

Cited in reference note in 41 A. D. 301, on effect of assignment in insolvency after commencement of suit.

22 AM. DEC. 661, MORRIS v. MOWATT, 2 PAIGE, 586.

Rights of purchaser at judicial sale.

Cited in Coster v. Clarke, 3 Edw. Ch. 428, holding purchaser at judicial sale not bound to take anything but legal title; Riggs v. Pursell, 66 N. Y. 193, holding purchaser on foreclosure sale not relieved by defects in title with reference to which bid made; Finley v. McCulley, 2 Phila. 212, 14 Phila. Leg. Int. 5, holding purchaser misled by representations of sheriff as to extent of encumbrance against land not bound to complete purchase; Hirsch v. Livingston, 48 How. Pr. 243, 5 Thomp. & C. 263, 3 Hun, 9, holding purchaser on foreclosure sale not bound to complete purchase where certain owners not made parties; Gregory v. Tingley, 18 Neb. 318, 25 N. W. 88, sustaining court's power to compel purchaser at judicial sale to pay price of bid; Farmers' Loan & T. Co. v. Green, 24 C. C. A. 506, 52 U. S. App. 69, 79 Fed. 222, holding purchaser at foreclosure sale having sale set aside not entitled to costs; Jackson v. Edwards, 22 Wend. 498, holding purchaser upon partition sale not required to accept equitable title; Norton v. Nebraska Loan & T. Co. (Norton v. Taylor), 35 Neb. 466, 37 A. S. R. 441, 18 L.R.A. 88,

53 N. W. 481 (dissenting opinion), on doctrine of *caveat emptor* as applicable to judicial sales.

— Setting aside sale.

Cited in *Vanernan v. Cooper*, 4 Clark (Pa.) 371, setting aside sheriff's sale where highest bidder procured adjournment and purchased at lower figure.

Sale of judgment debtor's interest.

Cited in *Tallman v. Farley*, 1 Barb. 280, holding judgment creditors entitled only to rights of judgment debtors in property sold; *Snyder v. Martin*, 17 W. Va. 276, 41 A. R. 670, holding judgment creditors' lien limited in equity to debtor's interest in property sold under execution.

When specific performance denied.

Cited in reference notes in 35 A. D. 520, on refusal of specific performance where complainant cannot make good title; 48 A. D. 335, as to when specific performance of contract will be refused for want of title in vendor.

Lien of judgment.

Cited in *O'Donnell v. Kerr*, 50 How. Pr. 334, holding lien of judgment removable by court of equity when judgment debtor holds legal title as naked trustee; *Averill v. Loucks*, 6 Barb. 19; *Denzler v. O'Keefe*, 34 N. J. Eq. 361,—holding that lien of judgment does not attach in equity to mere legal title in judgment debtor to exclusion of prior equitable title in another.

Cited in reference notes in 23 A. D. 596, on judgment liens; 38 A. D. 455, on extent of judgment lien; 28 A. D. 441, as to when docketed judgment becomes a general lien on all debtor's realty.

Cited in notes in 31 A. D. 256, as to what judgment lien attaches to; 93 A. D. 346, on interests of debtor to which judgment lien attaches; 93 A. D. 347, on power of debtor to impair judgment lien; 93 A. D. 346, on subjection of judgment lien to equities of third persons.

Liability for decedent's debts.

Cited in *Bloodgood v. Bruen*, 2 Bradf. 8; *Whitsett v. Kershaw*, 4 Colo. 419,—holding land descending to heirs liable for intestate's obligations; *Pierce v. Alsop*, 3 Barb. Ch. 184 (affirming 4 N. Y. Leg. Obs. 52), on rights of creditors in collection of debts from estate of deceased debtors.

Cited in reference note in 40 A. D. 193, on liability of property in hand of heirs, devisees, or alienees to payment of decedent's debts.

Discharge of mortgage.

Cited in *Kortright v. Cady*, 21 N. Y. 343, 78 A. D. 145, holding mortgage lien discharged by tender at any time before foreclosure.

Rights of mortgagee.

Cited in *Mutual L. Ins. Co. v. Voorhis*, 71 Hun, 117, 24 N. Y. Supp. 529, holding mortgagee of land bounded by navigable stream without lien on adjacent submerged land procured by mortgagor under grant from state; *Devin v. Hendershott*, 32 Iowa, 192, holding mortgagee entitled to benefit of covenants running with land; *Alexander v. Greenwood*, 24 Cal. 505, denying right of mortgagee to cut off all rights of subsequent lienors.

Cited in reference notes in 52 A. D. 649, on interest of mortgagee before foreclosure; 38 A. D. 693, on right of mortgagee to bring ejectment after forfeiture; 34 A. D. 213, on mortgagee's right to recover in ejectment; 26 A. D. 559, on mortgagee's right to possession of mortgaged premises; 79 A. D. 361, on rule that mortgagee may not maintain ejectment or writ of entry against mortgagor.

Nature of mortgage.

Cited in *Packer v. Rochester & S. R. Co.* 17 N. Y. 283, holding legal title to mortgaged property in mortgagor; *Main v. Green*, 32 Barb. 448, holding mortgagor of lease owner upon whom to serve notice of nonpayment of rent; *Swart v. Service*, 21 Wend. 36, denying right of mortgagee to recover in ejectment.

Cited in reference notes in 47 A. D. 304, on nature of and what passes by mortgage; 25 A. D. 410, on mortgage as a mere security.

Mortgagor as party to foreclosure.

Cited in *Miner v. Beekman*, 42 How. Pr. 33, 1 Jones & S. 67, 11 Abb. Pr. N. S. 147, holding foreclosure void when mortgagor not made party; *Raynor v. Selmes*, 52 N. Y. 579 (reversing 7 Lans. 440), holding owner of equity of redemption not notified of sale not liable for expenses of resale.

Relief to purchaser at judicial sale.

Cited in notes in 70 A. D. 575, 576, on defect of title and outstanding equities as ground for relief in equity sales; 21 L.R.A. 47, on objections to completing purchase at execution or judicial sale because of defect of parties; 69 L.R.A. 38, on release of purchaser from bid and return of deposit on annulling judicial or execution sale.

Preference on assignment.

Cited in *Miller v. Andrews*, 3 Coldw. 380, holding upon assignment by bank billholders entitled to preference under statute.

22 AM. DEC. 669, MITCHELL v. BUNCH, 2 PAIGE, 606.**Extraterritorial jurisdiction of court.**

Cited in *Barry v. Mutual L. Ins. Co.* 2 Thomp. & C. 15, denying injunction restraining prosecution of claim on same insurance policy in another state after action brought in New York; *March v. Eastern R. Co.* 40 N. H. 548, 77 A. D. 732, sustaining court's power to render judgment against foreign corporation served in state; *Shackleton v. Kneisley*, 48 Minn. 451, 51 N. W. 470; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067,—sustaining power of court having jurisdiction of partnership accounting to determine rights as to land in another state; *Williams v. Fitzhugh*, 37 N. Y. 444, sustaining power of equity to compel giving of valid notes in place of usurious ones secured by void mortgage on lands outside estate; *Miller v. Rickey*, 127 Fed. 573, holding bill to restrain diversion of stream not defective for failure to allege place of diversion.

Cited in reference note in 20 A. S. R. 212, on jurisdiction over nonresidents and their property.

Cited in notes in 6 A. S. R. 189, on equity jurisdiction over nonresidents; 53 A. S. R. 181, on acquisition of jurisdiction over persons temporarily in state; 94 A. S. R. 537, on jurisdiction over persons voluntarily within foreign country; 6 A. S. R. 181, on jurisdiction over person within state who is citizen of foreign state; 67 A. D. 101, on means of enforcement of decree concerning foreign subject-matter; 67 A. D. 96, on power of court to compel party to exercise his control over property or persons situated in another state.

Distinguished in *Bank of Bellows Falls v. Rutland & B. R. Co.* 28 Vt. 47, denying right of court of equity to enjoin action in law court of another state having concurrent jurisdiction.

—As to conveyances.

Cited in *Mead v. Brockner*, 82 App. Div. 480, 81 N. Y. Supp. 594, sustaining power of court in foreclosure proceedings to compel residents to give conveyance

of land partly outside of state; *Bailey v. Ryder*, 10 N. Y. 363, sustaining equity's power to compel judgment debtor to convey lands in another state for benefit of creditors; *Newton v. Bronson*, 13 N. Y. 587, 67 A. D. 89; *Gardner v. Ogden*, 22 N. Y. 327, 78 A. D. 192; *Fenner v. Sanborn*, 37 Barb. 610; *Cleveland v. Burrill*, 25 Barb. 532,—sustaining power of equity to compel nonresident served with process to execute conveyance of lands outside of state; *Hayes v. O'Brien*, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73, sustaining power of court having jurisdiction of person to compel conveyance of land beyond jurisdiction; *Loney v. Penniman*, 43 Md. 130, sustaining power of court to compel resident to execute conveyance of property outside of state; *Smith v. Tozer*, 42 Hun, 22, 11 N. Y. Civ. Proc. Rep. 343, sustaining power of court to require judgment debtor to deliver conveyances of lands outside state to receiver in supplementary proceedings; *Spurr v. Scoville*, 3 Cush. 378, denying power of court to compel nonresident to execute conveyance of land in state; *Adams v. Lamar*, 8 Ga. 83, denying power of court to compel nonresident to assign resident certain interest in land pursuant to agreement; *Bethell v. Bethell*, 92 Ind. 318, sustaining power of court to reform covenant of seisin in deed of land located outside state; *DeKlyn v. Watkins*, 3 Sandf. Ch. 185, sustaining power of court to set aside conveyance of land in this state and in foreign state upon service of parties here; *Williams v. Ayrault*, 31 Barb. 364, sustaining power of court having jurisdiction of parties to compel cancellation of void mortgage of lands outside state.

Cited in notes in 1 L.R.A. 79, on specific performance of contract for sale of lands in another state; 67 A. D. 98, on cases in which equity will decree conveyance of property situated in another state.

—As to land.

Cited in *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473, sustaining power of equity having jurisdiction of parties to compel performance of acts relating to property outside state; *Wilmer v. Atlanta & A. Air-Line R. Co.* 2 Woods, 409, Fed. Cas. No. 17,775, sustaining power of court having jurisdiction of party to decree with reference to realty outside state; *House v. Lockwood*, 40 Hun, 532, sustaining court's jurisdiction of action for strict foreclosure of mortgage of lands outside state where parties within jurisdiction of court; *Kennett v. Hopkins*, 58 App. Div. 407, 69 N. Y. Supp. 18, sustaining power of court having jurisdiction of partners to settle accounts, including lands outside state; *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220, sustaining equity's jurisdiction of action to redeem lease of land outside state where defendant within jurisdiction of court; *Dickinson v. Hoomes*, 8 Gratt. 353, sustaining power of court of equity to compel resident heir to account for lands outside of state necessary for payment of debts; *Schmaltz v. York Mfg. Co.* 204 Pa. 1, 93 A. S. R. 782, 59 L.R.A. 907, 53 Atl. 522, sustaining jurisdiction of court of equity in one state of action by resident holding mortgage to enjoin another from removing fixtures; *Columbia Nat. Sand Dredging Co. v. Morton*, 28 App. D. C. 288, 7 L.R.A. (N.S.) 114, 8 A. & E. Ann. Cas. 511, denying equity's jurisdiction to restrain trespass on lands in another state; *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, denying jurisdiction of receiver over land in another state; *Towne v. Campbell*, 35 Minn. 231, 28 N. W. 254, sustaining power of court to appoint receiver in supplementary proceedings although debtor's only property outside of state; *Baltimore Bldg. & L. Assn. v. Alderson*, 32 C. C. A. 542, 61 U. S. App. 636, 90 Fed. 142, denying power of court to appoint receiver of lands outside district; *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201 (dissenting opinion), on appointment of receiver for property outside state; *Schindelholz v. Cullum*, 5 C. C. A. 293, 12 U. S. App. 242, 55

Fed. 885, denying power of court to restrain nonresident from issuing attachment against lands in his state belonging to resident; *Great Falls Mfg. Co. v. Worsten*, 23 N. H. 462, sustaining power of equity to restrain destruction of dam across stream dividing states; *Mussina v. Belden*, 6 Abb. Pr. 165, sustaining court's jurisdiction of action against nonresidents to divest resident of title to land in another state where damages demanded; *Graydon v. Church*, 7 Mich. 36, holding foreign receiver required to file bill in state to enforce debtor's equity of redemption; *Winans v. McKean R. & Nav. Co.* 6 Blatchf. 215, Fed. Cas. No. 17,862, holding absence of corporate property in district no defense to action by creditor for appointment of receiver to collect unpaid subscriptions.

Cited in reference note in 22 A. D. 352, on chancery jurisdiction as to property outside of state.

Cited in notes in 10 E. R. C. 592, on mode of reaching real property in another state; 69 L.R.A. 677, on ability to grant effective relief by decree *in personam* as criterion of jurisdiction of equity over suits affecting real property in another state or country; 69 L.R.A. 695, on form of relief in suit in equity affecting real property in another state or country and effect and enforcement of the decree therein.

Venue of action as to land.

Cited in *Eachus v. Illinois & M. Canal*, 17 Ill. 534, holding that action for flooding lands must be brought in jurisdiction where lands located; *Roberts v. Roberts*, 124 Mich. 414, 83 N. W. 132, holding action to compel record of deed triable under statute in county other than where property located.

Power of receiver.

Cited in *Foster v. Townshend*, 12 Abb. Pr. N. S. 469, sustaining power of receiver under statute without assignment from debtor to bring action to set aside fraudulent conveyances.

Writ of ne exeat.

Cited in *Gleason v. Bisby*, Clarke, Ch. 551, holding writ ne exeat properly discharged upon giving bond; *Palmer v. Van Doren*, 2 Edw. Ch. 425, denying ne exeat on judgment creditors' bill where answer denies property; *Bushnell v. Bushnell*, 15 Barb. 399, holding power of supreme court to issue writ of ne exeat not affected by provisions of Code; *Forrest v. Forrest*, 5 How. Pr. 125, 2 Edm. Sel. Cas. 171, 10 Barb. 46, holding facts, not allegations of belief, necessary to issuance of writ of ne exeat; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Cable v. Alvord*, 27 Ohio St. 654; *Johnston v. Johnston*, 25 How. Pr. 181, 1 Robt. 642, 16 Abb. Pr. 43,—holding writ of ne exeat in civil suit issued for purpose of obtaining equitable bail; *Lewis v. Shainwald*, 48 Fed. 492, holding that writ ne exeat *republica* may be continued in force until decree satisfied; *Bayly v. Bayly*, 2 Md. Ch. 326, sustaining discharge of writ issued of ne exeat in action for divorce where no right to alimony established and intention to leave state denied.

Cited in reference notes in 25 A. D. 535; 52 A. D. 411,—as to when writ of ne exeat will be granted.

Cited in notes in 14 A. D. 560, 561, on writ of ne exeat; 28 A. D. 429, as to when ne exeat lies; 118 A. S. R. 994, on parties in whose favor writ of ne exeat will issue; 7 L.R.A. 397, on nature of writ of ne exeat; 7 L.R.A. 396, on rule that ne exeat is not prerogative writ; 118 A. S. R. 989, on writ of ne exeat as ordinary process in America; 118 A. S. R. 997, on bail and discharge of person arrested by virtue of writ of ne exeat; 7 L.R.A. 398, on discharge of writ of ne exeat.

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Writ of *capias*.

Cited in *Samuel v. Wiley*, 50 N. H. 353, sustaining power of court by writ of *capias* to restrain one leaving state to avoid payment of debts.

Action in court of one state as bar.

Cited in *Lorillard F. Ins. Co. v. Meshural*, 7 Robt. 308, holding right to maintain action in courts of one state not barred by action for same cause in another state; *Hatch v. Spofford*, 22 Conn. 485, 58 A. D. 433, holding pendency of action on account in another state no bar to action in Connecticut; *Lockwood v. Nye*, 2 Swan, 515, 58 A. D. 73, holding proceedings in sister state to subject property to debts no bar to action in Tennessee to enforce payment of same debt; *Smith v. Lathrop*, 44 Pa. 326, 84 A. D. 448, 21 Phila. Leg. Int. 12, holding plea *lis pendens* in another state no defense to action between same parties for same cause in Pennsylvania; *Harrington v. Libby*, 6 Daly, 259, holding discontinuance of proceedings before surrogate for accounting by administrator no bar to similar action in another court; *Trubee v. Alden*, 6 Hun, 75 (dissenting opinion), on pendency of action in foreign court as bar to action in state of residence.

Cited in note in 20 L. ed. U. S. 29, as to when plea in abatement of another suit pending is good.

Pendency of action in Federal court as bar to action in state court and vice versa.

Cited in *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Litchfield v. Brooklyn*, 13 Misc. 693, 34 N. Y. Supp. 1090; *Loring v. Marsh*, 2 Cliff. 311, Fed. Cas. No. 8,514,—holding pendency of action in state court no bar to action in Federal court affecting same cause; *Brooks v. Mills County*, 4 Dill. 524, Fed. Cas. No. 1,955, holding pendency of action in Federal court no bar to action in state court when parties not same; *Oneida County Bank v. Bonney*, 101 N. Y. 173, 4 N. E. 332, holding pendency of action in Federal court against one joint contractor no bar to action in state court against other; *Errett v. Crane*, Fed. Cas. No. 4,523, holding pendency of ejectment action in state court against one cotenant no bar to suit in Federal court by another who is resident of different state; *Cunningham v. Campbell*, 3 Tenn. Ch. 488, holding action to set aside fraudulent conveyances and subject land to payment of debts not barred by record in Federal court of another state on equity side showing suit by assignee in bankruptcy; *The Tubal Cain*, 9 Fed. 834, holding pendency of action in admiralty estoppel to action in state court for same cause.

Cited in reference note in 58 A. D. 77, on pendency of suit in foreign court or in United States court not being pleadable in bar or abatement in state court.

Cited in notes in 25 A. D. 197, on *lis pendens* in Federal court; 82 A. S. R. 588, on abatement of action in state court by prior action in Federal court and vice versa; 1 E. R. C. 545, on pendency of suit in Federal or foreign court as ground for plea in abatement; 42 L.R.A. 463, 465, on pendency of actions in both state and Federal courts sitting in same state.

Election as to court.

Cited in *Central R. Co. v. New Jersey West Line R. Co.* 32 N. J. Eq. 67, sustaining power of court to compel party to elect between action in state and Federal court.

Jurisdiction of courts.

Cited in *Ex parte Hardy*, 68 Ala. 303 (dissenting opinion), on jurisdiction of court to award writ of habeas corpus; *Aldrich v. Kirkland*, 8 Rich. L. 349 (dissenting opinion), on power of equity to grant injunction.

Cited in reference notes in 49 A. S. R. 737, on equity jurisdiction; 57 A. D. 200, on rules governing exercise of equity; 75 A. D. 228, on power of chancery court to compel discovery of debtor's property.

Cited in notes in 76 A. D. 670, on extent of jurisdiction *in personam*; 3 L.R.A. 203, on rule that courts cannot exercise powers that bring them into collision.

Enforcement of judgment.

Cited in *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200, holding one recovering judgment in Federal court sitting in state entitled to summary remedy provided by state statutes.

Cited in note in 63 L.R.A. 680, 682, on equitable remedy to subject choses in action to judgment after return of no property found.

Validity of bail bond.

Cited in *Haberstro v. Bedford*, 43 Hun, 201, holding bail bond not invalidated by containing unnecessary clause.

Merger of original judgment in new judgment.

Cited in *Bates v. Lyons*, 7 Paige, 85, sustaining right to file creditors' bill upon judgment after return of execution unsatisfied though new judgment has been recovered.

Action after nonsuit.

Cited in *Napier v. Gidiere*, 7 Rich. Eq. 254, holding permission to bring new action on attachment bond after nonsuit within discretion of court.

Effect of decree in equity.

Cited in *Jelke v. Goldsmith*, 52 Ohio St. 499, 49 A. S. R. 730, 40 N. E. 167, holding decree in equity operative only *in personam* and not execute itself so as to transfer personality.

22 AM. DEC. 679, BEEKMAN v. SARATOGA & S. R. CO. 3 PAIGE, 45.

Taking private property for public purpose.

Cited in *Bloomfield & R. Natural Gaslight Co. v. Richardson*, 63 Barb. 437, sustaining power of gas company to condemn private property; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 A. R. 564; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367; *Parmelee v. Oswego & S. R. Co.* 7 Barb. 599,—sustaining right of railroad company to condemn private property for railway purposes; *Boston & P. R. Corp. v. New York & N. E. R. Co.* 13 R. I. 260 (dissenting opinion), on right to take private property for railroad purposes; *Mt Washington Road Co.'s Petition*, 35 N. H. 134, sustaining right to condemn land for road to top of Mt. Washington; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 37 L.R.A. 189, 46 N. E. 77, sustaining power of city to condemn portion of railroad right of way for street purposes; *Heyward v. New York*, 7 N. Y. 314 (affirming 8 Barb. 486, 8 N. Y. Leg. Obs. 244), sustaining power of city to take land for extension of almshouse establishment; *State v. Dickson*, 3 Mo. App. 464, sustaining right of railroad company to enter upon land condemned as soon as award paid; *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406, denying right of railroad company to enter land condemned before full payment of compensation; *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 588, holding railroad company taking private property as authorized by statute not liable for trespass; *Forney v. Fremont, E. & M. Valley R. Co.* 23 Neb. 465, 36 N. W. 806, holding railroad company paying for land and building taken in condemnation proceedings not liable for conversion of building; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449 (dis-

senting opinion), on power to take private property under right of eminent domain.

Cited in reference notes in 22 A. D. 756; 24 A. D. 550; 25 A. D. 42; 31 A. D. 373; 33 A. D. 422, 535,—on subject of eminent domain; 50 A. S. R. 538, on right of eminent domain between railroads paralleling and crossing each other.

Cited in notes in 22 A. D. 634; 25 A. D. 622,—on eminent domain; 4 L.R.A. 785; 13 L.R.A. 431,—on right of eminent domain; 28 A. D. 423, on extent of right to take private property for public use; 53 A. D. 336, on right of legislature to authorize the taking of private property for private use; 13 L.R.A. 333, on exercise of right of eminent domain; 40 A. S. R. 29, on right to exercise eminent domain as question for legislature.

— Validity of statute.

Cited in *Taber v. Manhattan R. Co.* 14 Misc. 189, 35 N. Y. Supp. 465, holding power to exercise right of eminent domain for legislature to decide; *Young v. McKenzie*, 3 Ga. 31, sustaining act incorporating bridge company with power to take private property upon payment of compensation; *Waterworks Co. v. Burkhart*, 41 Ind. 364; *Rubbottom v. McClure*, 4 Blackf. 505,—sustaining statute authorizing taking of private property for canal purposes; *Cromie v. Wabash & E. Canal*, 71 Ind. 208 (dissenting opinion), on right to take private property for canal purposes; *Re Townsend*, 39 N. Y. 171 (dissenting opinion), on taking of land for canal purposes; *McCormick v. Lafayette, Smith* (Ind.) 83, 1 Ind. 48, sustaining statute authorizing village to take private property for street purposes; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376, sustaining statute providing for building of ditches through private property for irrigation purposes; *Alfalfa Irrig. Dist. v. Collins*, 46 Neb. 411, 64 N. W. 1086, holding district irrigation law not void as taking private property without compensation; *Whiteman v. Wilmington & S. R. Co.* 2 Harr. (Del.) 514, 33 A. D. 411; *Challiss v. Atchison, T. & S. F. R. Co.* 16 Kan. 117; *Swan v. Williams*, 2 Mich. 427; *Weir v. St. Paul, S. & T. F. R. Co.* 18 Minn. 155, Gil. 139; *Concord R. Co. v. Greely*, 17 N. H. 47; *Louisville, C. & C. R. Co. v. Chappell, Rice*, 383; *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547,—sustaining right of state to empower railroad company to condemn private property; *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. 100, sustaining power of legislature to authorize railroad company to take private property upon payment of compensation; *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 31 A. D. 313 (affirming 14 Wend. 51), sustaining act authorizing railroad to take private property upon payment of compensation; *Giesy v. Cincinnati, W. & Z. R. Co.* 4 Ohio St. 308, sustaining statute giving probate court jurisdiction of condemnation proceedings; *Newcomb v. Smith*, 1 Chand. (Wis.) 71, 2 Pinney (Wis.) 131, sustaining statute providing for erection of public milldam; *Bartlette v. Norwich & W. R. Co.* 33 Conn. 560, sustaining statute permitting mill owner to raise level of dam thereby causing overflow; *Re Hartwell*, 2 Mich. N. P. 97; *Harding v. Funk*, 8 Kan. 315,—sustaining act authorizing building of milldams raising level of streams.

— Right to compensation.

Cited in *Brewer v. Bowman*, 9 Ga. 37, holding statute authorizing construction of private ways but containing no provision for compensation, void; *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497, holding drainage act requiring payment of compensation before entry, valid; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674, denying right to divert water course without compensation to riparian owners; *Philadelphia, M. & S. Street R. Co.'s Petition*, 203 Pa. 354, 53 Atl. 191,

holding statute authorizing one street railway company to use portion of tracks of another without compensation, void; *Brown v. Gerald*, 100 Me. 351, 109 A. S. R. 526, 70 L.R.A. 472, 61 Atl. 785, denying right of electric company to set poles and string wires across land of private owner without compensation; *People ex rel. Fountain v. Westchester County*, 4 Barb. 64, holding right to award for land taken for street not affected by repeal of statute under which damages assessed; *Kramer v. Cleveland & P. R. Co.* 5 Ohio St. 140 (dissenting opinion), on assessment of damages in taking of land for railroad purposes; *Livingston v. New York*, 8 Wend. 85, 22 A. D. 622, holding that benefit to landowner from improvement of adjacent property may be set off against damages for land taken for street.

Cited in reference notes in 36 A. D. 385, on compensation for exercise of right of eminent domain; 69 A. D. 579, on duty of corporations to compensate injuries to individuals from the exercise of eminent domain; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use; 66 A. D. 153, on power of legislature to prescribe mode of ascertaining amount of compensation in eminent domain; 53 A. D. 215, on constitutionality of assessment of damages by commissioners for taking private property for public use.

Delegation of power of eminent domain.

Cited in reference note in 35 A. D. 472, on right of legislature to transfer power of eminent domain to subordinate agent.

Cited in notes in 1 L.R.A. 134, on delegation of right of eminent domain; 2 L.R.A. 680, on right of sovereign to delegate power of eminent domain.

What constitutes public use.

Cited in *Re Kerr*, 42 Barb. 119, holding construction of railroad for public purpose authorizing taking of private property; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147, holding railroad public use although conducted for private gain; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137, denying right of railroad company to take land by condemnation to prevent interference with competing line; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 A. R. 385, sustaining right of railroad company to condemn land for warehouse and storage of cars; *Williams v. School Dist. No. 6*, 33 Vt. 271, holding taking of land for school house, public purpose; *Re League Island*, 1 Brewst. (Pa.) 524, holding taking of land for naval station, public use; *Gilmer v. Lime Point*, 18 Cal. 229, holding fort public use authorizing condemnation of private property; *State, Olmsted, Prosecutor, v. Proprietors of Morris Canal*, 46 N. J. L. 495, sustaining right to divert stream to supply municipality; *Stamford Water Co. v. Stanley*, 39 Hun. 424, holding taking of land for municipal water supply, public use; *Re Malone Waterworks Co.* 38 N. Y. S. R. 95, 15 N. Y. Supp. 649, holding spring taken for municipal supply, for public use; *Dayton Gold & S. Min. v. Seawell*, 11 Nev. 394, holding appropriation of private property for mining purposes, public use; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 A. D. 634 (affirming 18 N. J. Eq. 54), holding reclaiming marsh lands, public use; *Re Ryers*, 72 N. Y. 1, 28 A. R. 88, holding drainage of property for public health, public use for which private property may be taken; *Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403, holding land taken for ditch along highway for public purpose; *Bankhead v. Brown*, 25 Iowa, 540; *Taylor v. Porter*, 4 Hill, 140, 40 A. D. 274; *Witham v. Osburn*, 4 Or. 318, 18 A. R. 287; *Sadler v. Langham*, 34 Ala. 311,—holding statute authorizing construction of private roads over private property, void; *Varner v. Martin*, 21 W. Va. 534, denying right to take private property with compensation for private road

to public highway; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 A. R. 86; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429,—holding question as to public use, for court.

Annotation cited in *Apex Transp. Co. v. Garbade*, 32 Or. 582, 62 L.R.A. 513, 52 Pac. 573, holding skidway built for private logging business not authorize taking private property; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884, holding taking land for side track, public use.

Cited in reference notes in 23 A. D. 319; 24 A. D. 300; 26 A. D. 644; 36 A. D. 144; 37 A. D. 238; 74 A. D. 555; 89 A. D. 229; 60 A. S. R. 821; 88 A. S. R. 926,—on what uses justify exercise of power of eminent domain; 23 A. D. 632, 772; 89 A. D. 229; 28 A. S. R. 644; 50 A. S. R. 597; 101 A. S. R. 961,—on what is a public use within meaning of eminent domain; 79 A. S. R. 586, on condemnation of property for private purposes; 31 A. S. R. 503, on right to take property for private use under power of eminent domain; 39 A. S. R. 818, on exercise of right of eminent domain for public use only; 30 A. D. 201, on “public use” and “public benefit” as convertible terms; 26 A. D. 644, on legislature as judge of necessity, utility, and expediency of appropriation of private property to public use; 36 A. D. 211; 42 A. D. 728; 59 A. D. 790; 33 A. S. R. 289,—on taking property for railroad being for public use; 41 A. S. R. 531, on gristmills and other mills as public uses; 98 A. S. R. 244, on right to condemn private property for mills and manufactories; 94 A. S. R. 740, on power of legislature to authorize condemnation of private property for drainage purposes.

Cited in notes in 102 A. S. R. 820, on effect when public use is incidental to private use; 102 A. S. R. 821, on who determines what is a public use; 42 A. S. R. 406, as to whether public use in eminent domain is legislative or judicial question; 28 A. D. 424, on legislature as the sole judge of expediency, necessity, and utility of appropriation of private property to public use; 88 A. S. R. 939, 940, on expediency, propriety, etc., as questions for legislature in determining existence of public use for which private property may be taken; 102 A. S. R. 838, on right to exercise power of eminent domain for mills or other public enterprises; 2 L.R.A. 681, on railroad as public use justifying taking property by eminent domain; 102 A. S. R. 822, on particular uses of railroads for which right of eminent domain cannot be exercised.

Property subject to condemnation.

Cited in *Chester, D. & P. R. Co.'s Appeal*, 8 Del. Co. Rep. 503, upholding the right of the legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use; *People v. O'Brien*, 45 Hun, 519, holding real estate and franchise granted street railway company property subject to condemnation; *Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076, holding property of railroad company not exempt from condemnation; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 50 A. S. R. 508, 31 L.R.A. 298, 41 Pac. 232; *North Carolina R. Co. v. Carolina C. R. Co.* 83 N. C. 489,—holding land acquired by one railroad unnecessary to exercise of franchise subject to condemnation by another; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed 535, sustaining right to condemn bridge held by company under charter from state for highway purposes upon payment of compensation; *Woodmere Cemetery v. Roulo*, 104 Mich. 595, 62 N. W. 1010, sustaining statute authorizing opening of highway through cemetery owned by private corporation; *Ellicottville & G. V. Pl. Road Co. v. Buffalo & P. R. Co.* 20 Barb. 644, holding railroad company not entitled to cross plank road without compensation; *United States v. Castillero*,

2 Black, 17, 17 L. ed. 360 (dissenting opinion), on right to forfeit mining property unless conditions prescribed by law are fulfilled.

Cited in reference note in 98 A. S. R. 823, on condemnation of property of mills and manufactories.

Cited in note in 4 L.R.A. 787, on right to take by eminent domain property already so appropriated.

Condemnation of easement.

Cited in *Roanoke City v. Berkowitz*, 80 Va. 616, holding city condemning land bound to take fee and not easement merely; *Weeks v. Grace*, 194 Mass. 296, 9 L.R.A. (N.S.) 1092, 80 N. E. 220, 10 A. & E. Ann. Cas. 1077, holding easement for sewer taken by city under right of eminent domain not breach of covenant of warranty.

Notice of assessment in condemnation proceeding.

Cited in *Wilson v. Baltimore & P. R. Co.* 5 Del. Ch. 524, holding notice of hearing of assessment of damages in condemnation proceedings not essential where not required by statute; *Langford v. Ramsey County*, 16 Minn. 375, Gil. 333, holding statute authorizing taking of land for street but not providing for notice of assessment to landowner or allowing him to object to appraisers, void.

Municipal aid of public improvement.

Cited in *Blair v. Cuming County*, 111 U. S. 363, 28 L. ed. 457, 4 Sup. Ct. Rep. 449, holding county bonds issued to improve water power of river, for public purpose.

— Railroads.

Cited in *Northern P. R. Co. v. Roberts*, 42 Fed. 734; *Stewart v. Polk County*, 30 Iowa, 9, 1 A. R. 238; *Leavenworth County v. Miller*, 7 Kan. 479, 12 A. R. 425; *Hallenbeck v. Hahn*, 2 Neb. 377; *Gibson v. Mason*, 5 Nev. 283; *Perry v. Keene*, 56 N. H. 514; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 14 A. R. 99,—holding taxation in aid of railroad construction, valid; *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382, sustaining tax in aid of railroad owned by private persons; *Clarke v. Rochester*, 14 How. Pr. 193, 24 Barb. 446, 3 Abb. Pr. 107, holding stock of a railroad company purchased by a city by issuing bonds, valid; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 A. R. 30, holding statute authorizing supervisors to issue county orders in aid of railroad and impose tax to pay orders, void, where county not stockholder; *Napa Valley R. Co. v. Napa County*, 30 Cal. 435, sustaining right to compel subscription to railroad stock by board of supervisors empowered to subscribe.

Taxation of property.

Cited in *Maestri v. Board of Assessors*, 110 La. 517, 34 So. 658, holding right to build market place as authorized by statute with power to rent stalls, taxable as franchise; *Debolt v. Ohio Life Ins. & T. Co.* 1 Ohio St. 563; *Knouk v. Piqua Branch of State Bank*, 1 Ohio St. 603,—sustaining act taxing banks and bank stock as other property; *Lewis v. Germantown, N. & P. R. Co.* 16 Phila. 621, 39 Phila. Leg. Int. 23; *Minot v. Philadelphia, W. & B. R. Co.* 2 Abb. (U. S.) 323, Fed. Cas. No. 9,645, 7 Phila. 555, 27 Phila. Leg. Int. 396, 2 Legal Gaz. 385,—sustaining power of state to tax franchise of railroad company.

Exercising taxing power in aid of railroad construction.

Cited in *Stewart v. Polk County*, 30 Iowa, 9, 1 A. R. 238, holding legislature may exercise taxing power in aid of construction of railroads.

Basis of taxation.

Cited in *Hartwell v. Armstrong*, 19 Barb. 166, holding cost of draining swamp assessed upon lands benefited, void; *Re Tuthill*, 163 N. Y. 133, 79 A. S. R. 574, 49 L.R.A. 781, 57 N. E. 303 (affirming 36 App. Div. 492, 55 N. Y. Supp. 657), holding act apportioning cost of drainage of agricultural lands in proportion to benefits, void; *People ex rel. Griffing v. Brooklyn*, 9 Barb. 535, holding assessment for improvement of street based upon benefit derived by abutting owners, illegal; *People ex rel. Post v. Brooklyn*, 6 Barb. 209, holding sewer tax based on extent of abutting owners' benefit, illegal; *Garrett v. St. Louis*, 25 Mo. 505, 69 A. D. 475, sustaining assessment against adjacent owners for street improvements on basis of benefit received.

Cited in note in 16 A. S. R. 367, on purposes which justify imposition of taxes or assessments.

Sale of property for taxes.

Cited in *Striker v. Kelly*, 7 Hill, 9, holding sale of property for nonpayment of taxes not taking without compensation.

Destroying vested right without compensation.

Cited in *Ex parte Tate*, 39 Ala. 254, sustaining statute revoking exemption to military duty of those furnishing substitutes; *Walker v. Gatlin*, 12 Fla. 9, holding that abolition of slavery does not affect warrant in bill of sale of negro as to slave for life.

Construction of street railway.

Cited in *Milhau v. Sharp*, 27 N. Y. 611, 84 A. D. 314; *Davis v. New York*, 14 N. Y. 506, 67 A. D. 186,—denying city's power to grant right to association of persons to build railway in street; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 38, 19 L. ed. 844, denying power of city in absence of statute to enter contract for construction of street railroad.

Right to jury trial.

Cited in *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558, sustaining right to jury trial in cases regarded as civil when constitution adopted; *Anderson v. Caldwell*, 91 Ind. 451, 46 A. R. 613, sustaining statute providing for trial of facts in drainage cases by court without jury; *Re Smith*, 10 Wend. 449, holding physician demanding reinstatement in medical society not entitled to jury trial of charges; *Mandlebaum v. Russell*, 4 Nev. 551, holding statute for determination of damages from rafting timber on rivers other than by jury, valid; *Marsh v. Palmo*, 1 N. Y. Code Rep. 13, holding statute authorizing destruction of buildings to stop conflagration not void because not providing for assessment of damages by jury; *Plimpton v. Somerset*, 33 Vt. 283, holding statute compelling reference of claim for injuries from defective highway, void as depriving one of trial by jury; *Lynch v. Metropolitan Elev. R. Co.* 129 N. Y. 274, 26 A. S. R. 523, 15 L.R.A. 287, 29 N. E. 315, 21 N. Y. Civ. Proc. Rep. 420, 28 Abb. N. C. 1; *Wiggins v. Williams*, 36 Fla. 637, 30 L.R.A. 754, 18 So. 859,—holding party not entitled to jury trial in equity case; *Dorsey v. Barry*, 24 Cal. 449, holding one contesting election not entitled to jury trial.

— In condemnation proceedings.

Cited in *State ex rel. Cleveland v. Board of Finance & Taxn.* 38 N. J. L. 259; *Livingston v. New York*, 8 Wend. 85, 22 A. D. 622; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570; *Gold v. Vermont C. R. Co.* 19 Vt. 478; *Re Bradley*, 108 Iowa, 476, 79 N. W. 280,—denying right to jury trial in condemnation proceedings; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17, holding one whose land taken for railroad

purposes not entitled to award by jury; *Koppikus v. State Capital Comrs.* 16 Cal. 248; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774; *Ross v. Irving*, 14 Ill. 171,—holding statute providing for assessment of damages in condemnation proceedings by commissioners instead of by jury, valid; *Menges v. Albany*, 47 How. Pr. 244, holding selection by lot of commissioners to award damages in condemnation proceedings, void; *American Print Works v. Lawrence*, 21 N. J. L. 248, holding statute requiring submission to certain persons of question of necessity for taking property not void as depriving one of jury trial; *Kendall v. Post*, 8 Or. 141, sustaining statute providing for assessment of damages for taking material for repair of road without jury trial; *State, Morris, Prosecutor, v. Heppenheim*, 54 N. J. L. 268, 23 Atl. 664, holding owner of property taken for public purpose without constitutional right to assessment of damages by jury.

Liability for consequential damages.

Cited in *Slatten v. Des Moines Valley R. Co.* 29 Iowa, 148, 4 A. R. 205, holding railroad company authorized to construct bridge not liable for consequential damages; *Texas & N. O. R. Co. v. Sutor*, 56 Tex. 496, holding railroad company occupying land of another under agreement to dig ditches, not liable for overflow caused by construction of another road.

Carrier's exemption from liability.

Cited in *Bissell v. New York C. R. Co.* 25 N. Y. 442, 82 A. D. 369, sustaining carrier's exemption by contract from liability for injury to dealer accompanying cattle without payment of fare.

Rights of public as to quasi public corporations.

Cited in *Taylor v. Griswold*, 14 N. J. L. 222, 27 A. D. 33, holding stockholders of bridge corporation not entitled to vote for each share owned; *Holladay v. Patterson*, 5 Or. 177, holding public interested in location of railroad and depot; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581, holding subscriber for railroad stock not relieved of payment by failure to build road as far as intended.

Validity of special act.

Cited in *Edwards v. Pope*, 4 Ill. 465, sustaining special act authorizing sale of land held in common when partition impracticable.

Legislative regulation.

Cited in *People ex rel. Underwood v. Daniell*, 50 N. Y. 274, holding that constitutional convention of New York which did nothing in regard to courts-martial intended to leave them to be regulated by law.

— Of transportation.

Cited in *Blake v. Winona & St. P. R. Co.* 19 Minn. 418, Gil. 362, 18 A. R. 345, sustaining statute fixing maximum rate for transportation of goods; *State ex rel. Atwater v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 A. R. 543, 2 Atl. 803, holding carrier liable for refusal to sell commutation ticket as sold to others.

Cited in reference notes in 50 A. S. R. 330, on duty of common carrier to furnish transportation; 27 A. D. 659, on right of legislature to regulate use of railroad franchise and limit amount of tolls.

Cited in note in 33 L.R.A. 179, on legislative power to fix tolls, rates, or prices for carriers.

Nature of land condemned for railroad.

Cited in *Drouin v. Boston & M. R. Co.* 74 Vt. 343, 52 Atl. 957, holding lands taken by railroad company by condemnation not subject to acquisition by adverse possession.

Cited in reference note in 89 A. D. 556, on vesting of title of land condemned for railroad, upon payment of compensation.

Franchise as contract.

Cited in *Bank of Toledo v. Toledo*, 1 Ohio St. 622, holding act incorporating state bank not contract.

What constitutes franchise.

Cited in *Delaware & H. Canal Co. v. Lawrence*, 2 Hun, 163, holding grant of right to build wharf on navigable stream, franchise.

Cited in reference note in 4 A. S. R. 269, as to definition of franchise.

22 AM. DEC. 708, DEN EX DEM. DAVIDSON v. FREW, 14 N. C. (3 DEV. L.) 3.

Effect of sheriff's sale against husband on dower.

Cited in *Lynde v. Wakefield*, 19 Mont. 23, 47 Pac. 5, holding that sheriff's deed under judgment against husband does not convey wife's inchoate right of dower.

Cited in reference notes in 26 A. D. 231; 32 A. D. 634,—on what will bar dower; 70 A. S. R. 315, on nonliability of dower for husband's debt; 23 A. D. 778, as to how dower is affected by sale on execution against husband; 62 A. D. 747, on effect of execution sales of husband's land upon widow's right of dower; 43 A. S. R. 348, as to whether dower is extinguished by judicial sale against husband or conveyance by him; 47 A. S. R. 752, on extinction of dower by execution or judicial sale against husband.

Cited in notes in 93 A. D. 357, on effect of judgment liens on dower; 18 L.R.A. 78, on effect of sale under execution against husband to cut off wife's dower right; 39 A. S. R. 27, as to whom dower may be assigned.

Time of operation of deed on judicial sale.

Cited in *Testerman v. Poe*, 19 N. C. (2 Dev. & B. L.) 103; *Cowles v. Coffey*, 88 N. C. 340,—holding that sheriff's deed operates from day of the sale, not from date of deed; *Woodley v. Gilliam*, 67 N. C. 237, on relation back of sheriff's deed to time of execution sale; *Dail v. Freeman*, 92 N. C. 351, holding that sheriff's sale relates to date of judgment as against conveyances and encumbrances subsequently made; *Presnell v. Ramsour*, 30 N. C. (8 Ired. L.) 505, holding that sheriff's deed does not relate back to sale so as to justify trespass before its delivery; *McArtan v. McLaughlin*, 88 N. C. 391, holding deed of commissioner for partition executed after two years from administration relates to date of sale; *Pickett v. Pickett*, 14 N. C. (3 Dev. L.) 6, holding that fraudulent deed becomes color of title on possession by vendee after creditor's sale.

Cited in note in 15 A. D. 250, on application of doctrine of relation to execution sales.

22 AM. DEC. 711, DEN EX DEM. BRINEGAR v. CHAFFIN, 14 N. C. (3 DEV. L.) 108.

Estoppel by recitals in written instruments.

Cited in *Ambs v. Chicago, St. P. M. & O. R. Co.* 44 Minn. 266, 46 N. W. 321, holding that recital in deed the truth of which is immaterial does not estop parties from asserting truth; *Pritchard v. Sanderson*, 84 N. C. 299, on settlement of accounts and recitals in deed given as security for balance as estoppel, where fraud alleged; *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685, holding that recitals in deed operate as estoppels when facts therein stated are of the essence of the

contract; *Williams v. Walker*, 111 N. C. 604, 16 S. E. 706, on effect of recital in mortgage executed by married woman that she was a "free trader."

Cited in reference notes in 56 A. D. 107, on recitals as estoppels; 51 A. D. 115, on recitals in deeds as estoppels; 42 A. S. R. 265, on estoppel by deed as to grantee.

Bigamy as affecting right of administration.

Cited in *Gathings v. Williams*, 5 Ired. L. 487, 44 A. D. 49, on bigamy as repelling right to administer on estate of wife or to distributive share.

22 AM. DEC. 714, BENDER v. ASKEW, 14 N. C. (3 DEV. L.) 149.

Execution creditor as tortfeasor.

Cited in reference note in 57 A. D. 707, as to when execution creditor is liable as a tortfeasor.

Court's power over judgments.

Cited in *Williams v. Beasley*, 35 N. C. (13 Ired. L.) 112, holding judgments taken, as of course, are always under control of the court where taken.

—To amend.

Cited in *Purcell v. McFarland*, 23 N. C. (1 Ired. L.) 34, 35 A. D. 734, holding omission of clerk to affix seal to fi. fa. may be remedied *nunc pro tunc*; *Griffin v. Hinson*, 51 N. C. (6 Jones, L.) 154, holding office judgment on specialty amendable at any time by correcting clerk's mistake in calculating interest.

—To vacate.

Cited in *Keaton v. Banks*, 32 N. C. (10 Ired. L.) 381, 51 A. D. 393, holding judgment may be vacated at any time where no guardian was appointed for infant defendant; *Skinner v. Moore*, 19 N. C. (2 Dev. & B. L.) 138, 30 A. D. 155, holding an irregular judgment when set aside is as to parties as if it had never been; *Winslow v. Anderson*, 20 N. C. (3 Dev. & B. L.) 9, holding court has power to set aside an irregular judgment at subsequent term on proper notice; *Bowman v. Foster*, 33 N. C. (11 Ired. L.) 47, holding judgment irregularly signed when there was no regular service of process may be set aside by court; *Powell v. Jopling*, 47 N. C. (2 Jones, L.) 400, holding office judgments can be modified or set aside upon sufficient cause shown at any term; *Davis v. Shaver*, 61 N. C. (Phill. L.) 18, 91 A. D. 92, on power of court to vacate an irregular judgment; *White v. Snow*, 71 N. C. 232, on what constitutes irregularity in judgment for which order may be made to vacate it; *Turner v. Douglass*, 72 N. C. 127, holding order changing venue in action against infant who appears by attorney may be vacated on application; *Harrell v. Peebles*, 79 N. C. 26, holding irregular judgment may be vacated within reasonable time on motion on parol proof of irregularity; *Moore v. Hinnant*, 90 N. C. 163, holding court has no power to set aside judgment at subsequent term except on petition; or to correct mistake; *Doe ex dem. Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2, holding judgment rendered against party then dead may be vacated on motion of party acquiring interest; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382, holding collateral attack on judgment on ground complainant a lunatic unavailable, remedy being direct proceeding to vacate; *Hinton v. Roach*, 95 N. C. 106, on effect of setting aside judgment for irregularity on title of judgment creditor purchasing on execution sale.

Cited in reference notes in 51 A. D. 394, on setting aside judgment; 99 A. D. 533, on vacating void judgments after lapse of considerable time; 42 A. D. 689, on power of court to set aside its judgments.

Amendment of process or return.

Cited in *Phillipse v. Higdon*, 44 N. C. (Busbee, L.) 380, holding amendment of execution making it different in substance improper where third person's rights intervene; *Steelman v. Greenwood*, 113 N. C. 355, 18 S. E. 503, holding sheriff's return of process amendable making it speak the truth, after suit for penalty for false return; *Stancill v. Branch*, 61 N. C. (Phill. L.) 217, holding return of constable on execution omitting to state no personalty found where levy made on land, amendable.

22 AM. DEC. 717, NORFLEET v. RIDDICK, 14 N. C. (3 DEV. L.) 221.**Who are executors *de son tort*.**

Cited in reference notes in 26 A. D. 166; 39 A. D. 499,—on who is liable as executor *de son tort*; 45 A. D. 778, as to how executor *de son tort* is constituted and liability of.

Cited in notes in 85 A. D. 424, on what acts constitute person executor *de son tort*; 98 A. S. R. 200, on transferee in fraudulent conveyances and transfers made by decedent as executor *de son tort*.

Fraudulent conveyances.

Cited in *Burton v. Farinholt*, 86 N. C. 260, holding voluntary transfer of a chose in action by insolvent donor to children void as to creditors.

— Recovery by insolvent's administrator.

Cited in *McLean v. Weeks*, 61 Me. 277, holding insolvent's administrator may recover for money given by testator, after insolvency, without consideration.

22 AM. DEC. 719, DEN EX DEM. WHITE v. ALBERTSON, 14 N. C. (3 DEV. L.) 241.**Validity of judgments.**

Cited in *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61, holding justice's judgment void where warrant of attachment was published but summons was not served; *Newsom v. Newsom*, 26 N. C. (4 Ired. L.) 381, holding judgment in which same person is plaintiff and defendant may be set aside on motion; *Doe ex dem. Burke v. Elliott*, 26 N. C. (4 Ired. L.) 355, 42 A. D. 142, holding county court judgment upon justice's execution returned levied on land precludes collateral inquiry into previous proceedings; *Keaton v. Banks*, 32 N. C. (10 Ired. L.) 381, 51 A. D. 393, on right to impeach judgment collaterally on parol testimony of irregularity; *Spillman v. Williams*, 91 N. C. 483, holding irregularity preliminary to service by publication does not render judgment obtained subject to collateral attack.

Cited in reference notes in 32 A. D. 540, on conclusiveness of judgment; 30 A. D. 168, on conclusiveness of judgment of court of competent jurisdiction; 29 A. D. 372; 32 A. D. 656,—on conclusiveness of erroneous judgments until reversed; 24 A. D. 324, on judgments void and erroneous; 35 A. D. 421, as to when judgments are void.

— Against infants or lunatics.

Cited in *Morris v. House*, 125 N. C. 550, 34 S. E. 712 (dissenting opinion), on validity of judgment against infant heirs not served on petition to sell land for assets; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176, holding judgment against infant when he appears by attorney, but has no guardian, not void but voidable; *Fry v. Currie*, 91 N. C. 436, on necessity of service of process on infant defendants as well as guardian in action to subject land to ancestor's debts; *Hollis v. Dashiell*, 52 Tex. 187, holding judgment consented to by guardian *ad litem* against ward

not void by reason of consent; *McMurray v. McMurray*, 66 N. Y. 175, holding that the fact that no guardian *ad litem* is appointed for infant defendant in foreclosure renders judgment voidable; *Larkins v. Bullard*, 88 N. C. 35, holding judgment against infant defendants void where no process served on them and no guardian appointed; *Turner v. Douglass*, 72 N. C. 127, holding an infant having no general guardian is properly brought into court by service on him personally; *McAden v. Hooker*, 74 N. C. 24, holding judgment confessed by guardian of insane person, statement being verified by guardian, not irregular; *Drake v. Hanshaw*, 47 Iowa, 291, holding judgment not subject to collateral attack because no guardian *ad litem* was appointed for infant defendant; *Hare v. Hollomon*, 94 N. C. 14, holding judgment against infant not served on petition to sell lands not subject to collateral attack where guardian appointed; *Hopper v. Fisher*, 2 Head, 253, holding judgment in partition against infants appearing by guardian unimpeachable collaterally though record does not show service; *England v. Garner*, 90 N. C. 197, holding an appearance by counsel for infant defendant, binds latter unless set aside in direct proceedings; *Sumner v. Sessoms*, 94 N. C. 371, holding failure of record to show that infant was not served with process not available in collateral action where record shows appointment of guardian *ad litem*.

Distinguished in *Moore v. Gidney*, 75 N. C. 34, holding decree to sell lands for assets may be set aside where process not served on infants.

22 AM. DEC. 722, DEN EX DEM. SEAWELL v. BANK OF CAPE FEAR, 14 N. C. (3 DEV. L.) 279.

Necessity of seal on papers issued by court.

Cited in *Taylor v. Taylor*, 83 N. C. 116, holding execution issued to county other than where judgment rendered must bear seal of superior court; *Freeman v. Lewis*, 27 N. C. (5 Ired. L.) 91, holding seal essential to validity of commission to take testimony directed to person out of county; *Tracy v. Suydam*, 30 Barb. 110, holding commission to take testimony void if without seal, and depositions taken under it inadmissible; *Finley v. Smith*, 15 N. C. (4 Dev. L.) 95, holding seal of court indispensable to validity of writ running out of county in which court sits; *Conkey v. Conder*, 137 Ind. 441, 37 N. E. 132, holding transcript on appeal insufficient because of omission of seal on clerk's certificate.

Cited in notes in 35 A. D. 53, on necessity of seal to writ; 20 L.R.A. 427, as to use of seals on original writs in civil cases; 40 A. S. R. 431, on jurisdictional defects in summonses and like process.

Power of court to amend records and process.

Cited in *Henderson v. Graham*, 84 N. C. 496, holding court has power to amend summons by allowing clerk to affix his signature; *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708, on power of court to amend summons where nothing appears to show its official character; *Purcell v. McFarland*, 23 N. C. (1 Ired. L.) 34, 35 A. D. 734, holding *fi. fa.* amendable *nunc pro tunc* at subsequent term where clerk omitted to affix seal; *Perry v. Adams*, 83 N. C. 286, holding court may so amend its records as to make them perfect transcript of what belongs in them; *Wolf v. Cook*, 40 Fed. 432, on power of court to amend writ of attachment by affixing seal omitted by mistake; *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128 (dissenting opinion), on power of amendment of commission to take testimony where clerk omitted to affix seal; *Mardre v. Felton*, 61 N. C. (Phill. L.) 279, on effect of ordinance of 1866 as preventing issuing of *venditioni* enforcing levy made one year and a day previously.

Sale of lands under execution.

Cited in *Love v. Gates*, 24 N. C. (2 Ired. L.) 14, holding that sheriff cannot sell land without new writ where fl. fa. regularly levied was returned before sale; *Samuel v. Zachery*, 26 N. C. (4 Ired. L.) 377, holding *venditioni exponas* to sell lands, tested after death of defendant without scire facias to heirs, void; *Isler v. Colgrove*, 75 N. C. 334, holding plaintiff may direct sheriff not to act on execution in his hands, which is equivalent to withdrawing.

Cited in notes in 15 A. D. 522, 523, on sales after return day; 76 A. D. 87, 88, on officer's power after return day of writ, by *venditioni exponas* or otherwise, to sell property.

— Validity of title on.

Cited in *Bailey v. Morgan*, 44 N. C. (Busbee, L.) 352, holding purchaser of lands acquires good title where sheriff sells under several executions one being valid; *Gifford v. Alexander*, 84 N. C. 330, holding sheriff being enjoined from selling under execution in hands, it cannot be called in to aid purchaser's title under other executions.

— Necessity of venditioni exponas.

Cited in *Smith v. Spencer*, 25 N. C. (3 Ired. L.) 256, on necessity of venditioni exponas to authorize sale of land by sheriff; *Tarkinton v. Alexander*, 2 Dev. & B. L. 87, holding an ex-sheriff cannot sell lands levied on by him under fl. fa. while in office.

22 AM. DEC. 728, McNAIR v. RAGLAND, 17 N. C. (2 DEV. EQ.) 42.**Right to issue more than one execution.**

Cited in *Adams v. Smallwood*, 8 Jones L. 258, holding that judgment creditor cannot take out two writs of fl. fa. at same time without special leave; *State use of Movers v. Ruland*, 12 Mo. 264, holding clerk justified in refusing to issue more than one execution at same time to different counties.

Cited in reference note in 65 A. D. 94, on plaintiff's right to sue out as many executions as he chooses on same judgment.

Necessity of returning fl. fa. before executing ca. sa.

Cited in *Ferrell v. Brickell*, 27 N. C. (5 Ired. L.) 67, on necessity of returning fl. fa. before executing ca. sa. though both issued at same time; *Wheeler v. Bouchelle*, 27 N. C. (5 Ired. L.) 584, holding that ca. sa. will be set aside on motion where sheriff levied fl. fa. and holds property thereunder.

22 AM. DEC. 729, WILLIAMS v. WILLIAMS, 17 N. C. (2 DEV. EQ.) 69.**Subrogation to rights of creditors of decedent — Of personal representative.**

Cited in *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243; *Roberts v. Bartlett*, 26 Mo. App. 611, — holding administrator paying claims against decedent's estate has, in absence of personalty an equitable claim against realty; *Morton v. Blades Lumber Co.* 144 N. C. 31, 56 S. E. 551, holding administrator having purchased note against estate and mortgage security, may be subrogated to rights of creditor.

Cited in reference note in 54 A. D. 657, on right of executor or administrator paying debt to be subrogated to rights of creditors.

— Of purchaser of land under invalid sale.

Cited in *Perry v. Adams*, 98 N. C. 167, 2 A. S. R. 326, 3 S. E. 729, holding purchaser of land sold for decedent's debts where sale invalid entitled to subrogation

to creditor's right; *Scott v. Dunn*, 21 N. C. (1 Dev. & B. Eq.) 425, 30 A. D. 174, holding lands sold for debts by executor under mistake liable for debts less value of personalty.

— Of widow.

Cited in *Brown v. Forst*, 95 Ind. 248, holding widow paying debts of husband's estate may be subrogated to creditors' rights.

Conclusiveness as against heirs of judgment against representative.

Cited in *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890, holding claims against estate reduced to judgment against personal representative conclusive on heir unless collusion shown.

22 AM. DEC. 732, BROTTEN v. BATEMAN, 17 N. C. (2 DEV. EQ.) 115.

Joint liability of persons in representative capacity.

Cited in *Little v. Fox*, 15 Ala. 576, 50 A. D. 145, holding administrator's executing joint bond liable for acts of each other, and bound to protect joint sureties; *Williams v. Harrison*, 19 Ala. 277, holding guardians who enter into joint bond, liable for acts and defaults of each other; *Thompson v. McDonald*, (2 Dev. & B. Eq.) 463, holding next of kin may sue executor of deceased administrator and administrator *de bonis non* for account of intestate's estate; *State v. Johnston*, 8 Ired. L. 397, on right of next of kin to maintain action against surviving administrator and representative of deceased administrator; *Lancaster v. McBryde*, 5 Ired. L. 421, holding executor of the last surviving of coexecutors may recover from executor of coexecutor first dying, bond belonging to first testator's estate; *Adams v. Gleaves*, 10 Lea, 367, holding coadministrator with will annexed having received fund primarily liable in equity to legatee.

Cited in reference notes in 26 A. D. 576; 35 A. D. 682; 44 A. D. 638,—on liability for acts of coexecutors or coadministrators.

Nonresident coexecutor as necessary party.

Cited in *Conolly v. Wells*, 33 Fed. 205, holding coexecutor resident in another state necessary party to suit for accounting.

22 AM. DEC. 738, ROBARDS v. WORTHAM, 17 N. C. (2 DEV. EQ.) 173.

Liability of descended lands for debts.

Cited in reference notes in 40 A. D. 193, on liability of property in hand of heirs, devisees, or alienees to payment of decedent's debts; 43 A. D. 629, on liability of descended lands for specialty debts.

Property primarily liable for payment of decedent's debts.

Cited in *Palmer v. Armstrong*, 17 N. C. (2 Dev. Eq.) 268; *State ex rel. Pate v. Oliver*, 104 N. C. 458, 10 S. E. 709,—on personalty as the primary fund for payment of debts of deceased person; *Swann v. Swann*, 5 Jones, Eq. 297, holding intestate property primarily liable for debts though other property directed by will to be sold for purposes; *Kirkpatrick v. Rogers*, 42 N. C. (7 Ired. Eq.) 44, holding mere charge of debt on particular part of estate will not exonerate fund primarily charged.

Cited in reference notes in 31 A. D. 399, on personal estate as fund first liable for payment of decedent's debts; 35 A. D. 291, on marshaling of assets; 43 A. D. 629, on order to be observed in marshaling assets for payment of debts of decedent.

Cited in note in 2 E. R. C. 242, on exoneration of personalty from payment of legacies.

Subrogation of legatee to creditor's rights in undivided realty.

Cited in *Smith v. Cairns*, 92 Tex. 667, 51 S. W. 498; *Hope v. Wilkinson*, 14 Lea, 21, 52 A. R. 149,—holding legatee entitled to subrogation to rights of creditors in undivided realty where legacy absorbed by debts.

Cited in note in 16 A. D. 106, on subrogation of specific legatees to rights of creditors of a decedent.

22 AM. DEC. 745, COOPER v. WILLIAMS, 4 OHIO, 253. Affirmed in bank in 5 Ohio, 391, 24 A. D. 299.

Riparian rights.

Cited in *State v. Pottmeyer*, 33 Ind. 402, 5 A. R. 224, holding riparian owner has right to prevent removal of ice attached to soil formed on running stream; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, holding surplus water resulting from improvement of navigation by state may be leased by state to private parties; *Re Cincinnati H. & D. R. Co.* 1 Ohio Dec. Reprint, 269, on difference between "general" and "special" benefits where riparian owner's water power appropriated; *Neff v. Sullivan*, 17 Ohio L. J. 166, on reciprocal rights and duties of lower riparian owner to receive waters of natural water course; *Neff v. Sullivan*, 9 Ohio Dec. Reprint. 765, holding that injunction lies against county commissioner improving water course in such way as to increase overflow on lower proprietor.

Cited in reference notes in 27 A. D. 318, on property in water; 33 A. D. 126, on rights and liabilities of riparian owners; 38 A. D. 112, on right of riparian proprietor to use of water flowing through his land.

Cited in notes in 24 A. D. 300, on rights in water courses; 79 A. D. 638, on riparian owner's right to natural flow of stream; 54 A. D. 794, on right of riparian owner to natural and uninterrupted flow of stream; 61 L.R.A. 853, on right to use canals for water power.

—To divert water.

Cited in *Cromie v. Wabash & E. Canal*, 71 Ind. 208 (dissenting opinion), on right of state to divert water of canal to other uses; *Troy Cotton & Woollen Manufactory v. Fall River*, 147 Mass. 548, 18 N. E. 465 (dissenting opinion), on right of riparian owner to prevent diversion of water from running stream; *Weisenberger v. Miller*, 7 Ohio C. C. 173, 3 Ohio C. Dec. 714; *Buckingham v. Smith*, 10 Ohio, 288,—holding canal commissioners authorized to take water enough from stream for navigation, but not to sell or lease; *Warder v. Springfield*, 9 Ohio Dec. Reprint, 855, 17 Ohio L. J. 398, holding municipal riparian owner cannot lawfully divert waters of running stream for use of its citizens.

Right of eminent domain.

Cited in *Waterworks Co. v. Burkhart*, 41 Ind. 364, holding right to take private property for public use inherent in state; *Orr v. Quimby*, 54 N. H. 590 (dissenting opinion), on right of eminent domain as being inherent in state and not conferred by constitution.

Cited in reference notes in 24 A. D. 550; 33 A. D. 422,—on eminent domain.

Cited in notes in 31 A. D. 373, on subject of eminent domain; 61 L.R.A. 837, on what is taken or acquired for construction or operation of canals; 4 L.R.A. 786, on abuse of right of eminent domain.

— **Purposes for which property may be taken.**

Cited in *Bloodgood v. Mohawk v. Hudson River R. Co.* 18 Wend. 9, 31 A. D. 313; *Coster v. Tide Water Co.* 18 N. J. Eq. 54,—holding property taken by eminent domain must be for state's use or use by public or some portion of it; *Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076, on right of state to take private property for purpose of speculation.

Cited in reference notes in 26 A. D. 644, on uses justifying exercise of power of eminent domain; 39 A. S. R. 818, on exercise of right of eminent domain for public use only; 50 A. S. R. 597, on irrigation as public purpose justifying eminent domain.

Cited in note in 24 A. D. 300, on what uses justify exercise of power of eminent domain.

— **What may be taken.**

Cited in reference notes in 74 A. S. R. 312, on appropriation for public use of interest of riparian proprietors; 37 A. D. 238, on appropriation of stream under power of eminent domain; 23 A. D. 632, on right to take for public use interest of riparian owners in stream of water.

Cited in note in 17 L.R.A.(N.S.) 1008, on power to condemn riparian rights apart from land to which they are appurtenant.

— **Necessity of compensation.**

Cited in *Bates v. Cooper*, 5 Ohio, 115; *Mercer v. M'Williams*, *Wright* (Ohio), 132,—holding that private property may be taken for public use when provision for payment of damages is made; *Willyard v. Hamilton*, 7 Ohio, pt. 2 p. 111, 30 A. D. 195, on necessity of assessment of damages for land taken for public use before appropriation; *Kramer v. Cleveland & P. R. Co.* 1 Ohio Dec. Reprint, 474, on amount of damages given for land taken for railroad purpose as affected by prospective benefits.

Cited in reference notes in 28 A. S. R. 249, on compensation to riparian owner; 26 A. D. 644, on duty of legislature to provide for compensation to owners of property appropriated to public use.

Setting off benefits in eminent domain.

Cited in *Kramer v. Cleveland & P. R. Co.* 5 Ohio St. 140 (dissenting opinion), on allowance of deduction of incidental but not of general benefits upon condemnation proceedings.

Discretionary powers of corporate bodies.

Cited in *Corrigan v. Coney Island Jockey Club*, 29 Jones & S. 393, 20 N. Y. Supp. 437, on interference by injunction with exercise of discretionary powers of corporate bodies; *Lloyd v. Catlin Coal Co.* 210 Ill. 460, 71 N. E. 335, on granting injunction directing amount of coal that must be left for support in coal mines; *Upjohn v. Richland Twp.* 46 Mich. 542, 9 N. W. 845, holding that boards of health will be presumed to have acted in line of duty until contrary shown.

22 AM. DEC. 757, KERNES v. SCHOONMAKER, 4 OHIO, 331.

When statute of limitation commences to run.

Cited in *State ex rel. Daniel v. Grizzard*, 117 N. C. 105, 23 S. E. 93, on running of statute against action by second mortgagee where registrar failed to index first mortgage; *Lattin v. Gillette*, 85 Cal. 317, 29 A. S. R. 115, 30 Pac. 545, holding statute runs against action for negligence from time negligence completed; *Glenn v. Cuttle*, 2 Grant Cas. 273, holding that statute runs as soon cause of action accrues where attorney in fact neglects to turn over collections; *Houston Water-Am. Dec. Vol. III.*—80.

works v. Kennedy, 70 Tex. 233, 8 S. W. 36, on running of statute against action for act constituting a legal injury; Gillette v. Tucker, 67 Ohio St. 106, 93 A. S. R. 639, 65 N. E. 865, holding statute runs, in favor of surgeon against action for negligence in leaving sponge in patient from termination of professional relation; Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8, holding cause of action against abstractor for wrong certificate accrues at date of delivery; Pearl v. Koch, 32 Ohio L. J. 52, holding statute runs from time alleged slander is uttered.

Cited in reference note in 25 A. D. 717, as to when statute of limitations will begin to run.

Cited in notes in 38 A. D. 270, 271, on beginning of statutes of limitations when damages are consequential; 27 A. D. 503, as to when statute of limitations begins to run in case of fraudulent concealment of cause of action.

— In favor of public officers and their sureties.

Cited in Governor v. Gordon, 15 Ala. 72, holding statute runs in favor of sureties on notary's bond from date of default where indorser not notified; Bank of Hartford County v. Waterman, 26 Conn. 324 (dissenting opinion), on running of statute in favor of officer for failure to serve process; Steel v. Bryant, 49 Iowa, 116, holding statute does not run in favor of clerk for accepting insufficient stay bond until stay expires; Bartlett v. Bullene, 23 Kan. 606, holding statute runs in favor of notary and sureties from date of making false certificate of acknowledgment; Lathrop v. Snelbaker, 6 Ohio St. 276, holding statute runs in favor of justice of peace from date of negligence in relation to appeal bond; Gaylor v. Hunt, 23 Ohio St. 255, on running of statute, in favor of justice of the peace against action for negligence.

Nature of officers' duties.

Cited in reference note in 14 A. S. R. 391, on judicial officers with ministerial duties.

22 AM. DEC. 759, ROLL v. RAGUET, 4 OHIO, 400, Reaffirmed on later appeal in 7 Ohio, 76.

Validity of contracts.

Cited in Wegner Bros. v. Biering, 65 Tex. 506, holding note, given for amount of account and in consideration that creditor will do an unlawful act, void.

Cited in reference note in 27 A. D. 267, on action on illegal contract.

Cited in notes in 3 A. S. R. 739, 740, on grantee's right to lay claim to property on ground that conveyance to him was in fraud of creditors; 6 L.R.A. 502, on effect of complicity in wrong on right to set it up in defense.

— When against public policy.

Cited in Columbus v. Reinhard, 1 Ohio C. C. 289, 1 Ohio C. Dec. 159; Goodrich v. Tenney, 144 Ill. 422, 36 A. S. R. 459, 19 L.R.A. 375, 33 N. E. 44,—on illegality of contracts founded upon a consideration against public policy; Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 A. R. 206, 4 N. W. 870, holding contract that railway would build station only in place designated in city unenforceable; Central Branch Union P. R. Co. v. Western U. Teleg. Co. 1 McCrary, 551, 3 Fed. 417, on invalidity of contract of railway in divesting itself of control of property, as being against public policy; Cowles v. Raguet, 14 Ohio, 38, holding mortgagor may redeem though consideration for mortgage was illegal or contrary to policy of the law; Jones v. Voorhees, 10 Ohio, 145, on illegality of contract of carrier limiting liability as against public policy; Kahn v. Walton, 46 Ohio St. 195.

20 N. E. 203 (dissenting opinion), on immoral consideration or consideration against public policy as defense to executory contract; *Cooper v. Rowley*, 29 Ohio St. 547, on unenforceability of contracts contrary to public policy or involving violation of criminal laws of state; *Ager v. Duncan*, 50 Cal. 325, holding court will not enforce executory contract founded on mutual moral turpitude of parties; *Moses v. Katzenberger*, 1 Handy (Ohio) 46, holding note given by debtor to one creditor as bonus for procuring remaining creditors to compound, void.

Cited in reference note in 61 A. S. R. 343, on invalidity of note as against public policy.

— When against statutory provisions.

Cited in *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768, holding maker of note may show illegal agreement as consideration in defense in suit by party to agreement; *Spalding v. Bank of Muskingum*, 12 Ohio, 544, holding agreement between bank and state contractors for bank to loan state for improvements charging contractors with commission, illegal; *Drinkall v. Movius State Bank*, 11 N. D. 10, 95 A. S. R. 693, 57 L.R.A. 341, 88 N. W. 724, holding gambler not "holder in due course" of cashier's check indorsed and delivered to him for chips; *Stevens v. Cincinnati Times-Star Co.* 72 Ohio St. 112, 106 A. S. R. 586, 73 N. E. 1058, holding guessing contests in which guesser pays lump sum for privilege of guessing and subscription to newspaper, unlawful.

— Compromise of crime as consideration.

Cited in *Williams v. Englebrecht*, 37 Ohio St. 383, holding the fact that mortgage was given to compound felony no defense in action for possession under Code; *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65, 90 N. W. 939; *Snyder v. Willey*, 33 Mich. 483,—holding promissory note given in consideration of the suppression of criminal proceedings void in hands of promisee; *Harrison v. Baldwin*, 5 Ohio C. C. 310, 3 Ohio C. D. 154 (affirming 11 Ohio, Dec. Reprint, 1, 24 Ohio L. J. 27), on invalidity of note given in consideration of compromise of crime; *Case v. Smith*, 107 Mich. 416, 61 A. S. R. 341, 31 L.R.A. 282, 65 N. W. 279, holding note founded on consideration of concealment from public and from maker's wife that he committed adultery, void; *McCoy v. Green*, 83 Mo. 626, holding contract made upon consideration that an impending prosecution for felony be abandoned, void; *Moore v. Adams*, 8 Ohio, 373, 32 A. D. 723, refusing to set aside conveyance made in consideration of agreement not to prosecute perjury charge; *Goudy v. Gebhart*, 1 Ohio St. 262, holding bond, consideration for which is sale made by obligee to obligor to defraud former's creditors, unenforceable; *Raguet v. Roll*, 7 Ohio, pt. 1, p. 76, holding mortgage founded upon forbearance to prosecute felony unenforceable; *Weber v. Shay*, 56 Ohio St. 116, 60 A. S. R. 743, 37 L.R.A. 230, 46 N. E. 377, holding attorney cannot recover on contract to prevent indictment against person accused of crime; *Springfield, F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270, 46 A. S. R. 571, 25 L.R.A. 37, 37 N. E. 1116, holding action lies by insured for balance where induced by threats to accept less than sum due; *James v. Roberts*, 18 Ohio, 548, holding chancery will restrain collection of mortgage where person induced to execute it through threats of groundless prosecution.

Cited in notes in 26 L.R.A. 50, on contracts procured by threats to prosecute relative as contrary to public policy; 26 L.R.A. 58, on contracts procured by threats to prosecute parent or child.

Equitable aid in enforcing illegal contract.

Cited in *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203, holding equity will not aid party to a gambling contract.

22 AM. DEC. 762, REEDER v. BARR, 4 OHIO, 446.**Constructive notice of defect of title.**

Cited in *Compton v. Wabash, St. L. & P. R. Co.* 7 Ohio L. J. 118; *Mattoon v. Clapp*, 8 Ohio, 248; *Hardy v. Harbin*, 4 Sawy. 538, Fed. Cas. No. 6,060,—holding purchaser of land chargeable with notice of facts disclosed by documents through which title is traced; *Gray v. H. M. Loud & Sons Lumber Co.* 128 Mich. 427, 54 L.R.A. 731, 87 N. W. 376, on diligence required of purchaser to ascertain defect of title where apprised of knowledge of defect; *Cincinnati Sav. Soc. v. Thompson*, 6 Ohio Dec. Reprint, 1198, 9 Ohio Dec. Reprint, 41, 10 Ohio L. J. 230, holding mortgagor of undivided interest of tenant in common chargeable with notice of mortgage on whole.

Cited in reference notes in 24 A. D. 235, on notice from circumstances putting one on inquiry; 43 A. D. 131, as to when vendee is charged with notice of recitals in title papers.

—Recitals in patents.

Cited in *Bonner v. Ware*, 10 Ohio, 465, holding owner tracing title to patent affected by notice of facts contained in recitals of patent; *Wimberly v. Pabst*, 55 Tex. 587, holding purchaser from patentee not chargeable with latent defects in transfer of certificate upon which patent issued; *Weeks v. Milwaukee, L. S. & W. R. Co.* 78 Wis. 501, 47 N. W. 737, holding purchaser from grantee of patentee chargeable with notice of contents of patent and of assignments therein mentioned; *Mack v. Brammer*, 28 Ohio St. 508, holding purchaser from guardian of military land warrant without court authority gets no title.

Distinguished in *Bell v. Duncan*, 11 Ohio, 192, holding recitals in patent of assignments by persons competent to convey, not notice of latent defects in assignments.

—Recitals in deeds.

Cited in *Ætna L. Ins. Co. v. Bishop*, 69 Iowa, 645, 29 N. W. 961, holding mortgagee charged with notice of prior mortgage where mortgagor's deed recites its existence, though not indexed; *Acer v. Westcott*, 45 N. Y. 384, 7 A. R. 355, holding recital that deed was in pursuance of contract not notice to mortgagee of assignee of contract of latent equities in assignor; *Hall v. Orvis*, 35 Iowa, 366, holding purchaser chargeable with notice of terms of contract where his grantor's deed refers to contract; *Brush v. Ware*, 15 Pet. 93, 10 L. ed. 672, holding purchaser of land bound to examine will to find power of executor, through whom he claims; *Hawes v. Chaille*, 129 Ind. 435, 28 N. E. 848, holding administrator cannot enforce vendor's lien against grantee of his grantee where deed did not show purchase price unpaid.

Cited in reference notes in 49 A. D. 170; 52 A. D. 66,—on recitals in deed as notice; 53 A. D. 241, on estoppel of vendee to deny facts recited in his title deeds.

22 AM. DEC. 764, GOODLOE v. CINCINNATI, 4 OHIO, 500.**Liability of corporations for injury to property.**

Cited in *Hamilton County v. Cincinnati & W. Turnp. Co. Wright (Ohio)*, 603, holding corporation acting under supposed authority liable at law for injury where empowering act unconstitutional; *Robinson v. New York & Erie R. Co.* 27 Barb. 512, on liability of railroad corporation for damages caused by use or improvement of its property; *Godspeed v. East Haddam*, 22 Conn. 531, 58 A. D. 439, holding action for vexatious suit may be maintained against a corporation.

Cited in note in 31 A. D. 161, on liability of corporation for tort.

— **Municipal corporations.**

Cited in *Western College v. Cleveland*, 12 Ohio St. 375, holding city not responsible for destruction of property by a riotous assemblage of persons; *Felloses v. New Haven*, 44 Conn. 240, 26 A. R. 447, holding city not liable for incidental injury to adjoining land caused by proper grading of street; *Youngstown v. Moore*, 30 Ohio St. 133; *Crawford v. Delaware*, 7 Ohio St. 459,—holding damages for substantial injury to erections on adjoining land recoverable where grade established is changed; *Cincinnati v. Penny*, 21 Ohio St. 499, 8 A. R. 73, holding municipality liable to adjoining owner for injury to building caused by excavation made for sewer; *Grant v. Hyde Park*, 67 Ohio St. 166, 65 N. E. 891, holding question of future change of grade of street and damages to abutter proper in condemnation proceedings for street; *Allegheny County v. Rowley*, 4 Clark (Pa.) 379, holding municipality may change grade of street on making compensation for injuries or securing buildings endangered; *New York v. Bailey*, 2 Denio, 433, holding municipality liable for negligence or unskillfulness of agents employed in construction of work for its benefit; *Argenti v. San Francisco*, 16 Cal. 255, on liability of municipal corporations on contract for improvements; *Rhodes v. Cleveland*, 10 Ohio, 159, 36 A. D. 82, holding municipality liable like individuals for injuries done although act not beyond lawful powers; *Matthew v. Cincinnati*, 1 Ohio C. C. 559, 1 Ohio, C. Dec. 311, holding damages for change of grade must be paid before work of changing grade commenced.

Cited in reference notes in 36 A. D. 84, on liability of municipal corporation for injuries by it; 29 A. D. 439, on liability of municipal corporations for illegal and malicious acts of agents; 51 A. D. 457, on when municipality is liable for injuries resulting from grading streets; 32 A. D. 734, on right of municipality to regrade street.

Cited in notes in 53 A. D. 367, on right to recover for consequential injuries through work authorized by law; 30 A. S. R. 407, on municipal liability for unlawful acts of officers and agents which are not *ultra vires*; 7 A. R. 260, on liability of municipality for damage resulting from change of street grade; 4 A. S. R. 401, on compensation for consequential damages resulting from change of street grade; 12 L.R.A. (N.S.) 698, on municipal liability for injury to lateral support in making street improvements.

Distinguished in *Green v. Reading*, 9 Watts, 382, 36 A. D. 127, holding municipality not liable for consequential injuries to abutter caused by improving and repairing streets.

22 AM. DEC. 767, HESS v. STATE, 5 OHIO, 5.

Admissibility of opinion as evidence.

Cited in *Jones v. Finch*, 37 Miss. 461, 75 A. D. 73, holding opinion as to genuineness of bank bill by person skilled in inspection of devices used in engraving, admissible.

— **As to handwriting.**

Cited in reference notes in 28 A. D. 324; 35 A. D. 732,—on evidence as to handwriting; 25 A. D. 141, on evidence admissible to prove handwriting of person.

Cited in notes in 64 L.R.A. 307, on limitation of expert testimony to handwriting; 66 A. D. 240, on points respecting which handwriting experts may testify.

Competency as witness of party to forged instrument.

Cited in reference note in 34 A. D. 675, as to when party to forged instrument is a competent witness.

Indorsement of note as separate contract.

Cited in *Morris v. Case*, 4 Kan. App. 691, 46 Pac. 54, on indorsement of note as being a separate and independent contract.

Variance as question for court.

Cited in *Turpin v. State*, 19 Ohio St. 540; *Santolini v. State*, 6 Wyo. 110, 71 A. S. R. 906, 42 Pac. 746; *Phelps v. People*, 6 Hun, 428,—holding objections to admission in evidence of written instrument on ground of variance presents question for court.

What subject of forgery.

Cited in note in 24 L.R.A. 40, on necessity that instrument be sufficient to deceive to be subject of forgery.

What constitutes forgery.

Cited in *Norton v. State*, 129 Wis. 659, 116 A. S. R. 979, 109 N. W. 531, holding that check falsely made with intent to defraud and apparently sufficient on face, is forgery.

Cited in reference notes in 34 A. D. 675, on what is forgery and indictment for; 71 A. D. 706; 96 A. D. 164; 4 A. S. R. 765,—on what constitutes forgery; 24 A. D. 443, on nature of crime of forgery.

Joint indictments.

Cited in reference note in 103 A. S. R. 696, on joint indictment where evidence as to act constituting crime applies to all persons indicted.

Sufficiency of indictment.

Cited in *Fouts v. State*, 8 Ohio St. 98, holding intention to kill must be specifically alleged in indictment for murder in first degree; *Gile v. People*, 1 Colo. 60, holding indictment for assault with intent to murder, in which the word "feloniously" is unnecessarily used, good; *Mitchell v. State*, 42 Ohio St. 383, on meaning of word "felonious" as used in criminal law.

Cited in reference note in 88 A. D. 680, on indictment for criminally uttering counterfeit bank notes and what may be proved.

Disapproved in *Black v. State*, 2 Md. 376; holding indictment for felony cannot be sustained as an indictment for misdemeanor.

— For forgery.

Cited in *Miller v. People*, 1 Cow. Crim. Rep. 535, holding indictment for forging check sufficient where check set out without reference to indorsements; *Haupt v. State*, 108 Ga. 53, 75 A. S. R. 19, 34 S. E. 313, holding indictment for forgery need only set out material parts of the instrument, as a contract.

Cited in reference notes in 71 A. S. R. 914, on sufficiency of indictment for forgery; 65 A. D. 206, on how indictment for forgery should describe instrument; 96 A. D. 164, on necessity of setting out in indictment the forged instrument or description thereof.

— Following statutory language.

Cited in *Ledbetter v. United States*, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774, holding indictment for carrying on business of rectifying without paying tax charging in words of statute, sufficient; *Morris v. United States*, 161 Fed. 672, holding indictment under oleomargarine act, § 4, using language of statute, sufficient; *State v. Finch*, 21 Ohio, Dec. Reprint, 431, holding indictment under statute must substantially employ language of the statute.

Cited in reference notes in 36 A. D. 502; 37 A. D. 84,—on form of indictment charging statutory offense; 56 A. D. 418, on sufficiency of indictment following

words of statute creating offense; 94 A. D. 252, on necessity and sufficiency of charging offense in the language of the statute; 53 A. D. 279, on necessity that indictment for statutory offense conclude *contra formam statuti*.

Similar transactions as proof of crime.

Cited in *Bainbridge v. State*, 30 Ohio St. 264, holding similar transactions near same time admissible on trial of indictment for knowingly delivering skimmed milk to factory; *Lindsey v. State*, 38 Ohio St. 507, holding similar transactions admissible on trial of indictment for forging deed to real property; *Sasser v. State*, 13 Ohio, 453, on proof of forgery of bank bills by experts as secondary evidence.

Cited in reference note in 45 A. D. 744, on admissibility of evidence of similar offenses to show prisoner's intent.

Cited in note in 62 L.R.A. 263, on evidence of other crimes, on trial for possession of counterfeit money with intent to utter.

Constructive presence in criminal act.

Cited in *Breese v. State*, 12 Ohio St. 146, 80 A. D. 340, holding person enticing owner of house away liable to indictment with others for burglary as being constructively present.

22 AM. DEC. 777, KING v. KEER, 5 OHIO, 154.

Covenants of warranty generally.

Cited in *Peoples' Sav. Bank v. Parisette*, 68 Ohio St. 450, 96 A. S. R. 672, 67 N. E. 896, on distinction between covenant of warranty and covenant against encumbrances in conveyance of land.

Cited in reference notes in 25 A. D. 555; 27 A. D. 237; 43 A. D. 597; 47 A. D. 572,—on covenants of warranty; 55 A. D. 407, on what constitutes covenant of warranty.

Covenants running with the land.

Cited in *Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91, holding a covenant of warranty runs with the land and passes by assignment.

Cited in reference notes in 27 A. D. 84, 553; 46 A. S. R. 550,—on covenants running with the land; 36 A. D. 94, on what covenants run with land; 48 A. D. 507, on covenant of warranty as a real covenant running with the land.

Cited in notes in 82 A. S. R. 664, on what covenants run with the land; 82 A. S. R. 687, on covenants of warranty and of quiet enjoyment running with the land.

Who may enforce covenant.

Cited in *Claunch v. Allen*, 12 Ala. 159, holding assignee alone can sue for breach of covenant of title unless assignor bound to indemnify assignee; *St. Clair v. Williams*, 7 Ohio, pt. 2, p. 110, 30 A. D. 194, holding widow evicted of lands assigned as dower cannot maintain action on covenant of warranty to husband.

Notice to warrantor to come in and defend.

Cited in *Claycomb v. Munger*, 51 Ill. 373, holding notice to covenantor to come in and defend title he has warranted not necessary; *Sisk v. Woodruff*, 15 Ill. 15, holding burden on person suing on warranty of showing eviction by superior title, unless warrantor notified of ejectment proceedings.

Cited in note in 43 A. D. 569, as to when warrantor of title may be brought in to defend.

Right to only one satisfaction on covenant.

Cited in *Eustis v. Fosdick*, 88 Tex. 615, 32 S. W. 872; *Wilson v. Taylor*, 9 Ohio

St. 595, 75 A. D. 488,—holding last covenantee though entitled to several judgments against successive prior covenantors entitled to but one satisfaction.

Breach of covenant—Of warranty.

Cited in *Johnson v. Nyce*, 17 Ohio, 66, 49 A. D. 444, holding covenant of warranty broken where dower assigned by metes and bounds and widow put in possession; *Tuite v. Miller*, 10 Ohio, 382, holding decree against grantee to pay annual sum for dower, dower not being assigned when conveyance made, no breach of common warranty; *Mason v. Kellogg*, 38 Mich. 132, holding judgment for value in ejectment sufficient ouster on which to ground action for breach of warranty; *Pence v. Gabbert*, 63 Mo. App. 302, holding actual eviction of assignee necessary though judgment establishing paramount title in undivided half in third person, rendered; *King v. Merk*, 6 Mont. 172, 9 Pac. 827, holding that under occupying claimant statute, covenantee may maintain action on covenant of warranty without showing actual eviction.

Cited in reference notes in 29 A. D. 407; 49 A. D. 53,—on covenants of warranty and breaches thereof; 33 A. D. 345, on right of action for breach of covenant of warranty; 25 A. D. 221; 36 A. D. 352; 39 A. D. 322; 49 A. D. 447,—on necessity for eviction to maintenance of action for breach of covenant of warranty.

Cited in notes in 120 A. S. R. 853, on necessity of eviction to breach of warranty; 17 L.R.A. (N.S.) 1180, 1181, on necessity of eviction to maintenance of action for breach of covenant of warranty of title.

—Against encumbrances.

Cited in *Funk v. Creswell*, 5 Iowa, 62, holding allegation of eviction unnecessary in action for breach of covenant against encumbrance, but only existence of encumbrance.

—Of seisin.

Cited in *Gest v. Kenner*, 2 Handy (Ohio) 86, holding covenant of seisin, when grantor in actual possession, not broken until eviction of paramount title.

—Of quiet enjoyment.

Cited in *Brown v. Dickerson*, 12 Pa. 372, holding covenant for quiet enjoyment broken by sheriff's sale under paramount encumbrance though assignee of covenantee purchase property; *Morgan v. Henderson*, 2 Wash. Terr. 367, 8 Pac. 491, holding no action for breach of covenant for quiet enjoyment lies until some hostile assertion of better title made.

Cited in note in 53 A. S. R. 119, on breach of covenant for quiet enjoyment in deed.

Measure of damages for breach of covenant.

Cited in *Dalton v. Bowker*, 8 Nev. 190, holding measure of damages for failure of title value at time of sale, with interest and expenses; *Clark v. Parr*, 14 Ohio, 118, 45 A. D. 529, holding covenantee in warranty of title, entitled to recover consideration, and interest not exceeding four years; *Brown v. Hearon*, 66 Tex. 63, 17 S. W. 395, holding covenantee in possession entitled to interest only from eviction unless accountable to paramount title holder for profits; *Lloyd v. Quimby*, 5 Ohio St. 262, holding covenantee in covenant in mortgage entitled on eviction after foreclosure to amount of debt with interest; *Barker v. Blanchard*, 5 Ohio N. P. 398; *McAlpin v. Woodruff*, 11 Ohio St. 120,—on measure of damages for eviction by paramount title from definite portion of premises; *Bricker v. Bricker*, 11 Ohio St. 240, on measure of damages on breach of covenant of warranty under the occupying claimant law; *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004, holding assignee of lease with accompanying warranty may recover on eviction

consideration paid with interest; *Allen v. McCoy*, 8 Ohio, 418 (dissenting opinion), on measure of damages for breach of covenant of warranty of title; *Stebbins v. Wolf*, 33 Kan. 705, 7 Pac. 542, holding amount received for back taxes should be allowed in suit by vendee against vendor who held under tax deed.

Cited in reference notes in 33 A. D. 346, on measure of damages for breach of covenant; 36 A. D. 94, 352, on measure of damages for breach of covenant of warranty; 79 A. D. 467, on measure of damages for breach of warranty of title to land.

Cited in notes in 125 A. S. R. 458, on measure of damages for breach of covenant of seisin; 125 A. S. R. 464, on measure of damages for partial breach of covenant of seisin.

Judgment as evidence.

Cited in reference note in 37 A. D. 620, on judgment in ejectment as evidence against warrantor.

22 AM. DEC. 785, TAYLOR v. MIAMI EXPORTING CO. 5 OHIO, 162.

Action by stockholders of corporation.

Cited in *Hiscock v. Lacy*, 9 Misc. 578, 30 N. Y. Supp. 860, holding stockholder may maintain action requiring directors to declare dividend where surplus applicable; *Ruffner v. Hamilton County*, 1 Disney (Ohio) 196, holding citizen of county may sue to restrain county commissioners from performance of fraudulent acts.

Cited in reference note in 67 A. D. 685, on stockholder's right to sue corporation.

Cited in note in 57 A. S. R. 71, on right of action by stockholders to prevent waste.

Liability of directors of corporation.

Cited in *Bates v. Bank of Alabama*, 2 Ala. 451 (dissenting opinion), on liability of directors of bank for losses occurring in consequence of their violation of charter; *Spering's Appeal*, 71 Pa. 11, 10 A. R. 684, holding directors of corporation liable to stockholders for losses from fraud or negligence; *Spering v. Smith*, 29 Phila. Leg. Int. 245, 4 Legal Gaz. 226, holding directors of corporation not liable for losses from mismanagement merely; *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes, 387, 3 Fed. 817, holding trustee in bankruptcy of insolvent may sue directors for moneys lost by their gross negligence; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, holding vote at stockholders' meeting directing selling of new stock void as to stockholder not having opportunity to purchase.

Cited in notes in 4 L.R.A. 747, on trust relation of directors in stock corporations; 2 L.R.A. 535, on liability of directors of corporations for frauds and breaches of trust.

Capital stock of corporation as trust fund.

Cited in *State v. Commercial State Bank*, 28 Neb. 677, 44 N. W. 998, holding assets of bank after ceasing to operate a trust fund for payment of its debts.

Ex V3.
11/29/13



